

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVAP2018/0010

BETWEEN:

CLINT LOUIS

Appellant

and

MIGUEL JEFFREY

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE

Chief Justice

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

The Hon. Mde. Esco Henry

Justice of Appeal [Ag.]

Appearances:

Mr. Alvin St. Clair for the Appellant

Mr. Dexter Theodore, QC with him Ms. Sueanna Frederick for the Respondent

2021: June 29;
November 10.

Civil appeal — Negligence — Assessment of damages — Approach of appellate court to findings of fact of court below — Approach of appellate court to award of damages by court below — Apportionment of liability – Whether judge erred in apportionment of liability between appellant and respondent — Whether judge erred in finding that appellant was liable in the circumstances — Whether learned judge erred in assessment of damages for pain and suffering and loss of amenities — Whether learned judge failed to draw reasonable inferences – Whether judge’s decision went against weight of evidence

The appellant, Clint Louis (“Mr. Louis”), was one of four defendants to a claim by Crystal Cherebin (“Ms. Cherebin”) seeking damages for personal injuries suffered by her in a motor vehicle accident. The accident involved three motor vehicles. One vehicle was driven by Mr. Louis, another by the respondent, Miguel Jeffrey (“Mr. Jeffrey”), and the third by Mr. John Demille. Mr. Louis was driving a white van travelling in a southerly direction and following behind him was Mr. Jeffrey, driving a black car. Ms. Cherebin was a passenger in the third vehicle, a bus travelling in a northerly direction. The parties disagreed on how the accident occurred. At the conclusion of the trial, the learned judge entered judgment for Ms. Cherebin

and awarded damages to her on her claim. He found that both Mr. Louis and Mr. Jeffery were responsible for the accident, accepted Mr. Jeffery's version of events and apportioned liability at 70% to Mr. Louis and 30% to Mr. Jeffery.

Mr. Louis filed a separate claim against Mr. Jeffery seeking compensation for loss and damage occasioned by Mr. Jeffery's negligence in causing the accident. Based on his analysis of Mr. Louis' injuries and the absence of medical reports that speak to any disability (partial or permanent) or ongoing medical care, the judge awarded general damages of \$100,000.00 for the injuries suffered by Mr. Louis. This amount was discounted to \$30,000.00 to reflect the judge's earlier finding that the Mr. Jeffery was only 30% liable for the accident.

Mr. Louis, being dissatisfied with the judge's decision, appealed. The issues for this Court's determination are: (i) whether the judge erred in finding Mr. Louis to be more liable than Mr. Jeffery for causing the accident by: (a) deciding against the weight of the evidence before him; and (b) acting as an expert in auto accident reconstruction and imposing his opinion as to the manner in which the accident occurred; and (ii) whether the judge erred in his assessment of the quantum of general damages awarded to Mr. Louis as well as by not making an award for loss of amenities.

Held: allowing the appeal in part and making the orders outlined at paragraph 54 of the judgment, that:

1. An appellate court reviewing the findings of a trial judge should not interfere with the trial judge's decision 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 judge's conclusion. In this case, it cannot be said that the judge acted as an expert for the purposes of reconstructing the accident. This is because the judicial process of assessing credibility requires a judge to weigh the balance of which narrative was more probable. The judge's attempt to rationalise how the accident happened does not equate to him acting as an expert witness. However, his theory of the accident is against the weight of the evidence. Based on the totality of the evidence, it was not open to the judge to find that Mr. Louis was more liable than Mr. Jeffery for the accident. The advantage enjoyed by the judge by reason of having seen and heard the witnesses is not sufficient to explain or justify his conclusion. Given the extent of Mr. Jeffery's role in causing the accident, a more appropriate apportionment of liability would be that Mr. Louis is 30% responsible and Mr. Jeffery is 70% responsible.

Watt (or Thomas) v Thomas [1947] AC 484 applied; **Webster Dyrod Mitchell and another v Jenny Lindsay** [2021] ECSCJ No. 691 (delivered 20th September 2021) applied; **Yates Associates Construction Company Ltd v Blue Sand Investments Limited** [2016] ECSCJ No.63 (delivered 20th April 2016) applied; **JTrust Asia PTE Ltd. v Mitsui Konoshita and another** [2021] ECSCJ No. 691 (delivered 20th September 2021) applied; **Onassis v Vergottis** [1968] 2 Lloyd's Rep. 403 considered.

2. An appellate court may interfere with an award of damages if, in all the circumstances, there is no reasonable proportion between the amount awarded and the loss sustained. The appellate court will also interfere if the judge misapprehended the facts, took irrelevant factors into consideration, or applied a wrong principle of law, or applied a wrong measure of damages which made his award a wholly erroneous estimate of the damage suffered, such that the judge's award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong. Applying the principles, there is nothing to suggest that the judge wrongly exercised his discretion in awarding Mr. Louis \$100,000.00 for pain and suffering and not making an award for loss of amenities. There is no basis for this Court to interfere with the award of damages. However, in light of this Court's finding that liability should be split at 30%/70% as between Mr. Louis and Mr. Jeffrey respectively, the amount ultimately payable by Mr. Jeffrey to Mr. Louis should be adjusted accordingly.

Joseph Horsford v Bernard Jarvis [1996] ECSCJ No. 29 (delivered 24th June 1996) followed; **Alphonso and others v Deodat Ramnath** (1997) 56 WIR 183 applied.

3. It would be illogical and unreasonable to expect the judge to determine the nature and extent of Mr. Louis' injuries, his permanent or partial disability, and any particulars of loss of amenities, from the receipts produced by him. The receipts, together with the initial medical report and witness statement, were insufficient to assist the judge in determining Mr. Louis' entitlement to damages for any permanent or residual disability and for loss of amenities.

Dawn Noel v Don John [2012] ECSCJ No. 374 (delivered 21st December 2012) distinguished; **Howell Fontenelle v Jn. Baptiste Marville** [2017] ECSCJ No. 298 (delivered 12th December 2017) distinguished; **Ryan Richards v Michael Francois**, GDAHCV2010/0156 (delivered 7th November 2013, unreported) distinguished.

JUDGMENT

- [1] **WEBSTER JA [AG.]**: This is an appeal against the order of the learned judge dated 2nd February 2018 reflecting his decision contained in an oral judgment delivered on the same day in related Claims Nos. 0903 of 2015 and 0905 of 2015. In Claim No. 0903 of 2015 Crystal Cherebin sued John Demille, Prince Richardson, Miguel Jeffery and Clint Louis for damages for personal injuries. In Claim No. 0905 of 2015 Clint Louis sued Miguel Jeffery for damages for personal injuries.

- [2] In so far as is relevant to this appeal, the judge ordered in summary that: (i) judgment is entered for the claimant, Crystal Cherebin, in Claim No. 0903 of 2015; (ii) special damages are awarded to Crystal Cherebin in Claim No. 0903 of 2015 in the sum of \$5,180.23 of which \$1,554.07 shall be paid by Miguel Jeffrey and \$3,626.16 shall be paid by Clint Louis together with interest at the rate of 3% from the date of the filing of the claim until judgment; (iii) general damages for pain and suffering are awarded to Crystal Cherebin in Claim No. 0903 of 2015 in the sum of \$30,000.00, of which, \$9,000.00 shall be paid by Miguel Jeffrey and \$21,000.00 shall be paid by Clint Louis together with interest at the rate of 6% from the date of judgment until payment; (iv) prescribed costs in accordance with Part 65(5) of the **Civil Procedure Rules 2000** (the “CPR”) are awarded to Crystal Cherebin in Claim No. 0903 of 2015 to be paid by Miguel Jeffrey as to 30% and by Clint Louis as to 70%; (v) special damages in the sum of \$39,255.00 are awarded to the claimant Clint Louis in claim No. 0905 of 2015 to be paid by the defendant Miguel Jeffrey in the claim together with interest at the rate of 3% from 2nd December 2012 until the date of judgment; (vi) general damages for pain and suffering are awarded to Clint Louis in the sum of \$30,000.00 together with interest at the rate of 6% from the date of judgment until payment; and (vii) Miguel Jeffrey shall pay 30% of the prescribed costs due to Clint Louis in Claim No. 0905 of 2015 under Part 65(5) of the CPR.

Background

- [3] Clint Louis (“the appellant”) is one of four defendants to a claim filed by Crystal Cherebin (“Ms. Cherebin”) seeking damages for personal injuries suffered by her in a three-vehicle accident involving motor vehicles driven by the appellant, Miguel Jeffrey (“the respondent”) and John Demille. The appellant also filed a separate claim against the respondent seeking compensation for loss and damage occasioned by the respondent’s negligence in causing the accident. The accident occurred along the Castries/Gros Islet Highway in the vicinity of Marisule on 1st December 2012 at approximately 1:30am. The appellant was driving a white van travelling in a southerly direction and behind him was the respondent driving a black car, also travelling in a southerly direction. Ms. Cherebin was a passenger on board

a red bus being driven by John Demille in the same vicinity but travelling in a northerly direction. This is as far as the parties agree on the facts of how the accident occurred.

[4] On the appellant's account, the road was slightly wet because it had rained earlier. After passing the Marisule traffic lights, in the corner next to the old Marisule Enterprise Building, the respondent's black car appeared behind him with bright lights and seemed to have lost control in the corner. The appellant then pulled more to the left and applied his brakes as the road was not clear. The red bus was coming in the opposite direction. The appellant alleges that at this point the respondent's black car passed him spinning and the rear end of the spinning black car hit the right front wheel and door of his white van. The impact caused the appellant to lose control of the white van and, as a result, it turned to the right and collided with the red bus.

[5] The respondent's version of the accident was that after seeing that the road ahead was clear, he started to overtake the white van opposite the Glace Gas station. He said that while overtaking the white van, instead of maintaining speed, the appellant increased his speed. Nonetheless, he completed the overtaking just before reaching the Corinth junction and returned to the left of the road. He continued driving on the left and began negotiating the left-hand corner south of the Corinth junction. The respondent stated that the appellant then attempted to overtake him around the corner as the red bus was approaching from the opposite direction. The appellant's white van then hit the right rear of his black car causing him to lose control and causing his vehicle to leave the paved surface and collided with a fence near the side of the road. The white van and red bus then collided with each other.

[6] Upon assessing the evidence before him, the learned judge made several findings of fact and law and concluded that judgment should be entered in favour of Ms. Cherebin and damages were awarded to her on her claim. He found that neither John Demille nor the owner of the red bus, Prince Richardson, were liable for or

contributed in any way to the accident. The judge found that both the appellant and the respondent were responsible for the accident and apportioned liability at 70% to the appellant and 30% to the respondent. This appeal centres on the judge's findings of fact that led him to determine liability on the part of the appellant and his apportionment of liability between the appellant and the respondent. It also challenges the judge's determination of the quantum of general damages awarded to the appellant on his claim against the respondent. Therefore, my summary of the judge's findings will extend only to those matters that are relevant to these issues.

[7] The judge considered it to be implausible that the black car, on the appellant's narrative, began spinning from behind the white van and despite spinning out of control it was able to spin past the white van, hit the right side of the white van with its rear end as it spun, sending the white van careening to the right hand side of the road into the red bus. He could not reconcile that the black car could spin in an orderly fashion, hit the white van, spin out of the way and miss the red bus completely. He also could not reconcile from the facts how the black car could hit the white van on the right and nonetheless cause it to veer to the right. The judge accordingly concluded that he found it more believable that the respondent was speeding, edged past and in front of the appellant and that the appellant hit the back of the black car causing it to be propelled into the fence. On that basis the judge found the appellant 70% liable and the respondent 30% liable for causing the accident.

[8] In determining the quantum of general damages awarded to the appellant in his claim against the respondent the judge considered the cases of **Dawn Noel v Don John**,¹ **Howell Fontenelle v Jn. Baptiste Marville**,² **Ryan Richards v Michael Francois**,³ **Marcel Fevrier et al v Bruno Canchan et al**⁴ and **Hayden James v**

¹ [2012] ECSCJ No. 374 (delivered 21st December 2012).

² [2017] ECSCJ No. 298 (delivered 12th December 2017).

³ GDAHCV2010/0156 (delivered 7th November 2013, unreported).

⁴ Saint Lucia High Court Civil Suit No. 313 of 1989 (delivered 28th March 2002, unreported).

Judy Mc Coy.⁵ Based on his analysis of the appellant's injuries, his review of the comparable authorities in the region (keeping in mind the recency of some cases and others being of an older vintage), and the absence of medical reports that speak to any disability (partial or permanent) or ongoing medical care, the judge concluded that an award of \$100,000.00 would be the appropriate award of general damages for the injuries suffered by the appellant. This amount was discounted to \$30,000.00 to reflect the judge's earlier finding that the respondent was only 30% liable in the circumstances. The appellant was dissatisfied with the judge's decision and appealed to this Court.

The Appeal

- [9] The appellant asked this Court to allow his appeal challenging the correctness of the judge's findings of fact in relation to liability, the judge's findings of mixed fact and law in relation to the quantum of general damages awarded to the appellant, and the orders consequent to those findings. More specifically, he asked that judgment be entered in his favour on the issue of liability in that the respondent is wholly responsible for causing the accident and the damage and loss resulting from it, or alternatively that the judge's apportionment of liability be amended to 30%/70% as between the appellant and respondent. The appellant also seeks to increase the judge's award of general damages for his pain and suffering, for which he estimates a more appropriate award to be in the range of \$200,000.00 to \$250,000.00. Finally, the appellant asked that the respondent pay the costs of the appeal.

Issues on Appeal

- [10] The notice of appeal lists eight grounds of appeal which may be condensed into two main issues:
- (i) whether the learned judge erred in finding the appellant to be more liable than the respondent for causing the accident by: (a) deciding against the weight of the evidence before him; and (b) acting as an

⁵ ANUHCv2003/0240 (delivered 9th March 2006, unreported).

expert in auto accident reconstruction and imposing his opinion as to the manner in which the accident occurred; and

- (ii) whether the learned judge erred in his assessment of the quantum of general damages awarded to the appellant.

Appellant's Submissions

[11] Learned counsel for the appellant, Mr. Alvin St. Clair, contended that this appeal concerns one of the instances where an interference with the findings of fact of the trial judge is warranted. He submitted that all the circumstances where appellate interference is warranted, as set out by this Court in **Yates Associates Construction Company Ltd v Blue Sand Investments Limited**,⁶ can be clearly identified in this appeal. Mr. St. Clair argued that the judge's decision on liability went against the weight of the evidence before him and on that basis this Court should set it aside. He submitted that it was not open to the judge to ignore or cast aside the facts before him and substitute his alleged expert evidence on accident reconstruction in concluding how the accident occurred. He stressed that the judge did not have sufficient regard to the evidence of Ms. Cherebin that supports the majority narrative and corroborates the appellant's evidence in three aspects: (i) that it was the respondent who was overtaking; (ii) that the respondent was overtaking at a corner; and (iii) that the respondent's vehicle was spinning.

[12] Mr. St. Clair asserted further that the judge ought not to have placed the respondent's credibility on par with that of Ms. Cherebin. He contended that the manner of the respondent's responses to counsel for the appellant during cross-examination ought to have led the judge to conclude that the respondent was not a witness of truth and he should not have attached greater credibility to the respondent's narrative of the accident.

⁶ [2016] ECSCJ No.63 (delivered 20th April 2016). The principles in Yates are set out in paragraph 23 below.

- [13] Mr. St. Clair also argued that the judge failed to give proper weight to the fact that the respondent pleaded guilty to driving without due care and attention during criminal proceedings against him in the Magistrate's court. In his oral submissions Mr. St. Clair was careful to distinguish circumstances where a conviction arises from a verdict of guilty as opposed to a plea of guilty. He argued that while a conviction on the former is inadmissible in a subsequent civil trial, a conviction based on the latter or any other admission during the course of a criminal trial is admissible in a civil trial. In support of this submission he referred this Court to the case of **Emrol Phillip and others v Paul Greenidge and others**⁷ which followed the principle as elucidated in **Amos Virgo v Steve Nam**.⁸
- [14] Finally on the issue of liability Mr. St. Clair submitted that based on the judge's findings, with the exception of his incorrect conclusion that the appellant hit the rear of the respondent's vehicle, nothing points to the appellant's actions on the morning in question as being negligent or liable in any way.
- [15] As it concerns the appeal against the quantum of general damages awarded by the judge to the appellant, Mr. St. Clair submitted that in accordance with **Levi Maximea v The Chief of Police and others**,⁹ an appellate court may interfere with an award of damages if, in all the circumstances, there is no reasonable proportion between the amount awarded and the loss sustained, or if the damages are out of proportion to the circumstances of the case. He emphasised further that the appellate court may interfere if the judge misapprehended the facts, took irrelevant factors into consideration, or applied a wrong principle of law, or applied a wrong measure of damages which made his award a wholly erroneous estimate of the damage suffered.

⁷ GDHACV2015/0461 (delivered 27th June 2016, unreported).

⁸ Supreme court of Jamaica Claim No. 2008/HCV00201.

⁹ [2019] ECSCJ No. 163 (delivered 7th May 2019).

[16] Mr. St. Clair argued that in his judgment the learned judge took into consideration and spoke to only three of the four injuries suffered by the appellant. He also asserted that the judge failed to look at the totality of the evidence when he reduced the award of general damages based on his finding that the appellant had shown no evidence of loss of amenities. He stated that it was evident that the appellant's life would have deteriorated given the sheer number of fractures in every major area of motor functionality of the appellant's body and the number of invoices describing the many surgeries the appellant underwent. Learned counsel relied on the case of **Emanuel Rock v Theresa Jolly**¹⁰ for his submission that a judge may draw reasonable inferences from the medical evidence in making an award of damages. He also distinguished the injuries sustained by the appellant as being far more severe than the injuries of the claimants in **Dawn Noel, Howell Fontenelle** and **Ryan Richards**.

[17] In light of the above, Mr. St. Clair urged this Court to allow the appeal by finding that the respondent is wholly liable for the accident and the resulting damage and loss, or alternatively, that liability be apportioned 30%/70% as between the appellant and the respondent. He asked further that the damages awarded to the appellant for pain and suffering be increased within the range of \$200,000.00 to \$250,000.00 (\$150,000.00 to \$200,000.00 for pain and suffering and \$50,000.00 for loss of amenities). He also urged this Court to award the appellant his costs of the appeal.

Respondent's Submissions

[18] Learned Queen's Counsel for the respondent, Mr. Dexter Theodore, agreed that the Court of Appeal has the power to interfere with findings of fact of the trial judge. However, this can only be done in limited circumstances and an appellate court must be extremely cautious about upsetting a conclusion of primary fact by the trial judge. He contended that the criteria for interference by this Court has not been established by the appellant and, therefore, this case is not one that merits interference with the findings of the judge. He relied on the authorities of **Watt (or**

¹⁰ DOMHCVAP2006/0010 (delivered 17th May 2007, unreported).

Thomas) v Thomas,¹¹ Central Bank of Ecuador and others v Conticorp SA and others,¹² Dufour and others v Helenair Corporation Ltd and others,¹³ Beacon Insurance Company Limited v Maharaj Bookstore Limited¹⁴ and Yates in support of this submission.

[19] Mr. Theodore stated that the weight to be attached to the evidence is an exercise of the discretion of the trial judge, and the appellant must show that the judge was blatantly wrong in the exercise of that discretion for this Court to interfere. He argued that the learned judge was entitled to prefer the evidence of one witness over the other witnesses, despite there being nothing in the demeanour of the other witnesses to suggest that they were being untruthful. He also argued that a guilty plea at the Magistrate's court does not automatically render the respondent solely liable for injuries sustained by other litigants, particularly where an explanation has been provided for the guilty plea. He also asserted that in the absence of an expert opinion, the learned judge was required to consider the evidence before him and arrive at a reasonable conclusion, and that his decision to do so should not be construed as an attempt to volunteer evidence. He stated that, in the circumstances, the appellant has not satisfied the burden of proving to this Court that the judge erred in determining the issues of liability or contributory negligence as he did.

[20] On the point of the quantum of damages awarded to the appellant, Mr. Theodore argued that the appellate court should refrain from interfering unless the appellant can prove that the judge's award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong. Further, an appellate court must never assume that the judge forgot parts of the evidence in his determination. In support of this submission he relied on the case of **Correia v University of North Staffordshire NHS Trust.**¹⁵

¹¹ [1947] 1 AC 484..

¹² [2015] UKPC 11.

¹³ (1996) 52 WIR 188.

¹⁴ [2014] UKPC 21.

¹⁵ [2017] EWCA Civ 356.

[21] Mr. Theodore argued that the medical evidence and receipts before the judge may have suggested that there was interference with the appellant's daily activities for a period of time, but the extent of the disruption could not be determined without more; the onus was on the appellant to provide the Court with evidence of the extent to which his daily life was affected and he failed so to do. He also asserted that the cases of **Dawn Noel** and **Howell Fontenelle** on which the appellant relies, are both distinguishable on the facts regarding the extent and nature of the injuries suffered by the claimants in each case and the corresponding damages awarded to each claimant. He insisted that the \$100,000.00 awarded to the appellant was more than adequate in the circumstances. On the basis of his submissions, Mr. Theodore asked this Court to uphold the findings of the trial judge and dismiss the appeal with costs to the respondent.

Discussion

Appellate Interference with Findings of Fact

[22] The law on an appellate court's ability to interfere with a trial judge's findings of fact is well-established. In the locus classicus for appellate interference with findings of fact, **Watt (or Thomas) v Thomas**,¹⁶ Lord Thankerton stated the applicable principles to be:

"I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

II. 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.

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

¹⁶ [1947] AC 484 p. 487-488.

[23] The headnote of the judgment in **Yates** contains a good summary of the main principles guiding an appellate court in assessing findings of fact by a trial judge.

The relevant portion of the headnote reads:

“1. An appellate court reviewing the findings of a trial judge on the printed evidence in relation to a question of fact tried by the judge without a jury and where there is no question of the judge misdirecting himself, should not interfere with the trial judge’s decision 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 judge’s conclusion. In the circumstances, the appellate court may consider that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. However, either because the reasons given by the trial judge are unsatisfactory, or because it is (sic) clearly appears so from the evidence, an appellate court may be satisfied that the trial judge 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.

...

2. Appellate court restraint against interfering with findings of fact, unless compelled to do so, applies not only to findings of primary fact, but also to the evaluation of those facts and inferences to be drawn from them. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses who have given oral evidence, and of the weight to be attached to their evidence, an appellate court has to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. It is only in exceptional circumstances that an appeal court is entitled to take a different view on credibility from that of the judge who has seen the witness, particularly when the judge has referred favourably to the demeanour of the witness concerned.

...

3. Where the trial judge fails to make proper use of the advantage he or she possesses in analyzing and carrying out an evaluation of the evidence, the judge’s decision cannot stand if the decision does not comport with the evidence that was adduced. The critical question before an appellate court is whether there was evidence before the trial judge from which the judge could properly have reached the conclusions that he or she did or whether, on the evidence, the reliability of which it was for the judge to assess, that the judge was plainly wrong.”

This portion of the headnote was adopted by Blenman JA in **Webster Dyrud Mitchell and another v Jenny Lindsay**¹⁷ and I also adopt it.

- [24] To the extent that the appellant challenges the weight given by the judge to the respondent's version of events over the appellant's, it is useful to reinforce the widely accepted principle that the weight of the evidence is a matter for the trial judge. I find the dictum of Blenman JA in **Jtrust Asia PTE Ltd. v Mitsuji Konoshita and another**¹⁸ to be useful, where she stated:

"Cognisance must be paid to the fact that the weight placed on evidence is a matter that is exclusively for the trial judge. The judge has been immersed in all aspects of the case and as such he would be able to better assess the evidence and has advantages which the appellate court does not have."

- [25] All of the above principles are apt and I will apply them in considering the learned judge's evaluation of the evidence and his findings of fact.

Issue 1 – Whether the learned judge erred in finding the appellant to be more liable than the respondent in causing the accident by: (a) deciding against the weight of the evidence before him and (b) acting as an expert in auto accident reconstruction and imposing his opinion as to the manner in which the accident occurred

- [26] Mr. St. Clair complained that a crucial, if not the sole aspect of the judge's decision on liability, as between the appellant and respondent, had to do with his finding on who was behind whom at the corner in question and/or who was attempting to overtake whom at the corner. He insisted that the judge's finding on this point went against the weight of the evidence because he was acting as an expert in auto accident reconstruction. Therefore, it falls to this Court to consider whether the learned judge's approach, having regard to the evidence, was appropriate in determining that the appellant's liability for the accident would weigh heavier than the respondent's.

¹⁷ [2021] ECSCJ No. 691 (delivered 20th September 2021) at para. 26.

¹⁸ [2021] ECSCJ No. 571 (delivered 31st May 2021) at para. 57.

[27] Critically, I consider that in cross examination in the court below Mr. St. Clair asked the respondent '[s]o Mr. Jeffrey You will agree, that there is no evidence presented by you in this Court to suggest Clint Louis hitting you on your right rear?'.¹⁹ The respondent answered '[t]oday, no; today, no'.²⁰ I also consider that as it relates to the evidence of Ms. Cherebin, the learned judge concluded that:

'All I can glean, therefore, from Crystal Cherebin['s] evidence in terms of liability is that Mr. Jeffrey tr[ie]d to overtake and I can glean that because ... Mr. Jeffrey himself said he tr[ie]d to overtake of course critically we don't know – there is a conflict as to where the overtaking took place. So that's as far as the testimony of Crystal Cherebin can take us, not very far, a limited way; if anything perhaps that Mr. Jeffrey was trying to overtake'.²¹

Further, the learned judge also acknowledged in his judgment that the paint transfer and gouge marks on the vehicles did not assist the court in anyway on the conclusion of liability.

[28] The above findings beg the question, in absence of proof that the appellant hit the rear of the respondent's vehicle and in further absence of proof that the respondent had successfully overtaken the appellant, on what evidence could the learned judge have properly concluded that '[the respondent] edge[d] past and in front of [the appellant] and that [the appellant's] vehicle hit the back of the black car which was what sent it propelling ahead'? ²²

[29] Notably, the learned judge appeared to have accepted Ms. Cherebin, the appellant and the respondent all as witnesses of truth in his judgment. The judge's oral judgment reveals, however, that the lynchpin of his ultimate determination is the theory of how the accident happened, based on his logic. He stated this several times:

¹⁹ See Record of appeal, Bundle 3, e-page 785 at lines 21-23 of the transcript of proceedings.

²⁰ See Record of appeal, Bundle 3, e-page 785 at line 24 of the transcript of proceedings.

²¹ See Record of appeal, Bundle 4, e-page 912 at lines 13-18 of the transcript of the oral judgment.

²² See Record of appeal, Bundle 4, e-page 915 at lines 9-11 of the transcript of the oral judgment.

- (i) At page 22 of the transcript of the oral judgment: 'In other words the Court cannot conclude that in watching and listening to [the appellant] that he was a dishonest Witness per se. The difficulty though is the believability of his theory of how the accident occurred'.²³
- (ii) At page 23 of the transcript of the oral judgment: '...it's the theory of how the accident happened which I can't make sense of'.²⁴
- (iii) At page 24 of the transcript of the oral judgment:
 "So in short in terms of [the respondent's] narrative when the Court attempts to reconstruct how the accident occurred either mentally or with the use of model cars... the end result is that the Court finds it more believable that '[the respondent] edge[d] past and in front of [the appellant] and that [the appellant's] vehicle hit the back of the black car which was what sent it propelling ahead".²⁵

[30] The judge's conclusion on liability was, therefore, based on the logic behind the reconstruction of the accident as opposed to whether the demeanour of any particular witness led him to believe one narrative over the other. Nevertheless, I find it useful at this point to refer to the speech of Lord Pearce in **Onassis v Vergottis**²⁶ which offers guidance on the issue of assessing credibility. Lord Pearce stated that:

"'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth, as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with

²³ See Record of appeal, Bundle 4, e-page 913 at lines 10-12 of the transcript of the oral judgment.

²⁴ See Record of appeal, Bundle 4, e-page 914 at lines 22-23 of the transcript of the oral judgment.

²⁵ See Record of appeal, Bundle 4, e-page 915 at lines 6-11 of the transcript of the oral judgment.

²⁶ [1968] 2 Lloyd's Rep. 403.

every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurs. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a judge assesses the credibility of a witness; they are all part of one judicial process.”

With the above guidance in mind, I agree with Mr. Theodore’s submission that credibility involves more than mere demeanour. The judicial process of assessing credibility also requires the judge to weigh the balance of which narrative was more probable, which is what the learned judge did in the circumstances.

[31] This takes me to the issue of whether the learned judge acted as an expert in auto accident reconstruction by imposing his opinion of how the accident happened. For the sake of convenience and context, I find it useful at this point to set out the judge’s statements on the theory of the accident. At pages 22-23 of the transcript of oral judgment, he said:

“Now, I am [at] great pains to point out that in the absence of experts to whom explaining and evaluating how accidents occur might be easy. In the absence of such people the Court is on its own and may [be] bobbing up and down on a wide sea of speculation. Be that as it may, the [c]ourt cannot shy away from its responsibility of deciding what it finds believable and what it finds unbelievable or which theory of how the accident occurred it prefers. Left without any expert help, as I say, an expert might easily say but a theory you think doesn’t make sense is easily explain[ed]. You have to understand the physics of this and that, that isn’t before me and without that I am only left to the processing powers of my own mind, the logic of my own mind, what, what, its able to analyze and I have to say quite honestly and straightforwardly that I find the theory put forward by Mr. Clint Louis do[es] not make sense, my mind is incapable of accepting that theory.

Specifically, then these are the issues that boggle this judicial mind in terms of its acceptance of how the accident occurred, one; I find it difficult to believe or to see that the black car on the Clint Louis narrative began spinning from behind the white van, and even though it was spinning and

out of control it was able to spin past the white van, hit the right side of the white van, rear end of the black car hitting the right of the white van as it span and in so hitting it sent it careening to the right hand side in to the red bus. I find that difficult to accept because my mind cannot process how it could be that if a vehicle behind is spinning out of control it would still spin in an orderly fashion so as to hit a vehicle ahead of it, continue spinning to get out of the way of that white van that it hit which careened to the right, miss completely the red bus and deposit itself in a fence ahead. As I say physicist[s], engineers, road traffic reconstruction experts might be able to explain away easily I cannot process it myself.

I find it difficult to believe that even though the black car was spinning when it hit the white van, the black car instead of bouncing off the white van into the [path] of the red bus from the impact was propelled forward with enough space to avoid the red bus and propel forward well away from where the white bus impacted the red--- the white bus impacted the red bus. I find it difficult to believe that when the black car hit the white van on its right side the white van instead of veering left from the impact went careening right and into the red bus. I find it difficult to believe that if as Clint Louis say[s], when he saw the spinning behind him he slowed down, he brakes and pull[ed] to the left, that notwithstanding that being conscious of the vehicle, I can't comprehend how if the vehicle hit him the white van move veer to the right. For those reasons as I said the difficulty with the narrative is not his demeanour as a Witness and so on, it's the theory of how the accident happened which I can't make sense of."²⁷

He continued at pages 24- 25:

"Since I do not believe the spinning theory which is Mr. Clint Louis's version of how the accident happened, it follows that I prefer the narrative of Miguel Jeffrey. I believe Miguel Jeffrey was speeding, he says he was speeding. I believe that his black car was hit in the back which caused it to be propelled into the fence. I conclude that [Miguel Jeffrey] was 30 per cent liable for the accident and [Clint Louis] 70 per cent liable for the accident."²⁸

- [32] With the above passages in mind and guided by the learning in **Onassis** I do not find, as Mr. St. Clair submits, that the judge acted as an expert for the purposes of reconstructing the accident. It is pellucid that the judge acknowledged the absence of any expert assistance in the matter but also affirms that 'the Court cannot shy away from its responsibility of deciding what it finds believable and what it finds

²⁷ Record of appeal, Bundle 4, at e-page 913, line 13 to page 914 line 23 of the transcript of oral judgment.

²⁸ Record of appeal, Bundle 4, at e-page 914, line 23 to e-page 915 line 3 of the transcript of oral judgment.

unbelievable or which theory of how the accident occurred it prefers'. As Lord Pearce noted in **Onassis**, beyond demeanour and as part of the judge's assessment of the credibility of witnesses, the judge must also interrogate whether a witness' narrative is 'so improbable that it is on balance more likely that he was mistaken'. I am not satisfied that the judge's attempt to rationalise how the accident happened equates to him acting as an expert witness in that endeavour. He was doing what was required of him as a trial judge with what he thought was the evidence before him.

- [33] Despite the above finding, I agree with Mr. St. Clair that given the evidence before him the learned judge's conclusion on the theory of the accident was plainly wrong. Several points of evidence which were before the judge lead me to this conclusion. Firstly, the respondent had conceded during cross examination that he had not provided the court with any evidence that the appellant had hit the rear of his black car.²⁹ He also conceded that while overtaking the appellant '[t]he speed, the speed was a problem. The speed that I had to maintain'.³⁰ The learned judge therefore found that he admitted that he was speeding.³¹ Secondly, the respondent said in his witness statement that '[t]he place where the accident occurred the road is marked with a single continuous white line'.³² It is trite that this means that overtaking at that section of the road is not permitted, and, I would add, potentially dangerous, especially at 1:30am on a wet road. Finally, while the learned judge was entitled to disbelieve the majority narrative of the witnesses, he had accepted both Ms. Cherebin and the appellant as witnesses of truth and there appeared to be no evidence before him of any collusion between them or any interest which would serve Ms. Cherebin in lying to support the appellant's narrative. Therefore, in absence of an indication that the appellant and Ms. Cherebin were being untruthful, and further in absence of any evidence from an expert witness which contradicts their narrative, I find it passing strange that the learned judge nonetheless concluded

²⁹ See paragraph 27 above.

³⁰ See Record of appeal, Bundle 3, e-page 777, at line 17 of the transcript of proceedings.

³¹ See Record of appeal, Bundle 4, e-page 915, at lines 1-3 of the transcript of the oral judgment.

³² See Record of appeal, Bundle 2, e-page 398, at para. 7 of the respondent's witness statement.

against the majority narrative by determining that the respondent had successfully overtaken the appellant and that the appellant had hit the rear of the respondent's vehicle resulting in the accident.

- [34] It appears from the judge's reasons that his conclusions were born of his inability to rationalise the manner in which, on the appellant's narrative, the respondent's vehicle was said to be spinning. In short, the learned judge found it incredulous that the black car began spinning from behind the white van and spun in an orderly fashion so as to hit the white van on the right but nonetheless sent it careening to the right, continued spinning so as not to impede the white van from hitting the red bus, missed the red bus completely and deposit itself in a fence ahead.
- [35] I do not agree with the learned judge's evaluation that it was improbable for the black car to have spun as it was said to do on the appellant's narrative. The appellant's evidence in the court below was that when the respondent's vehicle appeared behind him it seemed that it had lost control in the corner, and Ms. Cherebin's evidence was that the respondent's vehicle began spinning after its second attempt to overtake the white van. Further, the sequence of how the black car spun seems more related to timing and chance than to logic as the learned judge considered. I do not agree that a vehicle spinning out of control must be so manifestly chaotic that it is immune to either fortunate or unfortunate timing in so doing. It appears as well that the judge failed to consider that the appellant stated, at paragraph 3 of his witness statement, that the impact from the black car hit the right front wheel and door of the white van and, critically, caused him to lose control of the white van so that it turned to the right. 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. To my mind this provides a reasonable explanation for the direction in which the white van turned.

[36] Nothing else before the learned judge, beyond his inability to conceptualise the spinning car theory, could have led him to conclude as he did. In absence of any expert witness testimony to contradict the spinning theory, and in circumstances where he had found both Ms. Cherebin and the appellant to be witnesses of truth, the learned judge should have found that the appellant's narrative in that regard was more probable.

[37] I agree, however, with the judge's finding that if the appellant had slowed down, as he alleged, it is improbable that the damage would have been as severe or that the vehicle would have travelled a distance of some 90 feet after being hit by the black car, and with enough force to knock over the red bus. Therefore, it was reasonable for the judge to infer that the appellant was also speeding and therefore ought to share liability, contrary to the urgings of the appellant. However, in light of the totality of evidence before him I find that the judge's determination on the theory of the accident went against the weight of the evidence and he was plainly wrong to conclude that the appellant should bear more liability than the respondent in the circumstances.

[38] I am fortified in this view when I consider that the respondent pleaded guilty to the offence of driving without due care and attention in criminal proceedings connected to the same matter. I agree with Mr. St. Clair's submission that while a conviction in criminal proceedings is inadmissible in subsequent civil proceedings, a conviction based on a guilty plea is admissible. In **Emrol Phillip**, the court adopted the learning in **Amos Virgo** where Brown J [Ag.] stated at paragraph 24:

"Hollington v. Hewthorn is not authority for the proposition that a defendant's conviction in criminal trial, based on a plea of guilty, cannot afterwards be relied on in a civil trial. An admission made anywhere is good everywhere ... If Hollington v. Hewthorn laid down any rule, it is this, in all its untruncated glory, whereas a conviction arising from a verdict of guilty in a criminal trial is inadmissible, in a subsequent civil trial, a conviction based on a plea of guilty or any other admission during the course of the criminal trial is admissible."

[39] Mr. Theodore, QC did not demur from the intimation of the Court, during the hearing, that the judge's finding on the apportionment of liability did not properly represent the evidence in the case, and conceded that this Court could come to a different conclusion as to the degree of responsibility between the appellant and the respondent. He suggested a 50%/50% apportionment.

[40] In the totality of circumstances, and with consideration of the preceding authorities, I am of the view that it was not open to the learned judge to find that the appellant was more liable than the respondent for the accident. I am satisfied that the circumstances adumbrated in **Watt (or Thomas) v Thomas** and **Yates**, which warrant appellate interference with a judge's findings of fact, are present in this appeal. The advantage enjoyed by the trial judge by reason of having seen and heard the witnesses is not sufficient, without more, to explain or justify his conclusion and his decision cannot stand if it does not comport with the evidence that was adduced. Given the extent of the respondent's role in causing the accident, I agree with the appellant that a more appropriate apportionment of liability would be that the appellant is 30% responsible for the accident and the respondent is 70% responsible. Accordingly, I would allow the appeal against the judge's apportionment of liability.

Issue 2 – Whether the learned judge erred in his assessment of the quantum of general damages awarded to the appellant

[41] This issue concerns the appellant's contention that the learned judge erred in awarding only \$100,000.00 for pain and suffering and in making no award for loss of amenities on his claim against the respondent. An appellate court is reluctant to interfere with an award of damages, which is primarily an exercise of discretion entrusted to a trial judge. The pronouncements of Sir Vincent Floissac CJ in the case of **Joseph Horsford v Bernard Jarvis**³³ are instructive on the appellate court's approach in this regard. At paragraph 16, Sir Vincent Floissac CJ stated:

³³ [1996] ECSCJ No. 29 (delivered 24th June 1996).

“An Appellate Court does not normally interfere with an award of damages by a trial judge unless (1) the judge acted on or applied a wrong principle of law either by failing to take into account or by being influenced by relevant factors or by taking into account or by being influenced by irrelevant factors or by wrongly including or omitting a component item from a composite award where such inclusion or omission substantially affected the composite award or (2) the damages awarded are so inordinately high or low that no tribunal properly directed could reasonably make such an award and that the award must therefore be deemed to be a wholly erroneous estimate of the damage suffered or the damages to which the plaintiff is entitled or (3) the learned judge misapprehended the facts and thereby made a wholly erroneous estimate of the damage suffered or the damages to which the plaintiff is entitled.”

[42] I also find useful, the pronouncements of Satrohan Singh JA in **Alphonso and others v Deodat Ramnath**³⁴ where he states:

“In appeals, comparable in nature to the present one, it must be recognised that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial judge is indeed a heavy one. The assessment of those damages is peculiarly in the province of the judge. A Court of Appeal has not the advantage of seeing the witnesses, especially the injured person, a matter which is of grave importance in drawing conclusions as to the quantum of damage from the evidence that they give. If the judge had taken all the proper elements of damage into consideration and had awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, we ought not, unless under very exceptional circumstances, to disturb his award. The mere fact that the judge’s award is for a larger or smaller sum than we would have given is not itself a sufficient reason for disturbing the award.

But, we are powered to interfere with the award if we are clearly of the opinion that, having regard to all the circumstances of the case, we cannot find any reasonable proportion between the amount awarded and the loss sustained, or if the damages are out of all proportion to the circumstances of the case. This court will also interfere if the judge misapprehended the facts, took irrelevant factors into consideration, or applied a wrong principle of law, or applied a wrong measure of damages which made his award a wholly erroneous estimate of the damage suffered. The award of damages is a matter for the exercise of the trial judge’s judicial discretion and unless we can say that the judge’s award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong, we will not interfere.”

³⁴ (1997) 56 WIR 183.

- [43] Mr. St. Clair contended that when one considers the appellant's circumstances and the medical evidence before the court, despite its inadequacies, \$100,000.00 is not adequate compensation. He insisted that the appellant's pain and suffering were much more severe in comparison to the claimant in **Dawn Noel** and therefore the appellant's award should have been greater. In **Dawn Noel**, the claimant suffered serious injuries resulting from a motor vehicular accident including: (i) facial laceration approximately 15 cm long in the right Zygomatic region; (ii) laceration to the right lower lip approximately 10 cm long; (iii) intraoral laceration of approximately 20 cm in the right cheek; (iv) comminuted fracture of the right maxilla-malar complex and (v) comminuted fracture of the right anterior region of the mandible or jawbone. The Court, in that case, awarded \$110,000.00 for pain and suffering and \$50,000.00 for loss of amenities. The injuries, unlike the appellant's, were facial injuries. They were serious and left the claimant with permanent scarring, nerve damage, discomfort, loss of teeth, loss of function of facial muscles due to facial nerve damage, loss of bone, disability and the requirement for prosthesis.
- [44] Further, even in removing the amount for loss of amenities, there remains significant differences between the circumstances in **Dawn Noel** and the present appeal in terms of the proven ongoing suffering on the part of the claimant. At page 30 of the transcript of the oral judgment, the judge reasonably considered this point as part of his determination of the amount to be awarded to the appellant for pain and suffering.³⁵ He noted that **Dawn Noel** is a 2012 decision. Notably also, the learned master in **Dawn Noel** had referred to the affidavit of the claimant which had set out how her life had been affected as a result of the accident and a doctor gave testimony as to the nature and extent of her injuries.
- [45] I consider as well that the cases of **Ryan Richards** and **Howell Fontenelle** do not do very much to advance the appellant's case on the issue of assessing the quantum of general damages. I reject the appellant's submission that although the claimants in these cases each suffered just one of the fractures that the appellant

³⁵ See record of appeal, Bundle 4 at e-page 92.

may have suffered, that the court should look to them to “add up” the quantum of damages. On this point Mr. Theodore submitted, and I agree, that the court in looking at similar fact cases when determining the quantum for general damages, is not concerned with adding and discounting injuries but rather it is a matter of the court assessing them in the round. The nature and extent of the injuries must be looked at as a whole.

- [46] The inescapable observation is that, unlike the claimant in **Dawn Noel**, the appellant’s medical evidence is woefully scant which impacted his award for general damages. The learned judge was at pains to point this out in his oral judgment. He stated:

“It is an unfortunate feature of [the appellant’s] case that the medical report in evidence before the Court does not really comment at all on any disability, any ongoing suffering, any follow-up medical attention he might require, any pain and suffering in the future, any of those things which are - - it’s crucial for the medical report to support”.³⁶

- [47] The learned judge also gave consideration to all of the appellant’s injuries as presented to the court, contrary to Mr. St. Clair’s contention that he only spoke to the appellant’s broken arm, broken femur and broken jawbone without acknowledging the fracture to the left sinus. In outlining the injuries sustained by the appellant, the learned judge stated:³⁷

“Mr. Louis’ evidence was that due to the accident he said he sustain[ed] several injuries ranging from a broken arm, broken femur, broken jaw bone and cuts and bruises about [his] body. He said he spent two days at Victoria, transferred to Tapion, underwent two major surgeries at Tapion, one to his wrist the other to his femur. He says Dr. Kabiye also perform[ed] minor surgery to [his] left lung which had almost collapse[d]. He said he spent four weeks at hospital after which he was discharged and sent home.

There were injuries sustained to [his] mouth [he] was unable to chew and so [he] had to be [fed] from a straw and that was his Witness Statement in terms of, in terms of his injuries. ... he mentions his broken arm, broken femur, broken jaw bone and the surgeries to fix those but in terms of ... any

³⁶ See Record of appeal, Bundle 4, at e-pages 918-919.

³⁷ See Record of appeal, Bundle 4, at e-page 918 line 14 to e-page 919 line 13 of the transcript of oral judgment.

permanent disability, any loss of amenities, is he able to do the same things he enjoyed, any disability partial, I mean there was none of these things. So the medical report states on examination the finding[s] were jagged laceration to the lateral aspect of his left upper eyelid, jagged laceration to the upper lip with corresponding crepitus palpated in the left mandibular region, open fracture to the right radius, shortening and external rotation of the left hip corresponding to a fracture to the left femur, wounds toiletted and sutured. **Also verbal report of a subsequent CT Scan of the head revealed small petechial hemorrhages to the left parietal region, fracture to the left maxillary sinus and fracture to the left maxillary and mandibular regions.**”

I am satisfied that based on the above passage and the evidence before him, the judge gave due consideration to all the injuries complained of by the appellant.

- [48] Further, I do not agree with Mr. St. Clair’s assertion that while a further medical report would have been helpful to the court, nevertheless reasonable (medical) inferences can be drawn from the appellant’s receipts for his medical expenses. I do not agree that this is a satisfactory way to prove the nature and extent of injuries and resulting disabilities. A claimant in a claim for damages for personal injuries must support the proof of his injuries by medical evidence. Receipts are not medical reports. They do not expound on the nature and extent of the injuries or resulting disability. They do not contain the expertise of a medical professional from which a judge may adequately discern a claimant’s pain and suffering and loss of amenities. At most, they assist with proving an award of special damages. The appellant supported his submission by reference to the case of **Emanuel Rock v Theresa Jolly** where the trial judge drew an inference as to the source of the claimant’s injuries from the medical evidence which did not state specifically that the injuries were caused by the blow inflicted by the defendant/appellant. Rawlins JA opined:

“In my view, however, the judge was entitled to draw reasonable inferences from the medical evidence and it was within the bounds of reasonableness for him to have found that the injuries reported by the doctor were related to the incident...”

This is fundamentally different from drawing an inference as to the nature and extent of a claimant’s injuries, an assessment of which requires medical evidence. The

only reasonable inference that can be drawn from the appellant's receipts is that he incurred medical expenses. It would be illogical and unreasonable to expect the judge to infer from receipts the nature and extent of the appellant's injuries, that is, whether he had permanent or partial disability, and any particulars of loss of amenities. The receipts could not have helped the judge without a further medical report speaking to the nature and extent of the appellant's injuries and resulting disabilities. Further, it does not appear that the initial medical report that the appellant provided to the court was of much assistance to the learned judge as it simply set out the appellant's injuries without further explanation of how they might have impacted the appellant.

[49] I am not satisfied that the appellant's receipts, initial medical report and witness statement were sufficient to assist the judge in determining that he was entitled to damages for any permanent or residual disability and for loss of amenities. The appellant's witness statement lacked depth and only spoke of him being unable to chew and having had to be fed through a straw while in the hospital, and being unable to fully use his hand for some length of time after the accident. Neither the receipts nor the witness statement made mention of any permanent or residual effect of the injuries that interfered with the appellant's enjoyment of life as a whole. At best, the appellant's witness statement could only assist the judge in determining his pain and suffering.

[50] In the **Howell Fontenelle** case, on which the appellant relied, the claimant was awarded nothing for loss of amenities because he gave no evidence as to how the injuries he sustained impacted his day to day functioning or his life as a whole. The appellant having similarly failed to provide evidence in that regard, the judge, in my judgment, was not obliged to make an award to him for loss of amenities.

[51] I find that there is nothing to suggest that the learned judge exercised his discretion incorrectly in awarding the appellant \$100,000.00 for pain and suffering and not

making an award for loss of amenities. The judge took into account relevant factors and did not consider irrelevant factors. In coming to his conclusion, he stated:

“Base[d] on my analysis of the injuries, my understanding of the nature and extent of the injuries suffered, base[d] on my review of the comparable authorities in the region, keeping in mind the recent, the recency of some cases and others being of a more vintage variety, keeping in mind the unfortunate absence of medical reports that speak to any disability, partial disability, permanent disability, ongoing medical care etcetera the Court feels that an award of \$100,000.00 EC would be the appropriate award for the injuries suffered, pain and suffering of Mr. Clint Louis which of course 30 per cent is what he would get base[d] on - - of that figure base[d] on what the Court has found in terms of liability.”³⁸

[52] I am satisfied that the learned judge’s analysis was sufficient and he was entitled to find as he did. Therefore, I agree with the respondent that the appellant has not convinced this Court that any of the circumstances set out in **Alphonso** or **Joseph Horsford** warranting appellate interference with an award of damages are applicable in this appeal. The appellant has not proved that the judge’s award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong. Accordingly, I would affirm the learned judge’s award of \$100,00.00 for general damages. However, in light of my finding at paragraph 40, that liability should be split at 30%/70% as between the appellant and the respondent respectively, I would adjust the amount ultimately payable by the respondent to the appellant to \$70,000.00.

Costs

[53] On the matter of costs, I note that the judge had ordered the respondent to pay the appellant 30% of the prescribed costs due to him on his claim. I would vary this amount and order the respondent pay 70% of the prescribed costs due to the appellant on the claim below to reflect the change of the apportionment of liability on appeal. As for costs on the appeal, I also consider that the appellant has only partially succeeded in prosecuting his appeal and accordingly award him 60% of two-thirds of the prescribed costs due to him on his claim below.

³⁸ See Record of appeal, Bundle 4, e-pages 923-924.

Conclusion

[54] Based on the foregoing, I would allow the appeal in part and I would order as follows:

- (i) the judge's apportionment of liability in the claims below is varied to 30% to the appellant and 70% to the respondent;
- (ii) the amount payable by the appellant and the respondent in respect of the special damages awarded to the claimant Crystal Cherebin in claim No. 0904 of 2015 in the sum of \$5,180.23 is varied to reflect the variation in the apportionment of liability and the appellant shall pay \$1,554.07 and the respondent shall pay \$3,626.16 together with interest at the rate of 3% from the date of the filing of the claim until judgment;
- (iii) the amount payable by the appellant and the respondent in respect of the general damages awarded to the claimant Crystal Cherebin in claim No. 0904 of 2015 in the sum of \$30,000.00 is varied to reflect the variation in the apportionment of liability and the appellant shall pay \$9,000.00 and the respondent shall pay \$21,000.00 together with interest at the rate of 6% from the date of judgment until payment;
- (iv) the judge's award of \$39,255.00 for special damages to the appellant on his claim is varied to \$91,595.00 to reflect the variation in the apportionment of liability with interest at the rate of 3% from 2nd December 2012 until the date of judgment and thereafter at the rate of 6% from the date of judgment until payment;
- (v) the judge's award of \$100,000.00 for general damages to the appellant on his claim is affirmed;
- (vi) the amount payable to the appellant for general damages is varied to \$70,000.00 to reflect the variation in the apportionment of liability; and

- (vii) the respondent is to pay 70% of the prescribed costs due to the appellant on his claim below and 60% of two-thirds of those prescribed costs as costs on the appeal.

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Esco Henry
Justice of Appeal [Ag.]

By the Court

Chief Registrar