

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

ANTIGUA AND BARBUDA

ANUHCVP2023/0014

BETWEEN:

**[1] AKEEM BENJAMIN
[2] MARK MANSOOR
[3] MARTIN MANSOOR**

Appellants

and

**[1] NOVELLA PHILLIP
[2] WAYNE PHILLIP**

Respondents

Before:

The Hon. Mde. Esco L. Henry	Justice of Appeal
The Hon. Mr. Reginald T.A. Armour	Justice of Appeal [Ag.]
The Hon. Mde. Cadie St. Rose-Albertini	Justice of Appeal [Ag.]

Appearances:

Ms. C. Debra Burnette and Ms. Mandi A. Thomas for the Appellants
Mr. Kendrickson Kentish, KC with him Mr. Ralph Bowen and Ms. Kathleen Bennett
for the Respondents

2025: June 3;
2026: January 26.

Civil Appeal – Fatal Accident – Negligence – Award of damages on behalf of deceased’s estate – Causes of Action (Survival) Act – Whether the judge erred in making awards of damages for the benefit of the deceased’s estate under the Causes of Action (Survival) Act – Findings of fact – Whether the judge failed to conduct a proper evaluation of the facts and/or to ascribe appropriate weight to the evidence in finding the appellants liable in negligence – Apportionment of liability – Contributory negligence – Whether the judge erred in her assessment and apportionment of 15% contributory negligence to the deceased – Fatal Accidents Act – Whether the assessment of damages by the learned trial judge without a jury was contrary to the provisions of the Fatal Accidents Act – New point raised on appeal

This appeal concerns a fatal accident in which Ms. Oniqua Phillip (“the deceased”) lost her life whilst participating as a masquerader in the Carnival festivities taking place in St. John’s, Antigua and Barbuda on 2nd April 2016. The deceased’s fatal injuries were inflicted by a

Mack truck owned and operated by Mark Mansoor and Martin Mansoor (“the Mansoors”) that was carrying music equipment and at the time was being driven by Akeem Benjamin (collectively “the appellants”). The circumstances of the incident are that at approximately 8:15 pm that day, Ms. Phillip was in the vicinity of the Antigua Recreation grounds on Old Parham Road when the right rear wheel of the Mack truck came into contact with her resulting in fatal injuries to which she quickly succumbed. The deceased was survived by her parents, Mr. Wayne Phillip and Mrs. Novella Phillip (“the respondents”) and her young son. In the wake of the tragedy, the deceased’s parents filed a claim in the High Court of Antigua and Barbuda against Akeem Benjamin, Abdo Manoor & Sons and the Mansoors pursuant to the provisions of the Causes of Action (Survival) Act and the Fatal Accidents Act alleging negligence against them. The claim was made on behalf of the deceased’s estate and for the benefit of her dependents. When the claim was originally filed, Mrs. Novella Phillip was joined as a claimant in two representative capacities, firstly as Novella Phillip (Administrator of the Estate of Oniqua Zaleesha Phillip, Deceased) and secondly as Novella Phillip (as Next Friend of Eden Mims). She was struck off as a claimant in those capacities by court orders dated 29th June 2018 and 27th September 2018 respectively. Likewise, Abdo Mansoor & Sons Limited, was removed from the proceedings by court order dated 12th June 2019, when that claim was withdrawn on the ground that no allegation of negligence could be sustained against it, its involvement being limited to owning the musical equipment, but not the truck.

In a judgment dated 27th February 2023, the trial judge found the appellants partially liable in negligence for the deceased’s death and ruled that the deceased was 15% contributorily negligent. The judge awarded damages on the respondents’ dependency claim for the benefit of the deceased’s minor child in the sum of US\$294,753.00; made an award of US\$23,370.86 on the claim for the estate for loss of years; and awarded EC\$3,500.00 for payment of funeral expenses and EC\$5,000.00 for the loss of expectation of life, as well as prescribed costs under the Civil Procedure Rules.

The appellants were dissatisfied with the judgment and orders of the trial judge and launched the present appeal. They set out five grounds of appeal which are summarised and expressed as the following four issues: i) whether the learned judge erred in finding the appellants liable on the claim on behalf of the deceased’s estate and by awarding damages under the Causes of Action (Survival) Act; ii) whether the learned judge failed to conduct a proper evaluation of the facts and/or to ascribe appropriate weight to the evidence and as a result erred in holding the appellants liable in negligence; or whether the decision is against the weight of the evidence; iii) whether the learned judge erred in her assessment of 15% contributory negligence on the part of the deceased and; iv) whether the assessment of damages by the learned trial judge without a jury was contrary to the provisions of the Fatal Accidents Act. At the hearing of the appeal, the respondents conceded that the learned judge erred in making awards to the deceased’s estate since no claim had been issued by the deceased’s legal personal representative in the proceedings.

Held: allowing the appeal in part; making the orders at paragraph 109 of this judgment; and ordering that the respondents shall have $\frac{3}{4}$ of their costs and the appellants shall have $\frac{1}{4}$ of their costs in the appeal to be assessed within 21 days of today’s date if not agreed, that:

1. An action that devolves to the estate of a deceased person must be initiated by the duly constituted legal personal representative of the deceased's estate. Where the deceased dies intestate, the legal representative will usually be the duly appointed administrator (whether appointed by Letters of Administration or via court order to conduct proceedings on behalf of the estate) or if the deceased died testate, the executor of the deceased's estate. Since Ms. Oniqua Phillip, the deceased, died intestate, her estate could not be the beneficiary of an award under the Causes of Action (Survival) Act in circumstances where there was no duly appointed administrator. The learned judge erred in law by making such awards in the absence of a claim by a duly appointed administrator or representative claimant on behalf of the estate.

Causes of Action (Survival) Act, Cap. 78 of the Laws of Antigua and Barbuda applied.

2. Failure to properly plead and particularise the cause of action in the Claim Form or Statement of Claim as per rule 8.7 of the Civil Procedure Rules will result in a procedurally deficient claim. In the present appeal, the respondents failed to properly particularise the claim under the Causes of Action (Survival) Act and therefore any claim under that Act is unsustainable. Merely mentioning the Causes of Action (Survival) Act in the pleadings is not adequate particularisation of the cause of action for the purposes of compliance with the CPR. Likewise, the respondents' failure to identify any heads of loss under which damages were being sought was another deficiency in the pleadings in respect of the claim for the benefit of the deceased's estate. The awards made by the judge to the estate of the deceased are accordingly set aside.

Rule 8.7 of the **Civil Procedure Rules, 2023** applied; **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack** [2010] UKPC 15 followed.

3. It is trite law that an appellate court is always slow to disturb findings of fact by a trial judge and would do so only if persuaded that the lower court was plainly wrong in making such findings by reason that the trial judge failed to properly analyse the totality of the evidence and as a result made findings that are impermissible on the evidence adduced. In considering whether the learned judge erred in her evaluation of the evidence such that her conclusion that the appellants were liable in negligence for the deceased's death is fatally flawed, the principles of negligence in respect of motorists are to be borne in mind. They are taken into consideration for this purpose and in deciding (if necessary) whether any identified error(s) was fatal to her finding that the appellants were liable in negligence for the deceased's death as they contended. Drivers of motor vehicles owe in law a duty of care to other users of the road. The duty of care owed by a motorist on a given day at a particular time will depend on all the prevailing circumstances including the weather conditions, the amount and type of traffic on the roadway, the presence or absence of pedestrians including the number of pedestrians, noise levels, obstructions on the roadway if any, visibility, and any other relevant factors. Furthermore, the caution to be

exercised by a motorist in any given situation should be commensurate with whether any harm would be occasioned otherwise and the type of harm that could be caused to a road user if due care is not employed by him in driving his vehicle. The learned judge took into account the oral testimonies and witness statements of the parties, the police report, the postmortem report and the undated letter from the magistrate of Districts A and B certifying the results of the Coroner's Inquest into Ms. Phillip's death. These formed the evidential background from which the learned judge made her findings of fact. Having reviewed the evidence that was before the judge, the Court is satisfied that the learned trial judge was entirely justified in finding that the appellants did not meet the requisite standard of care. It is more than obvious that the evidence and especially the cross examination elicited sufficient evidence which led the learned trial judge to find the respondents' assertion of negligence more likely true than not.

Benmax v Austin Motor Co Ltd [1955] 1 All ER 326 applied; **Shaista Trading Company Limited d.b.a Diamond Republic v First Caribbean International Bank (Barbados) Ltd** ANUHCVP2018/0021 (delivered 26th April 2021, unreported) followed.

4. The test for finding liability in negligence and the basis for a claim under the Fatal Accidents Act are not to be conflated. What is required to establish liability under the Fatal Accidents Act is quite different from the elements of negligence. It is not relevant to a determination of negligence for a court to find proof that the death was caused by a wrongful act, neglect or default. Therefore, the appellants' criticism that the learned judge did not say what wrongful act, neglect or default was attributed to Mr. Benjamin is not made out.

Elizabeth Annette Fyfield (Intended Administrator of the Estate of Kitwana Fyfield, deceased) v Dwight Harris SKBHCV2013/0184 (delivered 23rd October 2015, unreported) considered; **Landau v Big Bus Company and another** [2014] EWCA Civ 1102 distinguished.

5. Contributory negligence involves the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless. In assessing whether the deceased was contributorily negligent, the learned judge noted that there was no evidence of what exactly happened at the time of the accident and that the driver did not see the deceased at the time of impact or before. She took into account that neither the deceased's mother nor the Mansoors were in proximity to the site of the incident. She noted further that there was no evidence of when the THC which was reported in the postmortem report was used by the deceased or whether her decision-making was affected by its consumption. The learned judge took note that there was also no positive indication of alcohol in the medical report. In this regard, the totality of the evidence with respect to alcohol being in the deceased's blood amounted to nothing more than speculation by the deceased's mother that she may have consumed alcohol. Although the appellants

mentioned a report wherein it was found that the deceased had alcohol and drugs in her blood, no such report or document was produced in evidence. The judge however did accept that the deceased came into contact with the right rear wheel of the truck in the area between the rig/truck and the trailer which suggested that the deceased did not sufficiently heed the sound of the horn and that the deceased likely positioned herself in a manner and/or at a location that was likely to cause personal harm. Having regard to the foregoing, the Court is satisfied that the judge conducted a structured, well-reasoned and sound evaluation of the relevant factors and that she did not overlook any material considerations or give too little or too much weight to any in arriving at the conclusion that the deceased was liable for contributory negligence or in apportioning the deceased's liability at 15%.

Attorney General v Collingford John et al SVGHC VAP2017/0006 (delivered 20th September 2018, unreported) followed; **Jones v Livox Quarries Ltd** [1952] 2 QB 608 applied.

6. An appellate court is cautious to allow a litigant to raise a new point on appeal but may do so if the interests of justice so requires on application by the party seeking to rely on it, with a clear and convincing explanation why it was not raised in the lower court. Other relevant considerations include the nature of the proceedings in the first instance court, the nature of the new point and any prejudice to the parties in granting or refusing leave to argue the new point. In this appeal, the appellants made no application to rely on the fourth ground of appeal where they contend that the learned trial judge exceeded her jurisdiction when she conducted an assessment of damages under the Fatal Accidents Act, although it was included in the Notice of Appeal. No explanation was provided as to why it was not raised before the learned judge. It appears to the Court that the administration of justice would in this instance be served by refraining from entertaining this new point on appeal. The trial proceeded below in circumstances where a procedural point about the forum for the assessment could have been raised but was not and where no other issue was taken regarding any other irregularity in the proceedings. In addition, it would be prejudicial to require the parties and the Court to consider setting aside the assessment of damages conducted by a judicial officer if the appellants were to prevail on this point. This ground of appeal is accordingly dismissed.

Win Business (Caofeidan) Limited formerly Win Business (Africa) Ltd v Anadarko China Holdings 2 Company et al BVIH CMAP2022/0044 (delivered 5th July 2023, unreported) considered; **Notting Hill Finance Limited v Sheikh** [2019] EWCA Civ 1337 considered.

JUDGMENT

Introduction

- [1] **HENRY JA:** The circumstances giving rise to this appeal surround a tragic accident in which Oniqua Phillip (“the deceased”) aged 25 years, lost her life after carnival parade celebrations in St. John’s, Antigua and Barbuda on 2nd August 2016. At approximately 8:15 pm that day, the deceased who had earlier participated in the carnival festivities as a masquerader, was in the vicinity of the Antigua Recreation grounds on Old Parham Road when the right rear wheel of a music Mack truck registration number C68 came into contact with her resulting in fatal injuries to which she quickly succumbed. The truck was owned and operated by Mark Mansoor and Martin Mansoor (“the Mansoors”) and at the time was being driven by Akeem Benjamin.
- [2] In the wake of the tragedy, the deceased’s parents Novella and Wayne Phillip filed a claim in the High Court of Antigua and Barbuda against Akeem Benjamin, Abdo Manoor & Sons and the Mansoors pursuant to the provisions of the **Causes of Action (Survival) Act**¹ and the **Fatal Accidents Act**² alleging negligence against them. The claim was made on behalf of the deceased’s estate and for the benefit of her dependents.
- [3] When the claim was originally filed, Mrs. Novella Phillip was joined as a claimant in two representative capacities, firstly as Novella Phillip (Administrator of the Estate of Oniqua Zaleesha Phillip, Deceased) and secondly as Novella Phillip (as Next Friend of Eden Mims). She was struck off as a claimant in those capacities by court orders dated 29th June 2018 and 27th September 2018 respectively.³ Likewise, the third-named defendant in the claim as originally filed, Abdo Mansoor & Sons Limited, was removed from the proceedings by court order dated 12th June 2019, when that

¹ Cap. 78 of the Laws of Antigua and Barbuda.

² Cap 166 of the Laws of Antigua and Barbuda.

³ By reason that Letters of Administration had not been extracted in respect of the deceased’s estate. She therefore did not have the requisite standing to pursue the claim in that capacity.

claim was withdrawn on the ground that no allegation of negligence could be sustained against it, its involvement being limited to owning the musical equipment, but not the truck. The claim went to trial with the parents as claimants. Akeem Benjamin and the Mansoors were the defendants. Mark Mansoor, originally the fourth defendant became the third defendant numerically, on the removal of Abdo Mansoor & Sons Limited.

[4] In her judgment dated 27th February 2023, the learned trial judge found the defendants partially liable in negligence for the deceased's death and ruled that the deceased was 15% contributorily negligent. Damages on the claimants' dependency claim for the benefit of her minor child Eden Mims, was awarded in the sum of US\$294,753.00 (being US\$346,769.23 less 15% of US\$52,015.35); on the claim for the estate an award of US\$23,370.86 (being US\$27,495.13 less 15% of US\$4,124.27 on account of contributory negligence) was made; payment of funeral expenses of XCD\$3,500.00 and loss of expectation of life of XCD\$5,000.00 was awarded to the claimants, as well as prescribed costs under the Civil Procedure Rules ("CPR").

[5] Being dissatisfied with the judgment and orders of the learned trial judge, the appellants (who were the defendants in the court below) launched this appeal in which they challenge various findings of fact and law made by the trial judge. They contended that the learned judge erred in awarding damages to the deceased's estate under the **Causes of Action (Survival) Act** in the absence of a claim by her legal personal representative. The respondents conceded that ground of appeal. The appellants argued further that the learned judge erred in holding them liable in negligence and apportioning their liability at 85%. The respondents resisted the other grounds of appeal.

Grounds of Appeal

[6] The appellants set out five distinct grounds of appeal, namely, that the learned trial judge erred:

- (1) when she found that a claim was made on behalf of the deceased's estate when a claim was made by the respondents (the claimants) only as dependents pursuant to the **Fatal Accidents Act**;
- (2) in her evaluation of the facts, by giving too much weight in some instances and too little weight in others to the relevant facts when she concluded that the appellants (the defendants) are liable in negligence resulting in the deceased's death from the accident;
- (3) in that her decision is against the weight of the evidence;
- (4) when she applied only 15% contributory negligence on the part of the deceased in circumstances where the evidence strongly supports a finding of full liability or majority of the culpability for the accident on the part of the deceased.
- (5) in that contrary to the provisions of the **Fatal Accidents Act** which provides that damages should be assessed by a jury, she exceeded her jurisdiction when she proceeded to assess the respondents' damages.

Issues

- [7] At the hearing of the appeal the respondents quite properly conceded that the learned judge erred in making awards to the deceased's estate since no claim had been issued by the deceased's legal personal representative in the proceedings. Accordingly, it was not necessary to delve into the merits of that ground of the appeal for the purposes of disposing of the appeal. However, the arguments are summarised and a formal conclusion is expressed on that ground of appeal.
- [8] In light of the foregoing, the issues that arise for consideration are fourfold:
- (1) whether the learned judge erred in finding the appellants liable on the claim on behalf of the deceased's estate and by awarding damages under the **Causes of Action (Survival) Act** ('liability point');

- (2) whether the learned judge failed to conduct a proper evaluation of the facts and/or to ascribe appropriate weight to the evidence and as a result erred in holding the appellants liable in negligence; or whether the decision is against the weight of the evidence ('evidential point');
- (3) whether the learned judge erred in her assessment of 15% contributory negligence on the part of the deceased ('contributory negligence point'); and
- (4) whether the assessment of damages by the learned trial judge without a jury was contrary to the provisions of the **Fatal Accidents Act** ('assessment by jury point').

Factual Background

- [9] Further to the brief background in the introductory paragraphs I consider that it is helpful to expand on the factual matrix in this case, for context. It is undisputed that the truck came into contact with the deceased when she was struck by its right rear wheel in the area between the rig/truck and the trailer, as the driver began to turn the truck around the roundabout on the north-western area of the Antigua Recreation grounds. The deceased became wedged under the truck's wheels and as a result a wrecker had to be deployed to lift the wheels to facilitate the removal of her body. Thereafter, she was transported to Mount St. John Medical Centre's Emergency Room where she was pronounced dead on arrival. The medical report disclosed that the deceased sustained multiple injuries from the impact with the truck. She was survived by her parents and young son Eden Mims.
- [10] The postmortem report dated 5th August 2016 determined that the deceased's death was caused by multiple trauma. Specifically, it detailed a severe head injury with multiple open skull fractures and a crush injury to the liver. The report also indicated that the deceased was positive for THC, a controlled substance, at the time of the incident. No evidence was adduced to determine when the substance had been

consumed or whether the detected levels would have impaired the deceased's decision-making at the time of the accident. The postmortem report disclosed no positive indication for alcohol in the deceased's blood sample.

[11] Mrs. Novella Phillip averred in her witness statement that the deceased might naturally have had alcohol in her system, considering that 'she was in a carnival parade partying'. However, she resiled from this position under cross examination, stating that she meant that the deceased may have consumed alcohol in the weeks leading up to the day in question and she did not see her drink any alcohol.

[12] A coroner's inquest as to the cause of death was conducted. It was completed on 3rd October 2017. The jury concluded that the death was an accident. The claim that gives rise to this appeal was filed thereafter. A Further Amended Claim Form and Statement of Claim was filed on 14th February 2019.⁴ Allegations of negligence were pleaded at paragraphs 8 through 10 of the Further Amended Statement of Claim as follows:

- "8. The first defendant the employee and/or agent of the second and Fourth named Defendants in the course of his employment so negligently managed and controlled the said truck, the property of the second and Fourth named Defendants along the said road that he caused or permitted the same to run over the Deceased causing her death.
9. The third named Defendant so negligently supervised the First named Defendant as he drove for them in the parade that it caused the personal injuries and loss and death of the Deceased.
10. The Deceased (sic) injuries and death were caused by the negligence of the First Defendant, and Third named Defendants. Whist, (sic) the Second named Defendant and the Fourth named Defendant are vicariously liable for the negligence of the First named Defendant, and/or liable for the acts of the First named Defendant acting as the agent of the Second and Fourth Defendant."

[13] The particulars of negligence set out in the pleadings relate only to the first and third defendants/appellants:

⁴ Record of Appeal, Volume 1, pages 78 – 101.

“PARTICULARS OF NEGLIGENCE of First and Third named Defendants

- (a) Drove at a speed that was excessive in the circumstances;
- (b) Failed to keep any or any proper lookout;
- (c) Failed to stop, slow down, swerve, or otherwise steer or control the truck so as to avoid driving said vehicle over the Deceased.
- (d) Failing to ensure that said vehicle had safety rails or protection to ensure no individuals could be damaged or killed by vehicle.
- (e) Failing to ensure that adequate persons supervised the driver of said vehicle to ensure that before he moved vehicle no persons were in a position to be injured or killed by said moving vehicle.
- (f) Failing to have a safe system of work for the use of a Truck and Trailer around Carnival revelers, including children and persons who might not be paying due attention as they danced in the streets.
- (g) Failing in their duty of care to persons who may come in contact with said vehicle and trailer.
- (h) Failing in their duty of care to persons who may be drinking alcohol and dancing in close proximity to the moving vehicle C68.”

[14] The appellants denied the allegations and particulars of negligence. It is noteworthy that they did not deny that the particulars of negligence would amount to negligence if established by the evidence. They pleaded that the deceased's death was caused or contributed to by her negligence. In this regard, they asserted that she failed to keep any or any proper lookout or any sufficient heed to the presence of their truck; failed to heed the sound of the horn from the truck; walked towards the truck while it was moving; created a dangerous situation for herself by consuming alcohol and the impairing substance THC (tetrahydrocannabinol) thereby impairing her judgment and walking towards a moving heavy duty truck and failing to have any regard for her own safety. They pleaded further that they would rely on the doctrine of *res ipsa loquitor* as far as is practicable.

- [15] At the time of her death, the deceased was employed as a social worker and was in her final year of earning a nursing degree, which was posthumously awarded. It was also undisputed that the deceased is survived by her minor child, Eden Mims, who lived with the deceased and the first respondent. However, while the respondents initially advanced claims for dependency on their behalf as the deceased's parents as well as for her child, the learned trial judge ultimately found that the parents' dependency was not sufficiently established by the evidence presented, thereby limiting the dependency award to the child only - a disposition uncontested by either the respondents or appellants.

Issue 1 – Liability Point

Appellants' submissions

- [16] The appellants advanced two main arguments on this issue. The first is that the learned judge erred by finding that a claim had been made on behalf of the deceased's estate and by awarding damages for the benefit of the estate. They argued that when the claim was withdrawn by Novella Phillip as administrator of the estate, that brought an end to the proceedings for and on behalf of the deceased's estate under the **Causes of Action (Survival) Act**.
- [17] The appellants contended that secondly, although reference was made to the **Causes of Action (Survival) Act** in the Amended Claim Form and Statement of Claim,⁵ those pleadings did not specify the cause of action being pursued under the **Act** or particularize the damages being sought pursuant to that **Act**. They cited in support **Roxanne Frederick (As Administratrix of the Estate of Steve Fraser, Deceased) v Richard Lam**,⁶ a case in which damages were disallowed under the **Causes of Action (Survival) Act** due to the claimant's failure to refer to the statute in the statement of case and did not seek expressly to rely on its provisions. The appellants relied further on **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack**⁷ as authority for the

⁵ Filed on 14th February 2019.

⁶ ANUHCv2008/0322 (delivered 29th July 2010, unreported).

⁷ [2010] UKPC 15.

principle that under rule 8.6 of the **Trinidad and Tobago Civil Proceedings Rules**⁸ the respondents were duty bound to, yet failed to include in their statement of case, a short statement of all the facts on which they relied and to identify all heads of loss being sought.

- [18] It was submitted that in light of these failures, no claims were made under traditional heads of loss for damages for personal injuries under a survival claim, such as, loss of expectation of life, pain and suffering, loss of amenities, or lost years. Resultantly, the respondents were not entitled to recover damages under those heads. Therefore, the learned judge erred in law in making such awards to the estate, including \$5,000.00 for loss of expectation of life, US\$23,370.86 for lost years, and EC\$3,500.00 for funeral expenses and they must be set aside.

Respondents' Submissions

- [19] To their credit the respondents readily conceded that no claim was brought by the administrator of the deceased's estate. As a result, there was no properly pleaded claim for the benefit of the deceased's estate and no basis existed on which an award could legitimately be made to the estate on the claim as pleaded. They accepted that it was right that the award of damages to the estate ought to be set aside.

Discussion

- [20] The extent of the respondents' pleadings under the **Causes of Action (Survival) Act** were as set out in two paragraphs of the Further Amended Claim Form and Statement of Claim as follows:

"The claimants bring this action on behalf of the Deceased's estate for the benefit of the dependents of the Deceased under the Causes of Action (Survival) Act, Cap 78 ..."⁹; and

"AND the Claimants claim:

⁸ The equivalent rule in this jurisdiction was rule 8.7 of the Civil Procedure Rules 2000 ('CPR') which is to like effect. The Civil Procedure Rules (Revised Edition) 2023 has since replaced the 2000 version of the CPR. However, the applicable rule remains r. 8.7.

⁹ Record of Appeal: Volume 1, paragraph 2 of the Further Amended Statement of Claim, page 81.

[21] Those pleadings are attributable to Novella and Wayne Phillip in their personal capacities, not as administrators of their deceased daughter's estate. It is trite law that an action that devolves to the estate of a deceased person must be initiated by the duly constituted legal personal representative of the deceased's estate, usually the duly appointed administrator or executor of the deceased's estate. In the case of a deceased person, who died intestate such as Oniqua Phillip, it was necessary for an administrator to be constituted by Letters of Administration for the purposes of commencing an action on behalf of the estate. Alternatively, the court could by order (pursuant to CPR Part 21) have appointed a representative party to initiate and conduct such proceedings. Neither course was adopted in the case at the appeal bar or before the claim was issued. Consequently, Oniqua Phillip's estate was not a party to the claim and could therefore not be the beneficiary of an award under the **Causes of Action (Survival) Act**.

[22] Additionally, merely mentioning the **Causes of Action (Survival) Act** in the pleadings is not adequate particularization of the cause of action for purposes of compliance with the CPR. In this regard CPR rule 8.7 states:

- "(1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.
- (2) The statement must be as short as practicable."

[23] As noted in **Charmaine Bernard v Ramesh Seebalack** the obvious objective of this rule is to ensure clarity to defendants to enable them to appreciate the parameters of the claim.¹¹ It also seeks to promote fairness and advance the overriding objective. It follows that the respondents' failure to properly particularize

¹⁰ In the Further Amended Claim Form and prayer; pages. 79 and 85 of the Record of Appeal: Volume 1.

¹¹ At paragraph 15 quoting Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at p 792.

the claim under the **Causes of Action (Survival) Act** is yet another reason why it was not sustainable.

- [24] Further, the respondents' failure to identify any heads of loss under which the damages were being sought was another deficiency in the pleadings in respect of the claim for the estate's benefit. On this point, the Board in **Charmaine Bernard v Ramesh Seebalack** authoritatively opined:

“Where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed.”¹²

- [25] Not only were the pleadings deficient in these respects, the claimants'/respondents' predicament was compounded by their lack of standing to prosecute a claim on behalf of the deceased's estate since neither of them had been appointed as the administrator of her estate (at the time) or had obtained an order from the court permitting them to pursue the claim on behalf of the estate.

- [26] In considering what measure of damages to award, the learned judge stated, “the claimants bring this action on behalf of the deceased's estate for the benefit of the dependants of the deceased under the **Causes of Action (Survival) Act...**”. She noted that Mrs. Novella Phillip had obtained Letters of Administration. She was clearly mistaken and quite likely had forgotten that earlier in the proceedings Novella Phillip in the representative capacity of administrator had been removed as a party from the claim. On the basis of this oversight, the learned judge proceeded to award the estate \$5,000.00 for loss of expectation of life, US\$23,370.86 in respect of lost years for the benefit of the estate and \$3,500.00 for funeral expenses even though those amounts were not particularized or specifically claimed. She thereby erred since the estate was not a party to the claim.

- [27] To their credit, the respondents have admirably conceded that the awards of general damages under those heads were made in error and must therefore be disallowed

¹² At paragraph 16 of the judgment.

for the reasons articulated. Accordingly, I would hold that the learned judge erred in law by making such awards in the absence of a claim by a duly appointed administrator or representative claimant on behalf of the estate. I would allow the appeal on this ground and set aside the awards of XCD\$5,000.00, US\$23,370.86 and XCD\$3,500.00 to the estate of the deceased.

Issue 2 - Evidential Point

Appellants' submissions

[28] Grounds of appeal 2 and 3 overlap in important respects, challenging as they do the learned judge's findings of fact in relation to negligence by the appellants. They are captured jointly under issue 2 above and are dealt with together. The appellants levelled several criticisms at the learned judge's approach to determining liability and her conclusion that they were liable in negligence. They contended that although the burden of proof rested on the respondents, they failed to lead evidence as to what transpired at the time of the accident and to establish that the appellants controlled the vehicle in an unsafe and negligent manner and 'maneuvered around the roundabout when it was unsafe to do so' or 'when the driver maneuvered around the roundabout, he did not have adequate assistance to safely drive around the roundabout'. It was submitted that the learned judge did not say what was unsafe about how the vehicle was driven or that the driver drove in an unsafe manner, and she did not find that Akeem Benjamin required assistance which was inadequate in that the number of persons assisting him fell below the required standard.

[29] The appellants argued that in considering the evidence led by them, the effect of the learned judge's ruling was to shift the burden of proof from the respondents to them by placing an unreasonable and unjustifiable expectation on them to disprove negligence instead of requiring the respondents to affirmatively prove negligence. It was submitted that one instance of this shift is evidenced in the learned judge's rejection of their evidence that guard rails cannot be customized for the locations that the vehicle is required to traverse, that it was impractical for guard rails to be placed around the truck and by her finding that they failed to implement those safety

precautions. They submitted that no evidence was led to support the learned judge's finding that guard rails can be customized to facilitate navigation by the truck and this finding should be overturned.

[30] Additionally, they contended that the learned judge did not consider any evidence led by the respondents in concluding that the driver maneuvered the vehicle around the roundabout when it was unsafe to do so. They submitted that there being no such evidence they were deprived of an opportunity to consider such assertions, answer, test or reject them. They contended further that the respondents did not prove that this was a required standard of care or that if guard rails are placed on a truck, it can yet navigate the narrow streets of St. John's without affecting the turning radius or that failure to meet this standard would have resulted in death or injury. Mark Mansoor's uncontroverted testimony was that it was impractical to place guard rails because doing so would affect the truck's turning radius.

[31] The appellants concluded that there was no basis for the learned judge to rule as she did on this point. In support, they highlighted the learned judge's statements that:

"[17] It appears to this Court that the driver of the vehicle maneuvered around the roundabout when it was not safe to do so as it was at the point of turning that the wheels came into contact with the deceased or when the driver maneuvered around the roundabout, he did not have adequate assistance to safely drive around the roundabout.

[18] ... this Court agrees with the submission of the Counsel for the Claimants that inadequate safety precautions were implemented by the owners of the vehicle. In the circumstances of a 50-foot trailer, there should have been a larger number of persons working around the truck to ensure that road users were kept a safe distance from the vehicle, additionally, the workers could have been provided with proper communication equipment which would have allowed the workers to communicate with each other despite the elevated noise from the music and persons. This court does not accept that it is not practical for guard rails to be placed around the truck as such rails can be customized for the locations where the vehicle is required to traverse."¹³

¹³ At paragraphs 17 and 18 of the judgment, (page 17 of the Hearing Bundle).

[32] It was submitted further that the learned judge did not indicate what was unsafe about the driving. They argued that it cannot simply be the fact that the deceased was fatally injured since death alone is not evidence of negligence. Citing **Elizabeth Annette Fyfield (Intended Administrator of the Estate of Kitwana Fyfield, deceased) v Dwight Harris**¹⁴ the appellants contended that where negligence is pleaded in a case where death occurs, a determination of negligence is predicated on a finding that death resulted from a wrongful act, neglect or default of a defendant. They reasoned that the learned judge failed to make a finding on the evidence as to what conduct of Mr. Benjamin was wrongful, negligent and caused the death in this case and she thereby erred. Placing reliance on **Benmax v Austin Motor Co Ltd.**¹⁵ they invited this Court to evaluate the evidence and decide whether Mr. Benjamin drove the vehicle negligently, taking into account the appellants' evidence including Mr. Benjamin's testimony that he kept blowing the horn and kept his hand on it.

[33] Another contention advanced by the appellants was that the learned judge placed undue weight on some factors and not put enough weight on others. In this regard, they submitted that she erred by placing too little weight on Mr. Benjamin's statement that he blew the horn of the truck continuously, while she placed greater weight on the statement in the police report that the truck was 'surrounded by a very large crowd of Carnival revellers ...'. It was submitted that the reference to a large group of revellers would obviously have been made based on police observations at the scene after the accident when it would be expected that a crowd would gather to see what happened and should not have been interpreted to suggest that a lot of people were in the vicinity when the tragic accident took place.

[34] It was submitted further that in light of the evidence that the deceased's body was found between the truck and the trailer, in the absence of evidence regarding what the deceased was doing when the driver blew his horn, coupled with the absence of

¹⁴ SKBHCV2013/0184 (delivered 23rd October 2015, unreported).

¹⁵ [1955] 1 All ER 326.

evidence from the respondents supporting a finding that guard rails would have provided a safety buffer and not affected the truck's turning radius, it was not open to the court to infer or find negligence by the appellants. Further, the deceased's apparent failure to heed the horn and the moving truck by taking precautions for her safety does not support a finding of negligence by the appellants. Addressing the learned judge's observations that the driver admitted to having blind spots, the appellants argued this does not translate into negligence. In fact, relying on **Landau v Big Bus Company and another**¹⁶ they submitted that the converse is true.

[35] It was submitted that the learned judge's evaluation of the facts was inconsistent, haphazard and without reason. The appellants argued that the respondents led no evidence as to what exactly happened and unlike in the case of **Trishel Wetherill v Joseph Pinder**¹⁷ no expert reconstruction evidence was adduced to demonstrate what probably transpired to give the court a reasonable explanation. Further, the police who investigated did not provide evidence and the respondents called no witnesses. The appellants stressed that it was not for them to disprove negligence, rather it was for the respondents to establish negligence. They submitted that applying the **Benmax** principles, this Court is in as good a position as the trial judge to evaluate the evidence and it should do so and allow the appeal on this ground. They cited further **Jada Construction Caribbean Limited v The Landing Limited**.¹⁸

[36] Regarding the evidence of THC as recorded in the toxicology report, the appellants argued that it was open to the learned judge to accept that at the time of death, the deceased had the controlled substance in her blood that could impair her judgment. They contended that it was unnecessary for the learned judge to require further evidence as to when the substances was consumed particularly since she did not say why such testimony was important and there was no expert opinion that this

¹⁶ [2014] EWCA Civ 1102.

¹⁷ ANUHCv2011/0581 (delivered 30th April 2014, unreported).

¹⁸ SLUHCvAP2009/011 (delivered 8th March 2011, unreported).

was a factor in determining whether and how passage of time could affect whether the deceased's judgment was impaired by the substance. It was submitted that the respondents neither challenged the report nor addressed the question of whether the deceased used the substance. The appellants argued that in the circumstances there was no evidence or proper evidence on which the learned judge could find them liable in negligence and that finding ought to be set aside.

Respondents' Submissions

- [37] The respondents accepted that the learned judge did not rely on their evidence to determine that there was a breach of a duty of care by the appellants. They acknowledged that she relied entirely on the appellants' evidence in this regard. It was submitted further that the appellants all impeached themselves while testifying. In relation to Mr. Benjamin, the respondents pointed out that he accepted that he had been driving for the Mansoors in such carnival parades for at least 5 years, that a Mr. Whyte usually worked with him specifically to assist in clearing persons away from the sides of the truck and with manoeuvring the long truck particularly when it is making a turn. Further, Mr. Benjamin agreed that Mr. Whyte was not present at the time of the accident, that there was only one person clearing persons from the side of the truck at that time, there were blind spots during the turn, he therefore did not have vision along the length of the trailer, did not see the deceased in the truck mirrors, his assistant Carlos was at the front of the truck clearing persons away from the truck, no one was at the sides where the fatality occurred and it was during the turn that the deceased lost her life.
- [38] It was submitted that Martin Mansoor's testimony did not assist the appellants' case in that he testified that four persons including the driver were employed to help the driver. However, he was unable to supply the names of those employed. This account was contradicted by the driver who identified Carlos and a security guard (who was at the back of the trailer) as the only persons assisting him.

[39] In response to the appellants' submissions regarding the learned judge's findings on the issue of guard rails, the respondents countered that the learned judge's ruling that they were necessary is only a minor issue with respect to the finding of liability for negligence. It was but one of the lacking safety precautions that led to a finding of breach of the requisite duty of care to the deceased. The other considerations that contributed to that finding include the learned judge's conclusion that there should have been a larger number of persons working around the truck to keep road users at a safe distance away from the vehicle and safe, absence of communication equipment that could have been used to maintain an open and adequate channel of communication between the driver and those on the lookout outside the vehicle and the decision by the driver to manoeuvre around the roundabout when it was not safe to do so having regard to the reduced visibility in the night hours and the increased noise from revellers some of whom can be expected to be inebriated as part and parcel of the carnival festivities.

[40] It was submitted that the appellants advanced contradictory arguments in relation to the police report by submitting in one breath that the report should be discounted for stating that the truck was surrounded by a large crowd and at the same time arguing that it should be relied on as proof that the driver blew his horn. The respondents contended that there is nothing inconsistent or haphazard about the learned judge's evaluation of the facts. Moreover, on the learning in **PIC Insurance Company Ltd v Zona Barthley and Zorol Barthley (Personal Representatives of the Estate of Dr. Rolston Barthley, Deceased) et al**¹⁹ an appellate court would be slow to interfere with findings of fact of a trial judge in a civil case. Accordingly, in all the circumstances of this case, a reasonable tribunal seized with the evidence would have found as the learned judge did. Therefore, on the preponderance of the evidence, the learned judge was entitled to find the appellants liable in negligence and her findings of fact should not be disturbed.

¹⁹ ANUHCVP2019/003 (delivered 28th January 2021, unreported).

Discussion

[41] Grounds of appeal 2 and 3 seek to have this Court reverse the findings of fact by the learned judge that led to her conclusion that Mr. Benjamin's negligent driving of the truck and navigation of the trailer caused Oniqua Phillip's death and that the Mansoors being his principals were vicariously liable in negligence. An appellant who challenges findings of fact by a first instance court faces a high hurdle in seeking to persuade an appellate court to set aside those findings. An appellate court is always slow to disturb findings of fact by a trial judge and would do so only if persuaded that the lower court was plainly wrong in making such findings by reason that the trial judge failed to properly analyse the totality of the evidence and as a result made findings that are impermissible on the evidence adduced. The principle reason for this reluctance is that the trial judge had the benefit of seeing the witnesses testify and would be able to assess the demeanour of witnesses as they presented their evidence as well as their credibility, an advantage that the appellate court does not enjoy and cannot approximate or duplicate through a revision of the transcript of the proceedings in the lower court.

[42] In **Benmax v Austin Motor Co Ltd** the House of Lords encapsulated the guiding principle as follows:

“An appellate court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge.”²⁰

[43] This principle has been applied numerous times by this Court including in **Shaista Trading Company Limited d.b.a Diamond Republic v First Caribbean International Bank (Barbados) Ltd**,²¹ where Pereira CJ stated:

²⁰ [1955] 1 All ER 326.

²¹ ANUHCVP2018/0021 (delivered 26th April 2021, unreported) at paragraph 31.

“The principles governing appellate intervention with respect to the review of findings of fact, the evaluations of those facts and the inferences drawn from them by a trial judge are well established. Indeed, there is a strong stream of jurisprudence which has been consistently applied, having been first laid down in **Watt (or Thomas) v Thomas** [[1947] 1 All ER 582]. These authorities emphasise the reluctance of appellate courts to interfere with a judge’s findings of primary fact, particularly when these findings depend largely upon the trial judge’s assessment of witnesses he or she has seen and heard give evidence.”

[44] Additionally, the learned Chief Justice referenced the decision of the Privy Council in **Ming Siu Hung and others v J F Ming Inc and another**²² where Lord Briggs quoted from **Fage UK Ltd v Chobani UK Ltd**²³ when explaining the rationale for appellate court restraint in this regard. There, Lewison LJ stated:

“114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court...”²⁴

[45] Before embarking on an evaluation of the evidence in the court below, the learned trial judge summarised the applicable principles of law relative to negligence and the duty of care owed by motorists to other road users. The appellants and respondents accept that the learned judge correctly identified and outlined those principles as articulated in **Cheryl Edwards (Administratrix of the Estate of Janique Lewis) v Ethel Mills**²⁵ and **Elizabeth Annette Fyfield (Intended Administrator of the Estate of Kitwana Fyfield, deceased) v Dwight Harris**. I agree. It suffices therefore to summarise them for the present purposes.

²² [2021] UKPC 1 at paragraph 20.

²³ [2014] EWCA Civ 5; [2014] FSR 29.

²⁴ [2014] EWCA Civ 5, paragraph 114.

²⁵ ANUHCv1998/0168 (delivered 28th November 2002, unreported).

[46] The decision in **Donoghue v Stevenson**²⁶ is a landmark case decided by the House of Lords in which the Law Lords broadened the reach of liability for negligence from contractual agreements to all types of relationships in which persons are now held to owe a duty of care to others. The principle of law introduced the concept that a duty of care is owed by one person to another where it is reasonably foreseeable that the latter may be harmed by the conduct of the former – now widely described as the neighbour principle. Lord Atkin famously opined:

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected which I am directing my mind to the acts or omissions which are called in question.”²⁷

[47] Motorists are not exempted from the duty to care for other road users. In **Cheryl Edwards (Administratrix of the Estate of Janique Lewis) v Ethel Mills** the court opined:

“Drivers of motor vehicles are under a duty to exercise due care on the road. They are expected inter alia to determine what other users of the road are doing. They are expected to manoeuvre their vehicle in order to prevent and avoid accidents. They are expected to use and observe proper signals, signals must be kept clear and unambiguous and as far as practicable in keeping with the Highway Code. They must exercise due care and attention at all times. ... It all depends upon the circumstances including the weather, visibility, the number of vehicles on the road, the presence of pedestrians and the state of the road.”

[48] More recently, in **Lisa Vernita Alexander v Neil Noel**,²⁸ Farara JA (Ag.) writing for this Court and citing the **Cheryl Edwards** case reiterated those principles, explaining:

“... 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

²⁶ [1932] AC 562.

²⁷ Ibid, at 580.

²⁸ SLUHCVP2021/0012 (delivered 10th March 2025, unreported).

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.”²⁹ (Emphasis added)

[49] In summary therefore, the duty of care owed by a motorist on a given day at a particular time will depend on all the prevailing circumstances including the weather conditions, the amount and type of traffic on the roadway, the presence or absence of pedestrians including the number of pedestrians, noise levels, obstructions on the roadway if any, visibility, and any other relevant factors. Furthermore, the caution to be exercised by a motorist in any given situation should be commensurate with whether any harm would be occasioned otherwise and the type of harm that could be caused to a road user if due care is not employed by him in driving his vehicle. It is evident that the learned judge appreciated that this was the benchmark against which the duty of care by the appellants towards the deceased on the fateful day was to be assessed and no issue arises in relation to her identification of the applicable law.

[50] In considering whether the learned judge made errors in her evaluation of the evidence such that her conclusion that the appellants were liable in negligence for the deceased’s death is fatally flawed, the foregoing principles of negligence in respect of motorists are to be borne in mind. I therefore take them into consideration for this purpose. If necessary, I will also bring them to bear in deciding whether any

²⁹ Ibid, at paragraph 62.

such identified error(s) was fatal to her finding that the appellants were liable in negligence for the deceased's death as they contended.

[51] The learned judge described the setting in which the accident occurred. At paragraph [8] she stated:

"In the circumstances of this case a Mack Truck was being operated during the Carnival parade. This vehicle carried a 40-foot trailer. The truck or rig was approximately 14 feet in length. Thus, the entire vehicle was in excess of 50 feet. The Carnival parade celebrations are characterized by a festive atmosphere with loud music, dancing, laughter, revelers, and persons being inebriated, the selling of a number of items such as food and souvenirs, and a relaxation of the pedestrians' normal road cautions. In such an atmosphere the ability to communicate becomes compromised and persons are likely to have a reduced appreciation for their safety. It is very much an occasion when the streets primarily become the domain of 'pedestrians'. Any person operating a vehicle under such conditions, particularly a vehicle of the size operated by the Defendants, would be expected to exercise extreme caution since there is a real risk of not only harm but serious harm to the revelers. Although the First Defendant indicated in his evidence that at the time of the accident, at night, the crowd had dispersed the police's auto report of the incident indicated that at the time of the accident the Truck was surrounded by a very large crowd of Carnival revelers."

[52] She then summarised in turn Mr. Benjamin's and Martin Mansoor's testimony before determining at paragraphs [17] and [18] that Mr. Benjamin's negligent driving caused Ms. Phillip's death. While Mark Mansoor testified, the learned judge did not refer to his account in the judgment. She captured the salient features of the appellants' oral testimony at paragraphs [9] through [16] of the judgment. I have already recited the essence of paragraph [9] of Mr. Benjamin's witness statement. The remaining paragraphs are short. It is useful to set them out.

[53] The rest of Mr. Benjamin's evidence is set out in paragraphs [10] to [13] as follows:

"[10] The evidence of the First Defendant is that on the day in question he was parked on the south side of the Government House entrance and parked at the entrance of the Government House with the recreational grounds on the right-hand side. He readied himself to leave his parked position and received directions from the police to proceed. The First Defendant indicated that he drove on the right side

of the roundabout then proceeded to try to get back to the correct side of the road. The First Defendant's evidence is that he was being directed by two uniformed police officers, that he put on the right indicator and kept blowing his horn to indicate to all in the vicinity that the truck was about to move. It was his evidence that the trailer is a left-hand drive trailer and that when driving straight he could see along the sides of the trailer, but and (sic) that there are blind spots when the vehicle is being turned. The (sic) was only one person, Carlos, clearing persons from the side of the truck.

[11] The First Defendant indicated that when he was turning, he was alerted that something had gone wrong. Carlos also 'banged' on the door of the truck and told the First Defendant to stop. The First Defendant also received instructions from a police officer not to move the truck.

[12] The witness admitted that during the turn there would have been blind spots and it was during the turning process that the deceased lost her life. The witness admitted that he had no vision of the length of the trailer, and he did not see the deceased in the mirrors of the truck. The witness indicated that upon turning the rig one loses visibility with the tail of the trailer and one would not see the tail of the trailer when the rig begins to turn or spin. Stated another way when the rig begins to turn there will be blind spots.

[13] The witness indicated that his assistant Carlos was to the front right of the truck clearing persons away from the truck giving directions and the witness was looking at both Carlos and the police officers. The witness indicated that there was a security guard at the back of the trailer."

[54] The learned judge then remarked:

"[14] The Court notes that the incident occurred at night around 8.15 pm which meant that, unless the area was well lit, visibility was likely to be further compromised. This Court also notes the police report which stated that their investigations revealed that the First Defendant blew the horn of the truck. There was no account of the First Defendant continuously blowing the horn of the truck as was suggested by this Defendant." (Emphasis supplied)

[55] The appellants have interpreted the final sentence as a finding by the learned judge in which she rejected Mr. Benjamin's testimony that he was blowing the horn continuously. I do not think that this was the intended meaning. It seems to me that

the learned judge was merely highlighting a divergence in the two accounts without making a finding and I would treat it as such.

[56] Martin Mansoor's testimony is captured in two paragraphs:

"[15] The evidence of Martin Mansoor is that the vehicle complied with the regulations set by the Antigua Festivals Commission and these regulations included the covering of the wheels from the rear of the trailer to the front of the trailer up to the area where the rig turning radius did not touch the covering, the provision of a roof system to protect the equipment and the provision of workmen. The equipment was strapped down to prevent it from accidentally falling and causing injury to any person, and a continuous rail system existed to prevent any of the workmen or performers from falling off the trailer bed.

[16] The evidence of Martin Mansoor is that six persons were employed to look after the equipment. These persons were to keep an eye out, move trees and wires with which the vehicle may come into contact. The evidence of Martin Mansoor is that four persons (including the driver) were employed to work with the driver. Mr. Mansoor could not provide any particulars of the persons so employed."

[57] He subsequently agreed with learned counsel's suggestion during cross-examination that to properly monitor and protect a vehicle, such as the one they used in the Carnival parade, in a crowd, would require a minimum of 10 persons. One in front one in the rear and four persons on each side.³⁰

[58] The respondents' testimony was not chronicled in the judgment. Neither of them was an eyewitness to the accident. The learned judge merely noted that they gave evidence in support of their case.³¹ Commenting on the evidence led by the parties she remarked that having regard to the time of the accident (8.15 pm) visibility was likely to be 'further compromised' unless the area was well lit. As noted earlier, she noted that the police report mentioned that Mr. Benjamin blew his horn.

³⁰ Record of Appeal: Volume 2 -Transcript of Proceedings, page 211.

³¹ At paragraph 5 of the judgment.

[59] Likewise, she compared his statement that the revellers had largely dispersed at the time of the accident with the police report that traffic police personnel visited the scene in the wake of the accident where the truck was surrounded by 'a very large crown (sic) of people'. However, in making the comparison the learned judge erroneously noted that the police report recorded that the large crowd was there at the time of the accident. She did not revisit the size of the crowd subsequently in the judgment; however, her decision was probably influenced by her reliance on this mistaken observation. To my mind, however, it should not matter whether there were 10 or 100 revellers in the environs of the truck. What matters as the learned judge correctly noted, is the likelihood and severity of harm that could be occasioned to such persons if the driver did not exercise due care in moving the vehicle from a stationary position to go around the roundabout. From her encapsulation of the evidence in the referenced paragraphs, it is clear that the learned judge considered it all in arriving at her decision. The appellants' arguments to the contrary are not borne out by the record.

[60] It is to be noted that the evidence comprised not only the *viva voce* testimony of the parties but also included their witness statements, the police report³² and the postmortem report by Dr. Petra Miller-Nanton dated 5th August 2016 and an undated letter from Magistrate C. Conliffe Clarke of Districts A and B certifying the results of the Coroner's Inquest into Ms. Phillip's death.

[61] In his witness statement, Mr. Benjamin indicated that he was being assisted by two police officers in uniform who were astride their motorcycles at the roundabout at the front of the truck. He stated:

"18. ... They instructed me to wait until the troupes and revellers on the 'Last Lap' had passed my truck. So I waited as instructed.

19. Once the area was cleared of most of the troupes and revellers, they signalled to me that I could move off, by motioning with their hands and pointing towards Old Parham Road. At this

³² Dated 17th January 2018.

time, most of the revellers were gone and only a few remained. No music was playing at this time.

20. Although the area was dark, I could see the police officers as they were standing in front of my truck and my lights were on.
21. I put on my right indicator and kept blowing my horn to indicate to all in the vicinity that the truck was going to move. I kept my hand on the horn and did not let go.
22. ...
23. When I began to move off, I could see the entire length of the right side of the trailer. Once I began turning, I could no longer see the entire right side.
24. At this time, Dave Whyte was in the ARG but a guy by the name of Carlos, whose name I do not know, was on the front, right-hand side of the truck, clearing people away.
25. ...
26. In making the turn, I heard a commotion and people were scream. I did not know what was happening. Carlos came to the truck, banged on the door and told me to stop and back up a little.
27. ...
28. A guy, whose name I do not recall now, ... told me that someone got caught under the truck.”³³

[62] When pressed as to how many people were actively providing safety assistance, Mr. Benjamin stated, ‘there were only two on the ground at the time’.³⁴ He then identified these two as Carlos (who was at the front of the truck) and a security guard (who was believed to be at the back of the trailer).³⁵ The first appellant also conceded that no mention was made of the assistance of a security guard in his witness statement. Mr. Benjamin then admitted that he did not see the deceased in his mirrors during the turn, and that the deceased was in a blind spot. He further

³³ Witness Statement of Akeem Benjamin on behalf of the Defendants, Hearing Bundle, pages 77-79.

³⁴ Record of Appeal - Volume 2: Transcript of Proceedings, page 288 at line1.

³⁵ Ibid, page 286.

went on to agree that during the turning process, he could not always see the security guard at the rear of the vehicle, nor could he 'recall'³⁶ if anyone was stationed at any of the blind spots during the turning process leading up to the accident. The first appellant also admitted that he and his team had no communication equipment to assist the driver with blind spots, and that it he may not have been able to hear any shouts from either of the individuals considering the loud music emanating from the Antigua Recreational Grounds.³⁷ He even further admitted that Carlos had to 'run from where he was to make [him] understand there was an issue'.³⁸

[63] The totality of these admissions from the appellants paints a clear and consistent picture of the location and movement of the vehicle, the appellants' knowledge of the identified risks to pedestrians who were in the vicinity, the utility of certain mitigating measures and their collective failure to implement them. The admissions also form a factual basis upon which the learned trial judge was required to decide whether the appellants operated the vehicle in an unsafe and negligent manner and if so, whether such negligence directly contributed to the unfortunate accident.

[64] This is the evidential background from which the learned judge made her findings of fact. It is necessary to consider whether she was entitled to find as she did on the evidence before her having regard to the totality of the evidence. The appellants made heavy weather of the learned judge's reliance on Mr. Benjamin's account of how the accident unfolded. They seemed to ignore the fact that he was the only person who gave eyewitness evidence of the prevailing circumstances and what actually happened at that time based on his observations which shed no light on how the deceased got struck by the truck wheel.

[65] Having regard to the fact that Mr. Benjamin was the sole eyewitness of the events as they unfolded, the learned judge had no choice but to examine his testimony and

³⁶ Ibid, page 286 at line 8.

³⁷ Ibid, page 290.

³⁸ Ibid, page 288 at line 8.

weigh it against other evidence in deciding whether or not the evidence on a whole was probative of failure by the appellants to exercise the requisite duty of care to road users in general and to the deceased in particular in navigating the movement of the truck and trailer from a standstill to make the turn around the roundabout. Her judgment makes it clear that she relied not only on Mr. Benjamin's account but also took into account the contents of the police report, the postmortem report and Martin Mansoor's testimony to gain an understanding of what actually happened. She cannot be faulted for doing so. She had to consider the entirety of the evidence and she clearly did. It was not necessary for her to set out all of the evidence that she took into account especially where there were overlaps and repetitions.

[66] In doing so, the learned judge was entitled to rely on the evidence adduced by the appellants as to how the accident unfolded. She was required to consider it and was not entitled in the absence of positive eyewitness testimony from the respondents to conclude that they had failed to discharge the burden of proof to establish negligence on a balance of probabilities. The respondents could satisfy that burden of proof by offering evidence that is probative of the elements of the tort of negligence or by eliciting such evidence from the appellants, or by a combination of both. In other words, the learned judge is not precluded by law from accepting and acting on the evidence led by the appellants as defendants (simply because the burden of proof rested on the respondents) and she cannot be faulted for so doing.

[67] In determining liability, the learned judge had to consider the pleadings and the evidence to decide whether negligence was made out on a balance of probabilities. She could for example, in view of the pleaded cases, infer from the prevailing circumstances such as the length of the truck and trailer, the number of persons charged with assisting the driver with navigating the roadway, the visibility and presence of revellers, that adequate supervision of the driver and assistance to him was necessary to meet the duty to exercise due care on the road and that in those circumstances, this entailed deployment of more than one or two persons on the sides of the truck to alert pedestrians that the truck was being moved. She could

also have decided that such failures in combination amounted to a breach of the requisite duty of care. She obviously so concluded having regard to her ruling.

[68] The learned judge found that the accident happened when the truck was being moved around the roundabout. She expressed the view that the accident was caused by the appellants' failure to put in place a safe system to supervise the driving and movement of the truck and that Mr. Benjamin drove the truck around the roundabout when it was unsafe to do so. In view of the circumstances under which the truck was being moved and the fact that Oniqua Phillip was injured and killed while the truck was being moved, implicit in the learned judge's findings is the conclusion that the appellants failed to exercise the requisite level of the duty of care as driver and owners of the truck and trailer. What this means is that they thereby failed to take the necessary steps to eliminate reasonably foreseeable injury and death to the deceased as a reveller, from the truck and trailer, by reason of Mr. Benjamin's driving of the truck with the trailer attached around Carnival revellers who were in a position to be injured or killed by the moving vehicle.

[69] The learned judge made it clear at paragraphs [17] and [18] of the judgment, that she determined that Mr. Benjamin as the employee and agent of the Mansoors, during his employment, drove the truck when it was not safe to do so and without adequate assistance to do so safely. I am satisfied that in the circumstances this is a clear finding that he failed to keep any or any proper lookout and/or failed to control the truck so as to avoid driving it over the deceased (as pleaded) and thereby failed in his duty of care to the deceased who came into contact with the vehicle.

[70] I would add that I do not think that it was necessary for the learned judge to state expressly that the failures she identified constituted unsafe driving or driving in an unsafe manner by Mr. Benjamin or that more persons should have been employed or deployed by the Mansoors to provide assistance to him and communicate with him and among themselves to satisfy the duty of care that he owed to the deceased

and other road users in those circumstances. It is implied. In my opinion, the appellants' contentions to the contrary are without merit.

[71] Likewise, the learned judge faulted the Mansoors as owners of the vehicle, for failing in their duty of care to the deceased to maintain a system to ensure that navigation of the truck with a 50-foot trailer was adequately supervised to prevent injury and/or death to revellers including the deceased, by the moving vehicle. The evidence considered in its entirety supports such findings of fact and her ultimate conclusion that the appellants are liable in negligence. Her assessment is in line with the guiding principles outlined in the case of **Cheryl Edwards**.

[72] As stated earlier, the learned judge summarised the salient aspects of the appellants' evidence before immediately thereafter setting out her conclusions. This demonstrates that she considered their accounts. The appellants' criticism that the learned judge did not say what wrongful act, neglect or default was attributed to Mr. Benjamin is not relevant to a determination of negligence. I will return to this point later in the judgment. To my mind, by saying that he maneuvered around the roundabout when it was not safe to do so, that the deceased was struck by the wheels of the truck at that time and that he did not have adequate assistance to safely drive around the roundabout, the learned judge was thereby communicating that Mr. Benjamin did not keep any or any proper lookout while proceeding to drive and/or failed to have adequate persons supervise his moving of the truck to ensure that no persons were in a position to be injured or killed by the moving vehicle.

[73] I return now to the argument that the learned judge had to decide what if any wrongful act, neglect or default was attributable to Mr. Benjamin to find negligence. The appellants sought to equate the test for the finding of liability in negligence with the basis for a claim under the **Fatal Accidents Act**. Their reliance on the decision in **Elizabeth Annette Fyfield (Intended Administrator of the Estate of Kitwana Fyfield, deceased) v Dwight Harris** is however misplaced, in my estimation. At paragraph [40] of that judgment, the learned trial judge stated:

“The basis of the claim under the **Fatal Accidents Act** has not been borne out on the evidence in this case. It is not the fact of death that entitles an action for damages to be brought under the Act. Rather it is proof of “death caused by any wrongful act, neglect or default” that attracts an entitlement to bring a claim for damages. If the fact of loss caused as a direct result of such wrongful act, neglect or default is successfully proved under the Act, but such loss could not be quantified, it is only then that a court will consider an award of nominal damages.” (Emphasis supplied)

[74] Earlier in the same judgment the learned trial judge addressed what must be established in a claim in negligence. She explained:

“**Clerk & Lindsell on Torts** [18th ed. At page 219] has concisely set out the requirements which a claimant must prove to establish a defendant’s negligence as:

- (a) The existence in law of a duty of care situation;
- (b) Careless behaviour by the defendant;
- (c) A causal connection between the defendant’s careless conduct and the damage;
- (d) Foreseeability that such conduct would have inflicted on the particular claimant the particular damage of which he complains; (Once (a) and (d) are satisfied, the defendant is liable in negligence and only then the next two factors arise);
- (e) The extent of the responsibility for the damage to be apportioned to the defendant where others are also held responsible;
- (f) The monetary estimate of that extent of damage.”³⁹

[75] As is readily apparent from a comparison of those two tests, what is required to establish liability under the **Fatal Accidents Act** is quite different from the elements of negligence. A claim in respect of those discrete causes of action must therefore be evaluated against those very different criteria. It is worth noting that the **Fatal Accidents Act** being considered by the learned trial judge in the **Fyfield** case is the one enacted for the Federation of Saint Christopher and Nevis and not the State of

³⁹ SKBHCV2013/0184 (delivered 23rd October 2015, unreported), paragraph 26.

Antigua and Barbuda, although the statutes are similar. It follows that this argument by the appellants is not helpful to them.

[76] In the **Landau** case cited by the appellants, the defendants were both found liable in negligence where the claimant who was driving a motor scooter was found to have been in the blind spot on the roadway between the two vehicles being driven by the defendants and was crushed between them. The court held that it was very unlikely that both drivers would have overlooked the claimant at once, especially since he was wearing high-visibility clothing. It ruled that it was more likely that he had been in a blind spot of one or both of the defendant drivers and this weakened his case since neither of them could reasonably have been expected to know of his presence near to them in those circumstances. Furthermore, the evidence did not reveal that either of those drivers had driven below the standard of care expected of them and could not in the circumstances have been more careful. It was held further that the claimant misjudged where to go and instead of proceeding should have held back when the traffic lights changed to allow the defendants to proceed. Neither defendant had been negligent.

[77] The facts of **Landau** are different from the instant case apart from the existence of a blind spot in both. Unlike in **Landau**, the scene of the accident in the instant case was a roadway being used by trucks, trailers and revellers during a carnival celebration. It was nighttime and it was reasonably expected and practiced that persons on the outside of the truck would assist in clearing the roadway and areas around the truck which was moving from a parked position where it had remained stationary for roughly 45 minutes. Visibility was affected by the late hours. Mr. Benjamin accepted that it was dark. Those were circumstances that placed a greater responsibility on Mr. Benjamin to be more vigilant than was warranted in the **Landau** case.

[78] To the extent that the appellants are seeking to rely on **Landau** as a principle that a driver owes no duty of care to a person in his/her blind spot, in my opinion that is

not the learning to be extracted from that case. In that case, all three motorists were simultaneously negotiating a sharp left-hand turn from stationary traffic lights in central London. It is therefore my view, that the learning to be extracted from **Landau** is that drivers on a roadway are to exercise greater care when driving in the blind spot of other vehicles to avoid placing themselves in harm's way of injury or death from those vehicles and are not likely to succeed in claims in negligence unless the defendant driver is proved to have driven without due care and attention. Revellers and pedestrians using a roadway have a corresponding duty of care to protect themselves from harm's way. However, the greater duty of care is placed on the driver of a truck and trailer on a roadway simultaneously occupied by revellers in circumstances where they are accustomed to moving in close proximity to each other as part of the festivities.

[79] With respect to the appellants' suggestion that the learned judge should have found that the deceased was impaired by the presence of THC in her system, there is no medical evidence to support a finding of how the THC would have affected the deceased's judgment or how long it was in her system. The learned judge would therefore not have been competent to make a ruling that the deceased's judgment was thereby impaired. She was entitled to refrain from making such a finding and I would not interfere with it.

[80] I turn next to the learned judge's ruling regarding the use of guard rails on trucks. She opined at paragraph [18] that she does not accept that it is not practical for guard rails to be placed around the truck. In other words, she found that it was practical for guard rails to be placed on the truck. It is important to note that the learned judge stopped short of concluding that the absence of guard rails from the truck in this case amounted to a breach of the requisite duty of care. She made the comment and left it hanging. It cannot therefore be said that the learned judge considered that the presence of guard rails was a requirement for the safe system to which she referred. As I understand it, she referred to two elements of a safe system at paragraph [18] of the judgment – firstly, a larger number of persons

working around the truck and secondly, provision and use of proper communication equipment. Reference to the guard rails was almost an afterthought and was not linked to the safe system that she said should have been implemented.

[81] To the extent that the appellants interpreted the learned judge's reference to guard rails as constituting the safe system that she said should have been put in place, they are mistaken. Their further submission that the learned judge by this statement placed on them an unreasonable and unjustifiable expectation to disprove negligence is not made out. It is therefore disregarded. It is also worth noting that the learned judge rejected the inclusion into evidence of a document labelled by the first respondent as exhibit "NP 4"⁴⁰ – said to be an article on 'Parade Float Safety'. She indicated during the trial that she was not going to allow "NP 4".⁴¹

[82] Having regard to all of the foregoing circumstances and conclusions and based on the appellants' own admissions, the learned trial judge was entirely justified in finding that they did not meet the requisite standard of care. In fact, it is more than obvious that the evidence and especially the cross examination elicited sufficient evidence which led the learned trial judge to find the respondents' assertion of negligence more likely true than not. Accordingly, I am satisfied that the learned judge's determination that Mr. Benjamin maneuvered the truck around the roundabout when it was unsafe to do so and in so doing caused the deceased's death is not plainly wrong and I would not disturb it. I would therefore dismiss grounds of appeal 2 and 3 for the foregoing reasons.

Issue 3 – Contributory Negligence

[83] The appellants argued that the learned judge erred in not finding that the accident was entirely attributable to the deceased's negligence or was more blameworthy than they. Accordingly, the lesser degree of liability of no more than 15%, if any at

⁴⁰ Referred to in paragraph 10 of the Witness Statement of Novella Phillip, at page 7 of the Record of Appeal: Volume 3.

⁴¹ Record of Appeal: Volume 2 - Transcript of Proceedings, page 54, line 3.

all, should have been ascribed to them. They contended that the evidence strongly supported such a finding. In this regard, they submitted that the learned judge properly found that the deceased was located between the truck and trailer, a position where no pedestrian should have been, that she likely positioned herself where she was harmed and that she did not sufficiently heed the horn which Mr. Benjamin sounded before moving from a stationary position and began making the right turn, providing fair warning and visible motion that a prudent pedestrian would heed. Additionally, it was argued that she could easily have been anywhere and out of sight leaving the court with no choice but to conclude that the deceased 'likely positioned herself in a manner and/or at a location that was likely to cause personal harm', a finding against which there is no counter-appeal. It was submitted that this was additional evidence pointing to the deceased's culpability and in the circumstances should have increased the percentage of contribution attributed to her to between 50% to 100%.

- [84] Another factor that the appellants suggested should have influenced the learned judge to increase her contribution was the testimony of Novella Phillip that the deceased was drinking alcohol. They argued that the learned judge took a quantum leap when in reliance on the postmortem report she accepted that there was no positive indication for alcohol in the report and proceeded to find that this 'lack of a report' supports Novella Phillip's evidence that the deceased did not drink or did not drink much alcohol on the day in question. It was submitted that the report simply indicated that a sample of blood for testing was taken from the deceased. They contended further that this finding is inconsistent with Novella Phillip's evidence in chief that 'of course the deceased was drinking alcohol, she was in a carnival parade partying. This is what the organisers advertise and promote'.⁴² The appellants submitted that the report when juxtaposed against her mother's testimony should have been accorded less weight than the mother's recollection.

⁴² Record of Appeal: Volume 3 – page 9, Witness Statement of Novella Phillip at paragraph 16.

[85] The appellants noted that Novella Phillip resiled from this position and in amplification and cross-examination testified that she meant that this was weeks before the day in question, although she only arrived on island a few days before the accident. It was submitted that the learned judge should have found that Mrs. Phillip was not a credible witness and the learned judge should have attached no weight to her evidence. **Elizabeth Annette Fyfield (Intended Administrator of the Estate of Kitwana Fyfield, deceased) v Dwight Harris** was cited as a compelling precedent in which that court found that the deceased was 100% liable after determining that the claimant failed to prove on a balance of probabilities that the collision was as a result of the defendant's negligence.

Respondents' Submissions

[86] It was submitted by the respondents that based on the evidence the court found that the deceased had placed herself in a dangerous position between the truck and the trailer but had otherwise not done anything else that was considered to be wrong. In addition, the appellants did not adduce any evidence as to what the deceased was doing at the time of her death and there was no evidence that Mr. Benjamin saw her prior to her death. They acknowledged that Mr. Mark Mansoor stated⁴³ that he had seen a report that stated that the deceased had alcohol in her system. However, no such report was presented to the court and importantly there was no evidence that she was intoxicated or impaired. The respondents submitted that the finding of 15% contributory negligence was appropriate on a preponderance of the evidence.

Discussion

[87] This Court has enunciated the legal principles governing review by an appellate court of findings by a lower court with respect to contributory negligence and apportionment of liability. In **Attorney General v Collingford John et al**⁴⁴ Blenman JA stated:

⁴³ Record of Appeal: Volume 2, pages 176 to 179.

⁴⁴ SVGHCVP2017/0006 (delivered 20th September 2018, unreported).

“... 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 Court of Appeal may reassess the apportionment if it is satisfied that the assessment made by the judge was plainly incorrect. This principle is borne out in the cases of **Jennings v Norman Collinson (Contractors)** and **Hannam v Mann**. [[1984] RTR 252, CA.].”⁴⁵ (Emphasis supplied)

[88] As to the legal basis for a finding of contributory negligence, Denning LJ explained in **Jones v Livox Quarries Ltd**⁴⁶ that:

“Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.”⁴⁷

[89] In the instant case, in assessing whether the deceased was contributorily negligent the learned judge noted that there was no evidence of what exactly happened at the time of the accident and that the driver did not see the deceased at the time of impact or before. She took into account that neither the deceased’s mother nor the Mansoors were in proximity to the site of the incident. She noted further that there was no evidence of when the THC was used by the deceased or whether her decision-making was affected by its consumption. The learned judge took note that there was no positive indication of alcohol in the medical report which she found supported the mother’s evidence that the deceased ‘did not drink or did not drink much alcohol on the day in question.’⁴⁸

[90] As to the deceased’s conduct, the learned judge stated:

“It is accepted that the deceased came into contact with the right rear wheel of the truck in the area between the rig/truck and the trailer. This suggests that the deceased did not sufficiently heed the sound of the horn which the investigating report indicated was heard and the deceased is likely to have

⁴⁵ SVGHCVP2017/0006 (delivered 20th September 2018, unreported), paragraph 54.

⁴⁶ [1952] 2 QB 608.

⁴⁷ [1952] 2 QB 608 at 612.

⁴⁸ Paragraph 22 of the judgment.

positioned herself in a manner and/or at a location that was likely to cause personal harm.”⁴⁹

[91] It was on this basis that the learned judge found that the deceased contributed to her death which was then determined to be 15%.

[92] I understand the appellants’ argument to be that the learned judge erred by not finding that the deceased consumed alcohol which impaired her judgment at the time as a result of which she positioned herself between the truck and trailer, where she should not have been. Closer examination of the evidence in relation to alcohol consumption reveals that in the case of the mother, she averred in her witness statement:

“I have also read the Defence of the Defendants and seen that they have indicated that my daughter had alcohol in her system. Of course she did, she was in a carnival parade partying. This is what the organisers advertise and promote.”⁵⁰

[93] During cross-examination Mrs. Phillip stated that she did not actually see her daughter drink alcohol on the day of the accident or after she arrived in Antigua and Barbuda from the USA. She explained that when she made the statement in her witness statement, she was extremely emotional and she thinks some things got misconstrued. She agreed that her daughter may have drunk alcohol when she was not present even on the day of the accident when they were in separate locations.⁵¹

[94] For his part, Mr. Martin Mansoor stated in his witness summary:

“I am also aware that a full inquiry into the death of the young lady was held and it was revealed that alcohol and drugs were found in her blood.”⁵²

[95] Mark Mansoor also make the identical statement in his witness statement.⁵³

⁴⁹ Ibid.

⁵⁰ Record of Appeal: Volume 3 - Witness Statement of Novella Phillip, page 9 at paragraph 16.

⁵¹ Record of Appeal: Volume 2 - Transcript of Proceedings, pages 59 – 69.

⁵² Record of Appeal: Volume 3 - Witness Summary of Martin Mansoor filed on 13th September 2019, page 176 at paragraph 13.

⁵³ Record of Appeal: Volume 3 - Witness Summary of Mark Mansoor filed on 13th September 2019, page 172 at paragraph 13.

[96] Akeem Benjamin made a similar assertion in his witness statement. He averred:

“33. I am aware that an inquiry into the young lady’s death was carried out
...

34. During the inquiry, it was revealed that the young lady had drugs and alcohol present in her blood. The reports are in evidence in this Court.” (Emphasis supplied)

[97] While being cross-examined, Martin Mansoor was shown the postmortem report prepared by Dr. Petra Nanton-Miller and the police report. He denied that either was the document in which he had seen mention of alcohol in the deceased’s system. He insisted that he had seen it in a document. No such document was produced in evidence. His brother Mark Mansoor was also shown both reports and accepted that neither indicated that there was alcohol in the deceased’s system. He eventually stated that there was another police report that was not produced in evidence which mentioned alcohol in her blood.⁵⁴ In similar fashion, Mr. Benjamin was cross-examined about his averments that a report of an inquiry revealed that the deceased had alcohol in her blood. He replied that he had never seen ‘a hard copy of the report’ however, it was ‘revealed to the nation via ABS and other media sources’. When pressed about his statement that the reports are in evidence, he stated that he was not certain what documents, that it was neither the police report nor the postmortem report that had been admitted into evidence and ultimately that he could not recall which document so indicated.⁵⁵

[98] The totality of the evidence with respect to alcohol being in the deceased’s blood amounts to nothing more than speculation by the mother that she may have consumed alcohol. In the absence of the report referred to by the appellants in their witness statements and oral testimony, the court was entitled to discount any assertion that she had alcohol in her system at the time of the accident. It is not clear what evidence led the learned judge to say that the deceased ‘... did not drink

⁵⁴ Record of Appeal: Volume 2 - Transcript of proceedings pages 174 to 182.

⁵⁵ Ibid, pages 257 to 261.

much alcohol on the day in question.’ She was rather generous in drawing such an inference from the evidence. However, there is no appeal from that finding.

[99] The upshot of these observations is that the learned judge quite properly identified as the main factor influencing her assessment of contribution at 15% to be the deceased’s bad judgment in placing herself between the truck and trailer. Inherent in that finding is an appreciation by the learned judge that Oniqua Phillip thereby exposed herself to harm and failed to have regard to the possibility of the driver of the truck being careless. I find no fault in this assessment. The learned judge also had regard to the suggestion and probability that there was alcohol in the deceased’s system at the time as a relevant factor in finding that she was liable for contributory negligence. She felt that there was a factual basis for so finding.

[100] In relation to the driver of the truck, the learned judge rightly considered that neither he nor the other appellants or the respondents were able to say how the accident happened and noted that the deceased was struck by the right rear wheel of the truck. She also took into account and disregarded the presence of THC as a material consideration. For the reasons outlined earlier in the judgment, I am of the view that she was entitled to do so.

[101] Being mindful of the applicable legal principles and the evidence, it is my opinion that the learned judge conducted a structured, well-reasoned and sound evaluation of the relevant factors in concluding that the deceased was liable for contributory negligence. I am satisfied that she did not overlook any material considerations or give too little or too much weight to any in arriving at that conclusion or in apportioning the deceased’s liability at 15%. I would accordingly not disturb her findings on either score.

Issue 4 – Assessment by Jury Point

[102] The last ground of appeal seeks to challenge the learned judge’s jurisdiction to assess damages under the **Fatal Accidents Act**. It was their contention that the

learned judge exceeded her jurisdiction when she conducted an assessment of damages under that Act. They argued that pursuant to section 4 of the **Fatal Accidents Act** only a jury is empowered to carry out such an assessment and apportionment of damages in fatal accident claims. They cited **Spencer and another (as Administrators of the estate of Jadianne Spencer, deceased) v Nicholas**.⁵⁶

[103] The Court notes from the record of proceedings including the skeleton arguments filed on behalf of the appellants in the High Court that this point is being taken for the first time on appeal. It was not raised before the learned judge and could not have been considered by her. In fact, the appellants identified four issues for the court's consideration in their written submissions filed on 21st June 2022.⁵⁷ The fourth issue set out in the submissions was 'If, the Defendants were negligent, what is the measure of damages?'

[104] Two observations arise from the appellants' decision to argue the issue of damages before the court. The first is that they submitted to the court's jurisdiction and specifically the learned judges, for purposes of assessment of damages. The second is that it is trite law that an appellate court would be cautious to allow a litigant to raise a new point on appeal but would do so if the interests of justice so requires on application by the party seeking to rely on it, with a clear and convincing explanation why it was not raised in the lower court. If authority is needed for this proposition, this Court's decision in **Win Business (Caofeidan) Limited formerly Win Business (Africa) Ltd v Anadarko China Holdings 2 Company et al**⁵⁸ makes the point. It must be noted that the appellants made no application to rely on the fifth ground of appeal although it was included in the Notice of Appeal. No explanation was provided as to why it was not raised before the learned judge. In fact, this was not brought to the Court's attention and was discovered after the hearing.

⁵⁶ [2022] 2 LRC 298.

⁵⁷ Record of Appeal: Volume 3, starting at page 566.

⁵⁸ BVIHCP2022/0044 (delivered 5th July 2023, unreported).

- [105] Other relevant considerations in granting permission to argue a new point on appeal include the nature of the proceedings in the first instance court, the nature of the new point and any prejudice to the parties in granting or refusing leave to argue the new point: the **Win Business** case citing **Notting Hill Finance Limited v Sheikh**.⁵⁹ In the latter case, the court made the point that even if the new point is one of pure law the appellate court retains jurisdiction not to entertain it. The court also remarked that it would not be sensible to allow an appeal on a new point by reason only that it was 'unjust because of some serious procedural or other irregularity in the proceedings.'⁶⁰
- [106] Regarding introduction of new points on appeal, the court in **Notting Hill Finance Limited** noted that an appellate court will act cautiously before allowing a new point to be raised on appeal but, will do so where if the justice of the case warrants such a course. Among the factors to be considered are whether a full trial transpired in the court below, whether the respondent had a full opportunity to respond to new contentions and any prejudice that may be occasioned to him/it if the new point is allowed to be argued.
- [107] Being mindful of those principles and all the circumstances of this case including the way the trial proceeded in the court below, the absence of an application supported by an explanation as to why the point is being taken for the first time on appeal, and the overriding objective, it strikes me that the administration of justice would in this instance be served by refraining from entertaining this new point on appeal. The trial proceeded below in circumstances where a procedural point about the forum for the assessment could have been raised but was not and where no other issue is taken regarding any other irregularity in the proceedings. It seems to me that it would be prejudicial to require the parties and the Court to consider setting aside the assessment of damages conducted by a judicial officer if the appellants

⁵⁹ [2019] EWCA Civ 1337.

⁶⁰ Ibid at paragraph 40.

were to prevail on this point. That prejudice to my mind would be greater to the administration of justice and the respondents than to the appellants who were represented by competent counsel in the lower court. I would for those reasons decline to entertain this new point on appeal and dismiss that ground of appeal.

Costs

[108] The respondents have largely prevailed on appeal while the appellants mounted a successful rebuttal to ground one of the appeal resulting in a concession by the respondents. In those circumstances, I would award the appellants $\frac{1}{4}$ of their costs on appeal and the respondents $\frac{3}{4}$ of their costs to be assessed within 21 days of today's date if not agreed. Further, it is also necessary to discount the prescribed costs awarded by the learned judge below by calculating those costs based on the reduced award occasioned by the setting aside of the awards to the estate.

Disposition

[109] For all of the foregoing reasons, I would make the following orders:

- (1) The appeal is allowed in part and the learned judge's award to the deceased's estate of XCD\$5,000.00 for loss of expectation of life, US\$23,370.86 in respect of lost years for the benefit of the estate and XCD\$3,500.00 for funeral expenses are set aside.
- (2) The prescribed costs ordered to be paid to the respondents in the court below are to be calculated on the diminished amount of the overall award of damages to the respondents occasioned by the setting aside of the awards at sub-paragraph (1) of this paragraph.
- (3) The appeal against the orders of the learned judge holding the appellants 85% liable in negligence and the deceased 15% contributorily negligent on the dependency claims and against the damages awarded in relation to the same is dismissed.

- (4) The damages awards made by the learned judge in relation to the dependency claim are affirmed.
- (5) The respondents shall have $\frac{3}{4}$ of their costs and the appellants shall have $\frac{1}{4}$ of their costs in the appeal to be assessed within 21 days of today's date if not agreed.

[110] I wish to thank all counsel for their written and oral submissions.

I concur.
Reginald T. A. Armour
Justice of Appeal [Ag.]

I concur.
Cadie St. Rose-Albertini
Justice of Appeal [Ag.]

By the Court

Chief Registrar