

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA**

SUPREME COURT CIVIL APPEAL NO COA2021CV00095

BETWEEN	ONEIL CARTER	1st APPELLANT
AND	DAWNALEE HARRISON	2nd APPELLANT
AND	VERONICA KELLY	3rd APPELLANT
AND	MORGAN'S TRUCKING COMPANY LIMITED	1st RESPONDENT
AND	CLIVE MORGAN	2nd RESPONDENT
AND	HOPETON STONE	3rd RESPONDENT
AND	TREVOR SOUTH	4th RESPONDENT

Richard Reitzin instructed by Reitzin & Hernandez for the appellants

Obika Gordon instructed by Frater, Ennis and Gordon for the 1st, 2nd, and 3rd respondents

4th respondent not appearing and not represented

27, 28 January 2025 and 23 October 2026

Negligence – Motor vehicle accident – Causation – Collision between large earth moving vehicle crossing street near blind corner and motorcar entering the blind corner – Breach of duty of care – Whether driver of vehicle entering a blind corner has a special duty of care to avoid any possible unforeseen danger – Whether duty of care to avoid foreseeable risk breached by driving into blind corner at a moderate speed – Whether there was a failure to take action to avoid the accident – Whether driver of motorcar contributorily negligent

Assessment of damages – Personal injury – Whether assessment of damages for personal injury wholly erroneous

Civil procedure – Dismissal of statement of case of absent parties – Whether discretion properly exercised – Civil Procedure Rules, 2002, rule 39

STRAW JA

[1] I have read, in draft, the judgment of Edwards JA. I agree with her reasoning and conclusion and have nothing to add.

EDWARDS JA

Introduction

[2] This is an appeal against the judgment of Wiltshire J ('the learned judge'), delivered on 27 September 2021. Judgment and orders were made by the learned judge in a matter involving three consolidated claims, ancillary claims and counterclaims brought in the Supreme Court, relating to a motor vehicle accident that occurred on or about 13 July 2012. The accident took place along the Colgate Main Road in Saint Ann and involved a motor car being driven as a taxi by the 1st appellant ('Mr Carter') and a front-end loader (a large earth moving vehicle), which was being operated by the 3rd respondent ('Mr Stone'). The 2nd appellant ('Miss Harrison') and the 3rd appellant ('Miss Kelly'), as well as the 4th respondent ('Mr South'), were passengers in Mr Carter's motor car at the time of the accident.

[3] On 12 March 2013, Mr South filed a claim (bearing claim number 2013HCV01505) against Mr Carter, Mr Stone and Mr Morgan (t/a Morgan's Trucking). On 4 June 2013, Mr Carter filed a defence to that claim (to which the judge referred but which did not form part of the record of appeal filed in this court), and an ancillary particulars of claim for indemnity, against Mr Stone, Mr Morgan (t/a Morgan's Trucking) and Morgan's Trucking. In response to Mr Carter's ancillary particulars of claim, an ancillary defence and counterclaim were filed by Morgan's Trucking, Mr Morgan and Mr Stone, on 18 September 2014, alleging that Mr Carter was solely to blame for the accident.

[4] On 18 August 2016, a second claim (bearing claim number 2016HCV03472) was filed by Miss Harrison against Morgan's Trucking, Mr Morgan and Mr Stone. On that same date, a third claim (bearing claim number 2016HCV03473) was filed by Miss Kelly against Morgan's Trucking, Mr Morgan and Mr Stone. On 2 December 2016, the latter three defendants filed a joint defence to the claim made by Miss Kelly. It would seem that on the same date a joint defence was also filed to the claim made by Miss Harrison, as it is referred to by the learned judge in her judgment. However, that defence did not form part of the record of appeal filed before this court. The three defendants also filed an ancillary claim in those matters, alleging negligence against Mr Carter. On 31 January 2017, Miss Kelly filed a defence to the ancillary claim and particulars of claim filed by Morgan's Trucking, Mr Morgan and Mr Stone, in which she denied that the accident was caused by Mr Carter's negligence.

[5] By order dated 5 October 2017, the claims were consolidated for the purpose of a single trial in the court below.

Background

[6] Mr Carter was the driver of a motor car he operated as a taxi, and at the material time he was transporting Miss Harrison, Miss Kelly and Mr South as passengers. During the journey, the taxi entered a blind corner and collided with the front-end loader being driven by Mr Stone, and which was travelling across the road in the path of the oncoming taxi. The front-end loader was described as a vehicle with a "heavy metal at the front like a shovel and some big wheels", as well as having grills and being yellow in colour.

[7] At the trial, only Miss Harrison and Miss Kelly gave evidence. Morgan's Trucking, Mr Morgan and Mr Stone were barred from relying on their witness statements by court order, for reasons given in a judgment of this court in **Oneil Carter and others v Morgan's Trucking Company Limited and others** [2020] JMCA Civ 54. Mr Carter and Mr South were absent from the trial, and their cases were dismissed by the learned judge.

Summary of the findings made by the learned judge

[8] The claims having been consolidated, the learned judge, at the hearing, had before her the claims brought by Mr South, Miss Harrison and Miss Kelly, the defence and ancillary claim brought by Mr Carter, and the defences, ancillary defences, counterclaim and ancillary claims brought by Mr Stone, Mr Morgan and Morgan's Trucking against Mr Carter.

[9] Having heard the evidence, the judge made several findings of law and fact, the relevant portions of which may be summarised as follows:

- i. Both Mr Carter and Mr Stone owed a duty of care to each other and to the claimants as road users.
- ii. Section 51(1) and (2) of the Road Traffic Act (RTA') applied.
- iii. The front-end loader was obstructing the roadway when the accident occurred.
- iv. Mr Stone was in breach of the requirements of the Road Traffic Act and failed to exercise reasonable care to avoid causing injury and damage.
- v. Mr Carter had a duty to take the necessary action to avoid the collision by keeping a proper lookout, slowing down, and "maneuvering [sic] the taxi around the front-end loader where it was safe to do so".
- vi. Mr Carter was driving at an excessive speed and did nothing to avoid the collision.
- vii. Mr Carter should have slowed down around the blind corner as he was unable to see around it. More care should have been taken to avoid any possible unforeseen danger.

- viii. On a balance of probabilities, Mr Stone acted negligently and caused the collision when he drove the front-end loader onto to the main road and obstructed the traffic along that thoroughfare.
- ix. Mr Carter “contributed to the collision when he negotiated a blind corner at such a speed that he failed to take the necessary action to avoid a collision”.

[10] As a result of her findings, the learned judge found Mr Stone and Mr Carter, each 50% liable for the accident. She also found Mr Morgan, as owner of the front-end loader, vicariously liable for the actions of Mr Stone, who was his servant and/or agent.

[11] At the trial, an issue arose as regards Mr Carter’s ancillary claim. Mr Carter did not file an ancillary claim but purported to have commenced his action by way of an ancillary particulars of claim. Counsel in the case below, Mr Gordon, submitted to the learned judge that no ancillary claim was properly before the court, as no ancillary claim had been filed, as required by rule 18.2 of the Civil Procedure Rules (CPR’). Mr Reitzin, who was also counsel in the court below, submitted to the learned judge that the requirement had been waived as the ancillary defendant had taken active steps in the matter after having knowledge of it. The learned judge found that, after being served with the ancillary particulars of claim on 14 August 2014, counsel for the ancillary defendants had filed an acknowledgement of service on 3 September 2014. Furthermore, an ancillary defence and counterclaim was filed on 18 September 2014. No objection had been taken to this situation during the entire six-year period leading to trial in December 2020. The learned judge, therefore, found that the ancillary defendants had waived the requirement for an ancillary claim to be filed, and allowed the ancillary particulars of claim to stand as filed.

[12] There is no appeal against this decision, and no arguments were made before this court on the issue. Therefore, it is not necessary to comment on the correctness, or otherwise, of this approach.

[13] However, at trial, the learned judge ordered that the case for both Mr South and Mr Carter be dismissed due to their absence. That decision, in the case of Mr Carter, has been appealed.

[14] The full text of the learned judge's orders is as follows:

"Claim No. 2013 HCV 01505

- i. The Claimant's statement of case is dismissed due to his absence from the trial.
- ii. Judgment for the 2nd and 3rd Defendants against the Claimant.
- iii. The 1st Defendant/Ancillary Claimant's statement of case is dismissed due to his absence from the trial.
- iv. Costs awarded to the 2nd and 3rd Defendants against the Claimant to be taxed.

Claim No. 2016 HCV 03472

- i. Judgment for Ms. Harrison, the Claimant, with liability to be apportioned as follows:
 - a. 50% liability against Mr. Carter, Ancillary Defendant
 - b. 50% liability against Mr. Morgan and Mr. Stone, 2nd Defendant and 3rd Defendant.
- ii. General Damages awarded in the sum of \$1,000,000.00 to be apportioned in accordance with liability with interest thereon at 3% per annum from the date of service of the claim form to the date of judgment.
- iii. Costs to the Claimant against the 2nd and 3rd Defendants and the Ancillary Defendant to be taxed and apportioned in accordance with liability.

Claim No. 2016 HCV 03473

- i. Judgement [sic] for Ms. Kelly, the Claimant, with liability to be apportioned as follows:
 - a. 50% liability against Mr. Carter, Ancillary Defendant

b. 50% liability against Mr. Morgan, 2nd Defendant and Mr. Stone 3rd Defendant

ii. General Damages awarded in the sum of \$800,000.00 to be apportioned in accordance with liability with interest thereon at 3% per annum from the date of service of the claim form to the date of judgment.

iii. Costs to the Claimant against the 2nd and 3rd Defendants and the Ancillary Defendant to be taxed and apportioned in accordance with liability.” (Emphasis as in original)

The grounds of appeal

[15] Notice and grounds of appeal were filed 2 November 2021, and an amended notice was filed 22 February 2022. The grounds of appeal were as follows:

“a) There was no evidence from which the learned judge could have formed the view that the first appellant was driving at an excessive speed and did nothing to avoid the collision.

b) The findings that the first appellant was both driving at an excessive speed and did nothing to avoid the collision were against the evidence and against the weight of the evidence.

c) The mere ‘suggestion’ to the court’s mind that the first appellant was both driving at an excessive speed and did nothing to avoid the collision did not justify the implied finding of those postulates as facts nor the ultimate holding that the first appellant was contributorily negligent as to 50% or at all.

d) The learned judge erred in holding that the first appellant’s duty as a driver was to ‘avoid any possible unforeseen danger’.

e) The learned judge erred in holding that the absence of the first appellant from the trial justified dismissing the first appellant’s statements [sic] of case.

f) The learned judge erred in not holding the first respondent liable as an owner of the front-end loader in question.

g) The awards of general damages in favour of the second and third appellants were wholly erroneous estimates of the damages to which the second and third appellants were entitled.”

Standard of Review

[16] In the case of **Margaret Blackburn v James A L Bristol** (unreported), Eastern Caribbean Supreme Court, Court of Appeal, Grenada, Appeal No GDAHCVAP2012/0019, judgment delivered 12 October 2015, Baptiste JA conducted a comprehensive review of the principles which ought to guide an appellate court in determining whether to intervene when reviewing the judgment of a trial judge that is based on that judge's findings and evaluation of facts. Since I cannot improve on it, it is more convenient to set out portions of that review, in Baptiste JA's own words, which are as follows:

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

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

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

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

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

'(i) The expertise of the trial judge is determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

(ii) The trial is not a dress rehearsal. It is the first and last night of the show.

(iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

(vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.'

[12] In **Langsam v Beachcroft LLP**, Arden L J stated that:

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

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

'The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc. v. Medeva Plc.* [1997] R.P.C. 1, 45:

'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary

evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance...of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation'.

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

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

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

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

(2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

(3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper

advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'

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

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

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

At paragraph 108 Lord Kerr stated:

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

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

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

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

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

[17] These are principles which have been consistently applied in this court, and it is accepted that an appellate court will not interfere with a judge's findings of primary facts unless they are plainly wrong (see **Branch Development Limited (T/A Iberostar Rose Hall Beach And Spa Resort) v Kieron Thomas** [2025] JMCA Civ 33). It is with these principles in mind that the success or failure of these grounds of appeal will be determined.

Ground a) - There was no evidence from which the learned judge could have formed the view that the first appellant was driving at an excessive speed and did nothing to avoid the collision.

Ground b) - The findings that the first appellant was both driving at an excessive speed and did nothing to avoid the collision were against the evidence and against the weight of the evidence.

Ground c) - The mere "suggestion" to the court's mind that the first appellant was both driving at an excessive speed and did nothing to avoid the collision did not justify the implied finding of those postulates as facts nor the ultimate holding that the first appellant was contributorily negligent as to 50% or at all.

Ground d) - The learned judge erred in holding that the first appellant's duty as a driver was to "avoid any possible unforeseen danger".

Discussion and analysis

[18] Grounds a), b), c) and d) concern the learned judge's findings regarding the way in which Mr Carter drove his taxi just before the accident occurred, which raise issues of causation and negligence. Ground d) concerns the question of whether the learned judge applied the correct principle of law in coming to her decision. These issues, therefore, may, conveniently, be dealt with together beginning with the correct principles of law applicable to this case.

A. Submissions

[19] Mr Reitzin maintained that the witness statements of the respondents had been excluded, so that there was no evidence from them alleging negligence on Mr Carter's part. Counsel submitted that although Mr South sued Mr Carter, his witness statement

contained no allegations of negligence against Mr Carter. The only evidence at trial, counsel pointed out, came from Miss Harrison and Miss Kelly, who also had made no allegation of negligence against Mr Carter.

[20] Mr Reitzin submitted that the learned judge's error resulted from her misapprehension of the duty of care applicable to drivers on the road. Mr Reitzin submitted that it was a "misapprehension by the learned judge" to find that the driver had a duty to "avoid any possible unforeseen danger". Counsel argued, citing **Muir v Glasgow Corporation** [1943] UKHL 2, that liability in negligence was limited to the consequences of our actions which a reasonable man of ordinary intelligence and experience would have contemplated. Counsel noted that the duty only extended to guarding against such eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience. For that principle, he relied on **Fardon v Harcourt-Rivington** [1932] All ER Rep 81, at page 84, as cited in **Adele Shtern v Villa Mora Cottages Ltd & Monica Cummings** [2012] JMCA Civ 20.

[21] Counsel pointed to the expression of the duty in **Marien v Gardiner; Marien v H J Heinz Company Australia Ltd** [2013] NSWCA 396), where it was said that the duty to users of the road was to take reasonable care for their safety having regard to all the circumstances of the case. It is an objective and impersonal standard (see **Cook v Cook** [1986] HCA 73). Counsel also relied on the principles set out below:

- (a) The duty is to use reasonable care and skill. The driver owes a duty to passengers to drive with reasonable care. If having exerted proper care and skill there is still an unfortunate accident, the driver is not liable.
- (b) The question whether there is a breach of duty is prospectively addressed by reference to what a reasonable driver in the appellant's circumstances would have done in responding to any foreseeable risk of injury or sources of danger to other road users (see **Wyong Shire Council v Shirt** [1980] HCA 12 and **New South Wales v Fahy** [2007] HCA 20).

- (c) The risk must be foreseeable, not insignificant, and it must be that a reasonable person would have taken certain precautions, in those circumstances. Reasonable attention must be paid to all that is happening on or near the roadway that may be a source of danger (see **Manley v Alexander** [2005] HCA 79, **Derrick v Cheung** [2001] HCA 48).
- (d) The driver is not required to know or predict every event that may happen in the vicinity of the vehicle so as to be able to take reasonable steps to react to such eventuality (see **Hawthorne v Hillcoat** [2008] NSWCA 340) and is not required to travel at a speed which is within the "limits of visibility and control", so as to be able to react to whatever ventures into the vehicle's path (see **Derrick v Cheung**).
- (e) The driver is only required to take reasonable steps to be in a position to know what is happening or might happen in the vicinity of the vehicle (see **Morris v Luton Corporation** [1946] 1 KB 114).
- (f) The relevant question is what a reasonable person in the driver's position would have done by way of response to any foreseeable risk of harm to users of the road (see **Graham Barclay Oysters PTY Limited & Anor v Grant Ryan and Ors** [2002] HCA 54; **South Tweed Heads Rugby League Football Club Limited v Cole and Another** [2002] NSWCA 205; [2002] 55 NSWLR 113; and **Trompp v Liddle** (1941) 41 SR NSW 108).
- (g) It is not unreasonable for a driver to act on the assumption that other drivers are obeying the rules, unless there is something that should make him realize that they are not.

[22] Mr Reitzin's further submissions on this point may be summarised as follows:

- a. Encountering a large front-end loader positioned across the road in a blind corner was not reasonably foreseeable;
- b. The driver was not required to predict such an event;
- c. He was not required to be in a position to react to everything which might happen in the vicinity of his vehicle;
- d. He was not required to travel at a speed within the limits of his control so as to be able to react to whatever ventures into his path;
- e. He was doing no less than a reasonable person would have done in the circumstances; and
- f. It was reasonable for him to act on the assumption that other drivers were obeying the rules since there was nothing to make him realize that they were not.

[23] In relation to the learned judge's finding that there was a "suggestion" that Mr Carter was driving at an excessive speed, Mr Reitzin submitted that this was not supported by any evidence and was against the weight of the evidence. Counsel pointed to what he described as the uncontradicted evidence of Miss Harrison and Miss Kelly, that Mr Carter was not speeding but was driving at a moderate speed. There was also uncontradicted evidence, he said, which indicated that Mr Carter had slowed down and applied his brakes. Counsel maintained that there was no evidence that Mr Carter had time to swerve or that swerving would have avoided the collision, as the evidence was that the front-end loader had been obstructing the roadway. Critically, counsel said, the learned judge accepted both witnesses as witnesses of truth.

[24] Counsel argued that a mere "suggestion" in the learned judge's mind was an insufficient basis on which to make adverse findings of fact. Counsel argued, relying on **Briginshaw v Briginshaw** [1938] HCA 34, that where the law required proof of any fact, the tribunal of fact must be persuaded before making a finding on that fact. The

allegation must be made out to the reasonable satisfaction of the tribunal of fact and that such “reasonable satisfaction cannot be produced by inexact proofs, indefinite testimony, or indirect inferences”. Counsel argued that the learned judge seemed to have drawn an indirect inference from the solitary fact of the existence of the blind corner, contrary to the uncontradicted evidence in the case.

[25] Counsel, Mr Gordon, on behalf of the respondents, relied on section 51(2) of the Road Traffic Act and the case of **Waller v Levoi** (1968) 112 Sol Jo 865, as well as the Privy Council decision of **Chop Seng Heng v Thevannasan s/o Sinnapan and others** [1975] 3 All ER 572, in submitting that there is an implied duty of care under the Road Traffic Act, as well as a duty of care at common law, imposed on a driver negotiating a blind corner. This duty, he said, is a “special duty of care” which is greater than that in relation to a straight road where visibility is clear. He argued that Mr Carter had a duty of care, on approaching the blind corner, to proceed with caution and take reasonable care to avoid any possible unforeseen danger, as he was unable to see around the corner. Counsel also asked the court to take judicial notice that the Jamaican road network includes winding roads and several blind corners, especially in rural areas, and therefore, it was important to impose this duty of care on drivers. Counsel also relied on **McLee Henry and another v Gloria Joseph and another** (unreported), Eastern Caribbean Supreme Court, High Court of Justice, Antigua and Barbuda, Claim No ANUHCV 2006/0155, judgment delivered 26 September 2008. Counsel also relied on **Ronald Chang and another v Frances Rookwood et al** [2013] JMCA Civ 40; **Margaret Blackburn v James A L Bristol; Whitehead (a protected party proceedings by her litigation friend, Amy English) v Bruce and others** [2013] EWCA Civ 229; and **Harvey v Road Haulage Executive** [1952] 1 KB 120, in respect of those submissions.

[26] Mr Gordon maintained that, based on **Waller v Levoi**, Mr Carter was liable in negligence, as he came around the blind corner too fast and failed to keep a proper look out.

[27] Mr Gordon submitted that the learned judge made no error, as her finding that Mr Carter drove at an excessive speed must be taken to mean that he drove at a speed that was "excessive in all the circumstances". Mr Gordon contended that the question of whether a driver was driving at an excessive speed in a negligence case must be assessed based on the circumstances. He said the learned judge did not need to know the exact speed at which Mr Carter was driving to determine whether that speed was excessive, as that could be inferred from the circumstances.

[28] Counsel relied on four basic findings made by the learned judge. The first was that the taxi had gone around a blind corner and collided with the front-end loader. The second was that none of the witnesses could say with assurance, in cross-examination, that the taxi had slowed down or swerved prior to the accident. The third was that Mr Carter's taxi had been moving at an excessive speed, and he had done nothing to avoid the collision. Lastly, Mr Carter had negotiated a blind corner at such a speed that he failed to take the necessary action to avoid the collision.

[29] Counsel argued that the learned judge was entitled to infer that Mr Carter had been driving at an excessive speed based on how the accident occurred, as he was unable to cope with the fact that there was a front-end loader in the road around the bend. Counsel also submitted that the learned judge was entitled to find that, had Mr Carter proceeded with the required caution and care in negotiating the blind corner, on a balance of probabilities, he could have avoided the collision. These, he said, were reasonable inferences that could properly be drawn from the evidence. Counsel contended that this court had no basis on which to interfere with the learned judge's conclusions on factual issues.

B. Analysis and disposal of grounds a), b), c) and d)

- (1) *Was the judge correct to find that Mr Carter should have taken more care to avoid "any possible unforeseen danger"?*

[30] In this case, there is no dispute that the driver of the front-end loader was negligent. There is no cross-appeal against the learned judge's finding in that regard. Mr Gordon conceded before this court that the front-end loader would bear more responsibility in the circumstances where it was crossing the road from a minor road going onto a major road. The evidence was that the front-end loader was crossing the road from a minor lane or street, in the blind corner. The only question left to be determined is whether there is any basis on which the court can interfere with the learned judge's finding that Mr Carter was contributorily negligent at all.

(a) The duty of care

(i) The Road Traffic Act

[31] I believe the starting point for any discussion on the duty of care of operators of motor vehicles on the road, towards other users of the road, be it drivers, riders or pedestrians alike, begins with the Road Traffic Act. Section 51 of the Road Traffic Act reads in part, as follows:

"(1) The driver of a motor vehicle shall observe the following rules -
a motor vehicle

- (a) meeting or being overtaken by other traffic shall be kept to the near side of the road. When overtaking other traffic the vehicle shall be kept on the right or off-side of such other traffic:

Provided that an animal being led or driven, may be passed or overtaken on whichever side is the safer;

- (b) being overtaken by other traffic shall be driven so as to allow such other traffic to pass;
- (c) shall not be driven alongside of, or overlapping, or so as to overtake other traffic proceeding in the same direction if by so doing it obstructs any traffic proceeding in the opposite direction;
- (d) shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic;

(e) proceeding from one road to another shall not be driven so as to obstruct any traffic on such other road;

(f) proceeding from a place which is not a road into a road or from a road into a place which is not a road, shall not be driven so as to obstruct any traffic on the road;

(g) ...

(h) ...

(2) Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident, and the breach by a driver of any motor vehicle of any of the provisions of this section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection.” (Emphasis added)

[32] In this case, the relevant duties that applied to the operator of the front-end loader in this case are set out in section 51(1)(d), (e) and (f). A breach of any of those provisions could have resulted in a charge for an offence under the section, and to the imposition of liability in the tort of negligence for breach of duty.

[33] Although the starting point of the duty of care on our roads is the Road Traffic Act, the proviso to section 51 shows that it is not the ending point. For the breach of duty by one operator does not absolve another from his or her duty to do what is necessary to avoid an accident. The failure of one operator of a motor vehicle to carry out his duty does not prevent the other motorist from also being liable for any resulting accident. The degree of liability is a question of fact for the trial judge to determine.

(ii) The common law duty of care and foreseeability of risk

[34] Liability for negligence at common law can only be ascribed to those consequences which a prudent and reasonable man of ordinary intelligence and experience would have had in his contemplation (see **Muir v Glasgow Corporation**). The duty is not “to guard against every conceivable eventuality, but only against such eventualities as a prudent and reasonable man ought to foresee as being within the ordinary range of human experience” (see the case of **Fardon v Harcourt-Rivington**, cited in **Adele Shtern v**

Villa Mora Cottages Ltd at para. [70]; see also **Marien v Gardiner**). If the risk of danger is reasonably apparent, then it is negligent not to take precautions to avoid such a risk. This includes guarding against the possible negligence of others. It is no rule that a man must guard against the mere possibility of danger that would never have occurred to a reasonable and prudent person, and if such danger did in fact occur, he will not be negligent if he fails to take extraordinary precautions.

[35] The learned judge's finding that Mr Carter should have slowed on approach to the corner as he could not see around the corner, and that he should have taken "more care to avoid any possible unforeseen danger", raises the issue whether the learned judge applied the correct test of the duty of care owed by an operator of a motor vehicle on the road.

[36] The duty of care, owed by drivers on the road, is well established. A driver is obliged to exercise the degree of care and skill of a reasonably prudent driver in the same or similar circumstances, to avoid foreseeable dangers. This does not extend to any possible unforeseen danger as the learned judge and counsel for the respondent indicated. A driver is not bound to foresee "folly in all its form" which occurs on the road but he must drive with the awareness of such follies which human experience shows can occur (see the judgment of Lord Uthwatt in **London Passenger Transport Board v Upson and Another** [1949] AC 155).

[37] The standard is that of a reasonably competent driver, and it is an objective standard. The duty is owed to all other users of the road. The duty of a driver extends to maintaining a proper lookout, maintaining control of the vehicle, accounting for road conditions, and observing traffic laws. For a driver to be held liable in the event of an accident, there must be a breach of duty, that breach must have caused or contributed to the accident and the harm suffered must have been foreseeable.

[38] I am of the view that the learned judge's statement as regards Mr Carter's duty to avoid "any possible unforeseen danger" is not entirely correct. Mr Carter's duty driving

into that blind corner was to take reasonable care to avoid any foreseeable danger. I am also of the view that there is no "special duty of care" imposed on a driver approaching a blind corner. Such a driver is only required to take reasonable care or, in other words, to take the necessary caution and exercise due care, appropriate to the situation facing him and the condition of the road, to avoid any foreseeable danger.

[39] A driver will be contributorily negligent if despite the negligence of the other road user, the driver failed to take such reasonable care as a reasonably prudent driver in his position would have taken, thereby contributing to the damage. In calculating the degree of contribution, the court will consider how the driver's actions or inactions contributed to the damage, in other words, the court will consider the relative blame worthiness of each party and the causative effect of the negligence of each party. Blame should only be apportioned equally when, at the end of all the evidence, it remains unproven whether one negligent party was more to blame than the other negligent party.

[40] There are two questions involved here. The first is whether the risk of an obstruction being in the road around the blind corner was foreseeable, for example a child darting across the road, another vehicle negligently going across the road from a side road or another motor vehicle being negligently parked near the corner or driving across the road near the corner. The second question is whether there was evidence that Mr Carter failed to take such reasonable care, in all the circumstances, bearing in mind the foreseeable risk.

[41] In this case, it is my view that, despite the learned judge describing the duty in wider terms than legally correct, it cannot be said that it would have been plainly wrong to hold that there was indeed a foreseeable risk of coming upon some obstruction in the blind corner and that Mr Carter would have been required to take steps to mitigate that risk.

- (2) Was there evidence to support the learned judge's finding that Mr Carter was travelling at an excessive speed?

[42] The question here is whether Mr Carter was driving at an excessive speed in the blind corner and in so doing failed to exercise the due care required of a reasonably prudent and competent driver. The answer to that question must come from the evidence in the case.

[43] The two witnesses both gave evidence in chief by way of their witness statements, which were both amplified in court, and both witnesses were cross-examined. Miss Harrison's evidence was that at the time of the accident, she was a passenger in the front seat of Mr Carter's taxi going along the Colgate Main Road, from Ocho Rios to Moneague. The car drove into a left-hand corner. She described it as a "blind corner", because, she said, "you cannot see any traffic approaching from the opposite side". She said that as the car was going around the corner, she saw the front-end loader, coming out of the left lane going forward across the road. The front up to the side of the front-end loader was in the road. The taxi "decelerated straight away" but the front-end loader was too close, and the taxi collided with it. Miss Harrison's evidence in cross-examination was that the taxi was not speeding and that Mr Carter was driving at a "moderate" speed. She was asked if the taxi changed speed from the time she saw the front-end loader to when the vehicle collided and she said no. It was suggested to her that the front-end loader was in a driveway and that the taxi lost control and collided with it and she denied that suggestion. She said that Mr Carter did not cause the accident and that it was the front-end loader that caused the accident.

[44] Miss Kelly's evidence was that she was a passenger in the middle seat at the back of the taxi. She could see outside from the gap between the driver and the front passenger. The taxi was going along the Colgate Main Road from Ocho Rios towards Moneague. The weather was sunny and the road was dry. She said the taxi drove around a left-hand corner "where you couldn't see cars coming from the other direction". It was a blind corner, she said. The car was not speeding. As Mr Carter entered the corner he saw the front-end loader, said "a wha dis yah fada" and collided in it. She said further that, as the taxi was in the corner, she saw the large front-end loader and said, "mi dead

now”, and the taxi went right into it. The front-end loader was moving from her left to the right, across the roadway coming from a “street”. It was blocking the road. She said Mr Carter “hold brake” (meaning he applied his brakes) but the front-end loader was too close. The taxi hit the side of the front-end loader. Her evidence was that Mr Carter was not speeding and was not the cause of the accident. She too was asked in cross-examination if Mr Carter had changed speed when she saw the front-end loader and she said she was frightened and could not say what happened. She also could not recall if the taxi had swerved from the front-end loader. She said it could have done and she forgot. She disagreed that Mr Carter was speeding and denied that Mr Carter lost control of the vehicle and collided with the front-end loader which was in a driveway.

[45] Both witnesses said that as Mr Carter entered the blind corner and came upon the obstruction in the road, he “decelerated” (per Miss Harrison) and “hold brake” (per Miss Kelly). Both witnesses said the front-end loader was too close to avoid the accident. Both witnesses said Mr Carter was not speeding but (per Miss Harrison) was driving at a moderate speed. From that evidence, it can properly be inferred that the front-end loader was crossing the road at a point just as a vehicle entered the blind corner. Although the learned judge relied on witnesses’ inability to testify, in cross-examination, to what Mr Carter did on seeing the front-end loader obstructing the roadway, she failed to reconcile what they had said in their witness statement about what Mr Carter did, with what they said or failed to say under cross-examination. She failed to indicate if and why she rejected what they had said in their witness statements, which were not substantially challenged because they failed to recall that evidence in cross-examination. This is a crucial failure, especially since the learned judge found them to be witnesses of truth and identified no material inconsistencies or discrepancies in their evidence. The suggestions in cross-examination made by counsel in the court below to the witnesses, as to how the accident occurred, was an account completely different to what the witnesses had said happened. Those suggestions were not supported by any evidence and, therefore, Miss Harrison’s and Miss Kelly’s account remained unchallenged.

[46] Speed in and of itself is not a sign of negligence. It will be considered negligent if a driver proceeds at a speed greater than allowable by law, or at a speed greater than it would be reasonably safe to drive at based on the state of the road, and an accident occurs (see **Trompp v Liddle** (1941) S R 108).

[47] The learned judge accepted that both witnesses were of the view that Mr Carter had not been speeding, had been driving at a moderate speed, and that the taxi had braked or decelerated at the sight of the front end-loader. Therefore, it is not entirely clear what was the basis of her finding that the evidence “suggested” that the taxi was going at an excessive speed and that Mr Carter did nothing to avoid the accident, simply because the witnesses were unable to recall, in cross-examination, the evidence that they gave in examination in chief. The learned judge did not find the witnesses unreliable or not credible and there was nothing in their evidence from which the inference of excessive speed could have been drawn. The origin of the “suggestion” of excessive speed is unclear aside from the fact of the accident itself and the learned judge’s concern that, in cross-examination” neither witness could “testify to a change of speed”. However, their was no suggestion made to the witnesses that they had lied or were mistaken when they said in their witness statement, which formed their examination in chief, that Mr Carter “decelerated” and “hold brakes” on seeing the front-end loader blocking the road.

[48] If counsel for the 1st to 3rd respondents is correct that excessive speed meant excessive in all the circumstances, the learned judge did not indicate by what means she arrived at the conclusion that a moderate speed was excessive in the circumstances. She also did not indicate what she accepted, from the evidence of the witnesses, the term “moderate speed” meant. Having accepted the evidence that Mr Carter was not speeding but was driving at a moderate speed, no attempt was made to elicit from the witness an estimate of what they were describing as “moderate”. She had no evidence of what was meant by “moderate speed” to be able to draw a reasonable inference that moderate speed was excessive in the blind corner, and she was not entitled to fill the gap by an explanation or “suggestion” of her own.

[49] A judge is required to make findings of fact from the evidence led. A judge is not entitled to make findings based on instincts or mere suggestions, as a suggestion is not evidence. The learned judge's claim of a "suggestion of excessive speed", in my view, is no more than her having a "feeling" about the issue. This cannot stand as a basis for a legitimate finding of fact. The learned judge had before her uncontradicted evidence of Mr Carter's manner of driving by persons who were in his vehicle and best able to give evidence of this. They were the ones who were injured in the said accident. Their evidence was inherently reasonable and ought to have been conclusive on the issue, the learned judge having accepted that evidence as true and having had no other evidence from which any opposing inference could have been drawn.

[50] The circumstances known to the learned judge is that a car rounded the corner at a moderate speed, not speeding, and ran into a large earth moving vehicle obstructing the roadway after slowing down and applying the brakes. It would mean, therefore, that the inference of excessive speed could only have been drawn from the fact of the accident itself. So, to take that logic one step further, it would mean that once there is an accident in a corner, there must be a finding that, for the accident to have occurred, there must have been speeding. This is an untenable position.

[51] To my mind, it is difficult to say that Mr Carter ought to have driven at a speed less than moderate when there was no evidence of the speed that was being described as moderate, except for the evidence that Mr Carter was not speeding. No evidence was given as to what that moderate speed was, and whether it was being measured in miles per hour or kilometres per hour. There was also no expert evidence as to what speed a car entering a blind corner would have to be going to avoid hitting an obstruction in the road positioned where it was, as the car entered the corner at the material time. Nor was there any measurement of the distance between where the car had entered the corner and the point of impact where the front-end loader was negligently crossing the road from a minor lane or street, to place the court in a position to determine the optimum stopping distance based on speed, or to cause a court to conclude that a moderate speed

was unreasonable in those circumstances. There was also no evidence of the precise point at which the front-end loader was crossing the road relative to the entrance to the corner, so as to determine, reaction time, stopping distance and the slowest speed at which the car entering the corner would have to be going to be able respond safely to a huge obstacle in the vehicle's path. There was, therefore, no evidence that the accident could have been avoided if Mr Carter had entered the corner at a lower speed than "moderate".

[52] Mr Carter was not sued for negligence by his two passengers who gave evidence, and it was the respondents who alleged contributory negligence and sought indemnity from Mr Carter. He who alleges must prove. The respondents brought no proof, and indeed they gave no evidence and their evidentially baseless suggestions as to how the accident occurred was completely contrary to the evidence given by the witnesses. The learned judge was left to infer that Mr Carter was going too fast and was thereby contributorily negligent from the mere fact that the accident occurred in a blind corner where the front-end loader was obstructing the road.

[53] Mr Gordon's reliance on the case of **Waller v Levoi** to submit that Mr Carter did nothing to mitigate a foreseeable risk is misconceived. In that case, the defendant, who intended to turn onto a side road from the main road, stopped his vehicle near to a bend at a junction with the main road and the side road, to better see a signpost near to the side road. The plaintiff's motorcycle came around the bend and collided into the defendant's vehicle. The plaintiff was travelling at 40 mph in the same direction and did not see the defendant until it was too late to avoid a collision. The plaintiff sued the defendant for damages for the personal injuries he sustained. At first instance, the court held both parties liable on the basis that the plaintiff had failed to keep a proper look out and the defendant had been negligent for parking on the bend. They both appealed. On appeal, it was held that the plaintiff was mainly in the wrong for the accident as he should have seen the defendant much sooner than he did, but the defendant was also wrong because parking on a bend was unwise. The Court of Appeal found that the defendant

ought to have “foreseen that someone might come along rather quickly, or without keeping a proper lookout, and that such a person would be put in a difficult position if there was a car parked on the bend”. Therefore, the court said, the defendant should have driven to a straight part of the road and walked back to read the sign.

[54] I would distinguish that case on three bases. Firstly, that case involved a bend and not a blind corner. There was no suggestion that the motorcyclist could not see around the bend and there was a finding that he ought to have seen the car much sooner and taken evasive action sooner. Secondly, the motorcycle was going 40 mph, which was found to be fast for a motorcycle. Thirdly, the motorcyclist took no action to avoid the accident, neither slowing down nor swerving, instead he flung himself from the motorcycle.

[55] I am also of the view that counsel’s reliance on **Chop Seng Heng v Thevannasan s/o Sinnapan and others** was also misguided, although it involved what was referred to, interchangeably, as a blind bend or blind corner. That case involved an accident between two lorries. The 1st defendant was the driver of the first lorry, and the second defendant was its owner. The 3rd and 4th defendants were the driver and owner, respectively of the second lorry. The 1st defendant rounded a “blind left-hand bend” and parked his lorry 30 feet away from the exit of the left-hand bend with the lorry lights on. There was ample room for an overtaking vehicle to pass it safely. The 3rd defendant drove his lorry around the blind bend at 35 mph, in the same direction, and crashed into the rear of the stationary lorry. The plaintiff was a passenger in the second lorry and sued the owners and drivers of both lorries for the serious injuries he received in the accident.

[56] The judge at first instance found that the primary cause of the accident was the parking of the first lorry too close to the blind corner, but the driver of the second lorry was also to blame by reason of “the speed at which he drove round the corner”. The judge apportioned the liability 75% (to the driver and owner of the first lorry) and 25% (to the driver and owner of the second lorry). On appeal by both sides to the Federal

Court of Malaysia, it was held, by the majority, that the 1st and 2nd defendants could not, in law, be at fault on the fact alone of simply parking on the highway at night with the lights on, and that it was the 3rd defendant driver of the second lorry who was at fault. The 4th defendant appealed to the Privy Council. The Privy Council restored the decision of the trial judge that both lorry drivers were to blame. The headnote reads, in part, as follows:

“There was no authority in law for the proposition that the bad parking of a vehicle could never of itself give rise to liability for negligence. A motorist who parked his vehicle in a position and in circumstances which were such that he ought reasonably to have foreseen that other road users who were driving quickly, or without keeping a proper look-out, might collide with it, could be held liable in negligence in the event of such a collision taking place. Since the Federal Court had accepted the trial judge’s finding that the first defendant had parked his lorry too close to the blind corner, it followed that in the particular circumstances the first and second defendants had properly been held liable in part for the accident.”

[57] In that case, the road was winding and there was reduced visibility due to mist. When the empty lorry driven by the 3rd defendant crashed into the rear of the stationary lorry, which was loaded with 100 bags of cement, the force of the impact pushed it forward a distance of 18 feet. The trial judge, with whom the Privy Council agreed, was of the view that the 1st defendant driving at that speed, in those conditions, was negligent. The plaintiff suffered severe injuries necessitating amputation of a leg above the knee. The Privy Council took the view that there was a probability that the plaintiff would not have been so severely injured if the speed of the lorry in which he was travelling had been less, which would have caused the resulting impact of the crash to be less violent.

[58] None of these authorities suggest that there is any special duty of care on a driver entering a blind corner. Certainly, once the risk is foreseeable a driver entering a blind corner is expected to take precautions to avoid the foreseeable risk. In that case, not only was it a blind bend, but it was also 3:00 am with a mist and reduced visibility. In those circumstances, the fact that the second lorry rounded the bend at 35 mph was

found to be “a bit fast” in the circumstances. It was also possible to draw the inference of speed from the nature of the injuries sustained and the resulting damage.

[59] The trial judge made two important findings of fact in that case. The first was that the stationary lorry was parked too close to the exit of the blind corner, being found to have been only 30 feet away. In the instant case, there is no finding as to precisely where the front-end loader was crossing the road near the corner, that is, whether it was near to the entrance, in the middle of or near the exit of the corner. There was some evidence from which such a finding could have been made, as the evidence of the only two witnesses the learned judge heard from was that the accident occurred as the taxi drove around or entered the corner. The second finding made by the trial judge in **Chop Seng Heng v Thevannasan s/o Sinnapan and others** was that the actual speed at which the lorry drove was “a bit fast” in the circumstances. In the instant case it was a clear, sunny day and there was no evidence of the actual speed except for “not speeding” and “moderate speed”. Yet the learned judge concluded Mr Carter was driving at an excessive speed when nothing in the evidence she heard supported such a finding.

[60] In this instant case, the front-end loader was not at the exit or any distance away from the exit but rather was in the blind corner. Mr Carter did apply his brakes, which, from the injuries received by Miss Kelly and Miss Harrison, may have lessened the impact of the collision.

[61] The statement in **McLee Henry and another v Gloria Joseph and another**, relied on by the respondents for the proposition that motorists going around a blind corner owe a special duty of care, is set out at para. [11] of that judgment, as follows:

“For Gavin Matthew to have come around the clear bend some 300’ [sic] behind the Claimant, after McLee Henry had observed the road as clear and to end up alongside the Claimant just as he was turning towards Herberts Road, Garvin [sic] must have been travelling at a faster rate of speed than was appropriate and safe in the circumstances. Our road conditions routinely present intersections in close proximity to blind corners at which cars are at a stand still or turning across the roadway to enter the abutting minor road. A driver

must drive with these conditions in mind. It is simply an inescapable and perpetual incidence of responsible driving in this jurisdiction.”

[62] However, this statement is not a proposition that there is a special duty on a driver entering a blind corner. It merely suggests that knowledge of an area and the possible risks involved in that area make those risks more foreseeable to drivers, who should therefore take the necessary precaution.

[63] Furthermore, these remarks were made in circumstances where the trial judge had rejected the defendant’s account of what had occurred and accepted the claimant’s account that the road had been clear for some distance of 300 ft before he began to make the turn across the road, and that the defendant driver must have been driving at a “fast rate of speed” to have covered that distance and collided with the claimant as he made the turn. The trial judge had also rejected the suggestion of counsel that the defendant driver was already near to the claimant who was stationary on the verge of the road, and who had been unable to see him in his “blind spot” before he suddenly made the turn, thus wholly causing or at least contributing to the collision. The trial judge accepted that other evidence supported the claimant’s evidence that the defendant driver was going at an excessive speed. She considered the evidence as to the extent of the damage on both vehicles, and the position where the defendant vehicle came to rest after the accident. Having accepted the claimant’s evidence that the road had been clear for some distance before he began to make the turn, the trial judge found the short time it took the defendant driver to get to the claimant’s vehicle to be evidence of the “fast rate” of speed. Furthermore, the defendant had admitted that he had seen the claimant’s vehicle from 300ft away but took no action.

[64] In that case, the trial judge had evidence from which she could have inferred that the driver had been going fast. In the instant case, there was none. The injuries sustained by Miss Harrison and Miss Kelly are not such as would suggest that the taxi hit the front-end loader at an excessive speed. The cases are, therefore, distinguishable, in my view.

[65] In this case there was no evidence from which the learned judge could properly have concluded that excessive speed was the reason for Mr Carter's failure to have reasonably avoided the consequences of Mr Stone's negligence.

[66] I am, of course, not to be understood to be saying that Mr Carter had no duty, independent of the front-end loader obstructing the roadway, to enter the blind corner at a speed which would have given him the opportunity to make any necessary adjustments to his driving where there was a foreseeable risk of danger. Whereas some inference may be drawn from the fact that the taxi did collide with the front-end loader in the blind corner, that inference is not inescapable and the fact of the accident alone is insufficient to ground a finding of negligence, in the light of the evidence of two persons, who were passengers in the car. The learned judge had no other evidence bearing upon the fact. In such cases there must be evidence that the driver could have avoided the accident if he had taken more reasonable care and that evidence must be more than mere "suggestion". In this case, there is no evidence that where the taxi entered the corner to where the front-end loader was in its path, a driver who was "not speeding" and who was going at less than what the witnesses described as "moderate speed", could have avoided the accident.

[67] Although Mr Reitzin relied on **Briginshaw v Briginshaw**, it was of limited value as it dealt with the standard of proof required in the case of a petition for divorce on the grounds of adultery. However, the court in that case did make a statement which I found useful and with which I agree. At page 2, it was said that:

"There is no mathematical scale according to which degrees of certainty of intellectual conviction can be computed or valued. But there are differences in degree of certainty, which are real, and which can be intelligently stated, although it is impossible to draw precise lines, as upon a diagram, and to assign each case to a particular subdivision of certainty. No court should act upon mere suspicion, surmise or guesswork in any case. In a civil case, fair inference may justify a finding upon the basis of preponderance of probability."

[68] In the absence of a claim of *res ipsa loquitur*, the mere fact of an accident cannot provide a “suggestion” of negligence.

(3) Did Mr Carter fail to take action to avoid the accident?

[69] The learned judge also found that Mr Carter did nothing to avoid the accident. There was no evidence that Mr Carter could have swerved to avoid the unit that was fully obstructing his path in the roadway. In cross-examination the witnesses were not able to say that Mr Carter swerved to avoid the front-end loader. There was, however, no evidence from which it could have been properly concluded that at any point it was safe or that there was room to safely manoeuvre around the front-end loader in the road. Attempts were made at trial to find out from the witnesses whether at the time of the accident there was oncoming traffic on the other side of the road. The witnesses were unable to answer as, according to them, the accident had occurred very quickly. Furthermore, the cross-examination did not place the front-end loader in the road but instead placed it in a driveway with the suggestion that Mr Carter left the road and collided with it in the driveway.

[70] On the witnesses’ account, coming upon this obstacle in the roadway, Mr Carter, did what the witnesses described in their witness statements as “decelerating” and “holding brake”. Although the learned judge said the court was not assured in cross-examination, that Mr Carter slowed down or swerved, she did not reject the evidence given in examination-in-chief, neither did the witnesses distinctly resile from that evidence. Therefore, there being evidence before the learned judge that Mr Carter applied his brakes, the learned judge was wrong to conclude that Mr Carter failed to take the necessary action to avoid the collision.

[71] In **Arnold White v Merle Crawford** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 26/1986, judgment delivered 25 June 1990, which involved a motor vehicle collision, this court, after stating the position in **Watt v Thomas**, per Campbell JA, said this, at page 7:

“However, it is equally established that this principle holds good only where there is no suggestion that the trial judge has misdirected himself in law and since a conclusion based on no evidence is a question of law an appeal court will unhesitatingly interfere in such circumstances.

In this case, the judgment of the learned trial judge rests partly on a conclusion for which there is absolutely no evidence. The conclusion is that the appellant was driving in excess of 25-30 m.p.h. and was going downhill from which it is to be inferred that he was driving at ‘too fast a speed in the circumstances.’ This is exactly what the respondent pleaded and would have had to prove of which however there is no proof. This court is therefore entitled to interfere.”

[72] In the instant case, these were the learned judge’s findings at paras. [46] and [47], having rehearsed the evidence of the witnesses, and having found the driver of the front-end loader negligent:

“[46]...Notwithstanding the foregoing, Mr. Carter also had a duty to take such action as may be necessary to avoid the collision by keeping a proper look out, slowing down or maneuvering [sic] the taxi around the frontend loader where it was safe to do so.

[47] On the evidence both Claimants agree that Mr. Carter was not speeding. However, on cross examination both could not assure the court that Mr. Carter slowed down upon seeing the frontend loader. In fact, although in their evidence in chief they stated that the taxi slowed down, under cross examination neither could testify to a change of speed and both denied that the taxi swerved prior to the collision. Their evidence is that the frontend loader was too close and the taxi collided into the side. This suggests to the court that the vehicle was moving at an excessive speed and Mr. Carter did nothing to avoid the collision. The corner is described by both witnesses as a ‘blind corner’; hence, Mr. Carter should have slowed down as he would have been unable to see around the corner and hence needed to have taken more care to avoid any possible unforeseen danger.”

[73] At para. [48], the learned judge went on to hold that:

“[48] The court finds on a balance of probabilities that Mr. Stone acted negligently when he drove the frontend loader unto the main road and obstructed the traffic that was travelling along that

thoroughfare, thus causing the collision. The court also finds that Mr. Carter contributed to the collision when he negotiated a blind corner at such a speed that he failed to take the necessary action to avoid a collision. The court therefore assigns 50% liability to Mr. Stone and 50% to Mr. Carter.”

[74] The learned judge’s misquote of the standard of duty of care apart, since her finding that Mr Carter was liable was tied to her findings on the question of speed and his failure to do anything to avoid the accident, for which there was no supporting evidence, the finding of negligence on Mr Carter’s part cannot stand.

[75] I agree with Mr Reitzin’s submission that the learned judge had no evidence from which to conclude that Mr Carter did nothing to avoid the collision, and her conclusion, in this regard, was against the weight of the evidence.

[76] I would like to point out that a large earth moving vehicle on the road such as a front-end loader is considered a high-risk hazard to motorists and other users on the road, not only due to its size, but also since it is slow-moving. These vehicles, when driving on a public road, should be piloted. Furthermore, they should never be crossing a road without a flagman. Worse yet, the operator of such a vehicle going from one side of the road to the other, in a blind corner around which there would likely be oncoming traffic, owes a duty of care to those drivers to warn them of the presence of the front-end loader on the roadway and of the manoeuvre it was undertaking.

[77] In this case, there is no evidence that this duty was discharged. The action of the operator of the front-end loader was both a breach of the Road Traffic Act and a breach of the common law duty of care. The learned judge, in my view, failed to give effect to the high degree of culpability of the operator of the front-end loader moving it from a minor road across the main road in the path of oncoming vehicles, and around a blind corner, without providing basic warnings of the move. Failure to take even the most basic care, in such circumstances, would import a high degree of culpability over and above 50%.

[78] In my view, based on the evidence, the front-end loader obstructing the main road, in a blind corner, without a flagman or any form of warning to oncoming traffic was the cause of the accident. Despite the learned judge's finding based on a "suggestion" and Mr Gordon's spirited defence of those findings, I do not see how Mr Carter can be held to have been contributorily liable, much less for as much as 50%.

[79] These grounds, therefore, have merit and ought to succeed.

Ground f) - The learned judge erred in not holding the first respondent liable as an owner of the front-end loader in question.

[80] Counsel Mr Reitzin submitted that the learned judge erred when she failed to award damages, interest and costs to the appellants against Morgan's Trucking.

[81] I agree with counsel for the respondents that this ground is completely without merit.

[82] Although Miss Harrison and Miss Kelly sued Morgan's Trucking and Clive Morgan as owners of the front-end loader, on 29 June 2018, after the defence was filed, the appellants filed a request for information requesting that the respondents state who was the actual owner of the front-end loader. At a pre-trial review hearing on 15 January 2020, an order was made in the court below that, *inter-alia*, the appellants refile the request for information and that the respondents respond to the request. On 3 February 2020, the respondents filed a response indicating that the owner of the front-end loader was Clive Morgan. That request and reply were before the learned judge in her trial bundle. There was no challenge to this reply to the request for information. Therefore, the learned judge could not be faulted for granting judgment against Mr Morgan as owner of the front-end loader.

[83] This ground fails.

Ground e) - The learned judge erred in holding that the absence of the first appellant from the trial justified dismissing the first appellant's statement of case

[84] This ground raises the issue of whether the learned judge erred when she dismissed Mr Carter's statement of case in his absence.

[85] Mr Reitzin, submitted to this court that the judge was wrong in law to dismiss Mr Carter's case due to his absence from trial. Mr Reitzin's submissions on the point may be summarised as follows:

(i) Mr Carter was not a claimant and merely sought indemnity and contribution from the first, second and third respondents.

(ii) The parties knew that the first and second respondents were not permitted (by court order) to give evidence and that Mr South's witness statement made no factual allegations of negligence against Mr Carter.

(iii) Neither Miss Harrison nor Miss Kelly had alleged any negligence against Mr Carter in their pleadings or witness statements. Mr Carter, therefore, had no case of negligence against him to answer. Accordingly, his presence at trial would have been unnecessary, time-consuming, and costly to him.

(vi) Mr Carter was represented by counsel for the entire course of proceedings.

(vii) There was no application made for Mr Carter's statement of case to be dismissed pursuant to rule 39.5 or otherwise. No indication was given by the court that such a course was being considered so that submissions could have been made.

(viii) Mr Carter's absence was explained as he resided and worked overseas. There had been no intimation by the learned judge that Mr Carter's statement of case was to be dismissed.

(ix) Given that there was no witness statement before the court making any assertions amounting to negligence against him, Mr Carter was entitled to judgment against all the respondents, with costs, as they had all pleaded negligence against him.

(x) It was not in keeping with the overriding objective to require Mr Carter to be present at trial, failing which his statement of case would be dismissed.

(xi) Rule 39.5 merely allows the court to proceed with trial in the absence of the relevant party. It does not give the court the discretion to strike out a statement of case.

[86] On behalf of the respondents, Mr Gordon submitted that the learned judge had every right to dismiss Mr Carter's statement of case. Counsel argued that this was so since Mr Carter was required to be at court for the trial, both in his capacity as a defendant, and as an ancillary claimant.

[87] Pointing also to Mr Carter's ancillary claim for contribution and indemnity from the 1st, 2nd and 3rd respondents, and his detailed witness statement in which he set out, among other things, particulars of the accident as a result of which he sought damages, Mr Gordon submitted that Mr Carter was an integral part of the case. Additionally, Mr Gordon argued that Mr Carter's attendance was expected, as he was the driver of one of the vehicles in the accident.

[88] Counsel further argued that the parties had three years notice of the trial date, which was sufficient time for Mr Carter to arrange his affairs to ensure his attendance. Furthermore, counsel contended, no prior notice was given of Mr Carter's absence, and

at no time did Mr Carter or his counsel apply for him to be excused from the trial, nor was any application made for his witness statement to be admitted into evidence, without his attendance at trial, pursuant to section 31E(4) of the Evidence Act. Counsel also pointed out that an application could also have been made for Mr Carter to give evidence by way of video link. Finally, counsel noted that even at trial no explanation was given for Mr Carter's absence, and, therefore, since his absence was without excuse, the judge was correct to dismiss his statement of case.

Disposal of ground e)

[89] On the first day of the trial, Mr Carter was absent. Despite this, his trial counsel asked the court to enter judgment in his favour against the respondent Mr South, who was also absent from trial. There was an objection to this course being taken by counsel for the defendants who were present. The learned judge, in considering the issue, referred to rule 39.5, but gave no explanation as to its applicability to the case before her. She, however, reserved her ruling on this preliminary issue until the completion of the hearing. She ultimately dismissed Mr Carter's defence and ancillary claim, and on Mr Morgan's and Mr Stones' defence and ancillary claim, found Mr Carter 50% contributorily liable, with liability also for 50% of the costs to Miss Harrison and Miss Kelly.

[90] Guidance as to whether the course taken by the learned judge had any support in law can be found in rule 39.5 of the CPR, which is aptly titled "Failure of party to attend trial".

"39.5 Provided that the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules –

- (a) if no party appears at the trial the judge may strike out the claim and any counterclaim; or
- (b) if one or more, but not all parties appear the judge may proceed in the absence of the parties who do not appear."

[91] The rules, therefore, provide a trial judge with two options in the absence of a party or all parties. The first option is where no parties to a claim turn up for the trial. In that case, the trial judge may strike out the claim or counterclaim. If that happens everything falls away. The second option is where only some of the parties are present, in which case the judge may proceed to trial and judgment in the absence of those parties. In such a case some parties will succeed, and some will fail.

[92] Where there is a rule 39.5(b) situation and the judge proceeds to trial and judgment, the absent party against whom judgment has been entered has the option to apply to set it aside under rule 39.6. That rule, aptly titled "Application to set aside judgment given in party's absence", reads in part, as follows:

"39.6 (1) A party who was not present at a trial at which judgment was given or an order made in its absence may apply to set aside that judgment or order."

[93] The learned judge appears to have acted under rule 39.5(b) to proceed to trial in the absence of both Mr South and Mr Carter, and to dismiss Mr South's claim, granting judgment to Mr Stone and Mr Morgan, on their defence to his claim, with costs. There is no appeal regarding that course.

[94] The learned judge also dismissed the defence and ancillary claim filed by Mr Carter in Mr South's claim but did not order costs against Mr Carter. In this case, where judgment was entered against Mr Carter in his absence, he was entitled to apply to set it aside under rule 39.6. However, there is no indication that he availed himself of that option.

[95] Counsel Mr Reitzin's contentions are that, firstly, like Mr Stone and Mr Morgan, Mr Carter was entitled to judgment and costs, despite his absence, since Mr South's claim against him had been dismissed. I am unable to find any grounds on which to say that the learned judge was palpably wrong to dismiss Mr Carter's defence against the claim brought by Mr South, in the absence of them both.

[96] Similarly, there is no ground upon which I could say the judge erred in dismissing the ancillary claim brought by Mr Carter against Mr Stone, Mr Morgan and Morgan's Trucking for indemnity and contribution, where he was absent from his own trial and provided no evidence in support of his case. Mr South was a passenger in Mr Carter's taxi when the accident occurred. Mr Carter's statement of case alleged he did not drive his car negligently and that the accident resulted from the sole negligence of Mr Stone. His ancillary claim was against Mr Stone, Mr Morgan and Morgan's Trucking for negligence, contribution and indemnity. There was no application to the court to permit his absence and for him to rely on his witness statement which he had filed. The indication to the court was that he was overseas.

[97] Mr Morgan and Mr Stone had filed a joint defence and ancillary claim in the claims brought by Miss Kelly and Miss Harrison, and an ancillary defence and counterclaim in Mr South's claim, in response to Mr Carter's ancillary claim. In all their statements of case, they alleged that it was Mr Carter who was negligent and asked for indemnity and contribution from Mr Carter, if they were found liable.

[98] Although judgment was granted against Mr Carter in his absence, the learned judge granted judgment on the basis that she found evidence that Mr Carter was contributorily negligent. She, therefore, found for Mr Morgan and Mr Stone in their ancillary claim and counter claim and dismissed the ancillary claim brought by Mr Carter.

[99] Having decided to proceed with the hearing, there was no basis, and it would have been improper, for the learned judge to indicate that Mr Carter's case would be dismissed, before she had considered all the evidence, despite his absence. This was not a case of striking out. She correctly made her decision at the end of the case.

[100] The learned judge could not be faulted for taking the approach she did, and Mr Carter always had the option of applying to set aside the judgment granted in his absence. He did not do so.

[101] This ground fails.

Ground (g) - The awards of general damages in favour of the second and third appellants were wholly erroneous estimates of the damages to which the second and third appellants were entitled.

[102] An appellate court is loath to interfere with an award of damages, unless it is so erroneous as to be too low or too high, or it results from an error of law as to be plainly wrong (see **Cadet's Car Rentals and another v Pinder** [2019] UKPC 4). I will consider the award granted to each appellant separately.

(a) Submissions on the issue of the adequacy of the award of damages in the case of Miss Harrison

[103] Mr Reitzin complained that the quantum of damages awarded to Miss Harrison was based on an erroneous assessment of her injuries and was too low. Counsel argued that the learned judge's reliance on the case of **Peter Marshall v Carlton Cole and Alvin Thorpe** (unreported), Supreme Court, Jamaica, Claim No 2006 HCV 01006, judgment delivered 17 October 2006 (set out at page 109, volume 6, of the Recent Personal Injury Awards made in the Supreme Court of Jamaica, compiled by Ursula Khan, hereinafter referred to as 'Khan's') was misguided, and that, more guidance could have been had from the case of **Claston Campbell v Omar Lawrence and others** (unreported), Supreme Court, Jamaica, Suit No CL C 135 of 2002, judgment delivered 28 February 2003, which the learned judge incorrectly distinguished as involving more severe injuries.

[104] Mr Reitzin submitted that the case of **Peter Marshall** was not comparative to Miss Harrison's case. He argued that the case of **Billy Tate v Wesley Salmon** [2015] JMSC Civ 25, relied on by the respondents, was also at the lower end of the scale, but was, nevertheless, in keeping with those suffered in **Evoni McLean v Pepsi Cola Bottling Co Ltd & Anor** [2014] JMSC Civ 55, which updated at the date of judgment to \$2,684,729.06 and **Pamela Francis** which updated at the date of judgment to \$2,593,448.28. He said that the case of **Claston Campbell** is more useful. In that case, the claimant was awarded \$650,000.00, which counsel submitted updated to \$2,801,814.52. Mr Reitzin further complained that the learned judge did not account for

the fact that the award in **Peter Marshall** was at the lower end of awards for similar injury. He cited the statement made by Brown Beckford J in **Clifford McFarlane v Technology Plus Company Limited & Enos Ferguson** [2016] JMSC Civ 154, at para. [35]. He also complained that the learned judge did not take account of the fact that Miss Harrison had continuing disability years after the accident, whereas Mr Marshall's injuries had been resolved after 16 weeks.

[105] Mr Gordon submitted that the learned judge made no error in law and there was nothing in her written judgment from which this court could find that the award given to Miss Harrison was so inordinately and disproportionately low as to be plainly wrong. In the case of Miss Harrison, counsel contended that the learned judge was correct to find that the injuries in the case of **Claston Campbell** were more severe than Miss Harrison's injuries.

(b) Disposal on the issue of the adequacy of the award of damages in the case of Miss Harrison

[106] Miss Harrison, who was 27 years old at the time of the accident, suffered injuries in the accident. At the time of the accident, she "jerked forward very hard" and was rendered dazed and stunned. The dashboard of the car "collapsed down" on her legs. The back of the seat had to be broken down to free her. She felt pain all over her body and she was frightened. She was taken to the Saint Ann's Bay Hospital for emergency treatment. Whilst there, she was bleeding from her left arm and right leg at the knee. She was examined, put in a neck collar, and given an injection. She was sent for x-rays, her wounds were stitched and bandaged, and she was given a prescription for medicine and sent home. She had pain in the neck and the lower back (on the shoulder) and suffered headaches, even four to five days after the accident.

[107] Miss Harrison's medical report, dated 10 May 2016, prepared by Dr Sudarshan Mariyappa, revealed that Miss Harrison went to the Avalon Medical Centre for treatment about five days after the accident. She complained of having headaches with pain in the neck, lower back, chest and both shoulders. She had bruises on her left forearm with

pain and mild swelling, as well as a laceration and an abrasion over the right leg with pain and swelling.

[108] Following the doctor's examination, her injuries were reported as: painful range of movement of the cervical spine; tenderness of her trapezius muscle; tenderness of the sternocleidomastoid muscle; pain in the chest; tenderness over the anterior aspect of the ribs; tenderness over the proximal 1/3 of the left forearm; abrasions over the posterolateral of the proximal forearm; mild lumbar muscle spasms; painful range of motion of the thoracolumbar spine; a 3 cm sutured laceration over the anterolateral aspect of proximal 1/3 of the right leg with nearby abrasions, and swollen and tender surrounding area; and painful ambulation.

[109] Miss Harrison was assessed, on 17 July 2012, as having whiplash injury, mechanical back pain, laceration to left leg with soft tissue injury, abrasions to left forearm with soft tissue injury, and blunt trauma to the chest and shoulder. She was required to do x-rays and treated with oral analgesics, antibiotics, anti-inflammatory medications and muscle relaxants. She was reviewed on 24 July 2014, at which time she reported occasional pain during movement. However, it was noted that her laceration had healed, she was ambulating normally, and she had no residual impairment.

[110] Miss Harrison listed her temporary disabilities resulting from the accident as: inability to bathe normally due to pain and stitches in the knee and bandages on the elbow; difficulty standing and walking because of pain and stitches in the knee; difficulty sitting down and standing up; difficulties cooking, cleaning, washing and ironing for several weeks after the accident; difficulty standing or walking normally for considerable time after the accident; inability to lift heavy objects; occasional swelling and cramping in her left arm and feet; inability to sleep because of pain in the lower back and fear; inability to dance due to pain in the side; difficulty with intimacy due to pain in the back and waist; and inability to engage in pre-accident social, domestic and sporting activities. The pain gradually went away except for the lower back pain, the pain in her right hip

and pain in her leg and arm when it gets cold. The pain in her back affected her ability to sleep and to do chores around the house.

[111] Before applying the case of **Peter Marshall**, the learned judge considered the injuries received by the claimant in **Claston Campbell**. The claimant in **Claston Campbell** had laceration to the chin, trauma to the chest resulting in severe chest pain and difficulty breathing, trauma to the back resulting in severe pain and swelling in the back and difficulty walking for three weeks. He also suffered whiplash injury to the neck causing pain in the neck and restricted movements. A collar was recommended. A sum of \$650,000.00 was awarded for general damages.

[112] The learned judge, in this case, found that Miss Harrison did not return for any follow-up visits so no findings could have been made regarding any long-term complications from her injuries. She made the award she did based on the nature of Miss Harrison's injuries and the continuing pain in the lower back. She found that the injuries in **Claston Campbell** were more severe than Miss Harrison's, and considered those in **Peter Marshall** to be more apt. With that finding, however, I disagree. In **Peter Marshall**, the claimant suffered moderate whiplash, a sprain, swelling and tenderness to the left wrist and hand, as well as moderate pain and spasms to the lower back. He had no residual pain or suffering after 16 weeks of medical care. The sum of \$350,000.00 was awarded in 2001.

[113] While there are some differences in the injuries suffered by the claimant in **Claston Campbell** from those suffered by Miss Harrison, the differences are not so remarkable as to place it entirely out of the realm of a reasonable comparison. I agree with counsel Mr Reitzin that the award in **Peter Marshall** is at the lower end of the scale, and any award to Miss Harrison based on that would be disproportionate. I also agree with Mr Reitzin that the case of **Billy Tait**, whilst comparable in terms of the long-term suffering, was also on the lower end of the spectrum, when the pain suffered by Miss Harrison is taken into consideration. That claimant in that case had a whiplash injury to the neck with moderate muscular spasm and pain in the neck, back and shoulders. The

pain was accompanied by headaches and caused limited movement in the neck. He also had lower back strain with moderate muscular spasm of the lower back muscles, gluteal areas and hamstring muscles. Further, he had a contusion to the sterna area of the chest with tenderness, resulting in painful inspiration and coughing. Possible long-term complications included chronic intermittent pain in the neck and lower back caused by ligament damage, and costochondritis of the sternocostal joint.

[114] In this case, the evidence is that due to the impact of the accident, Miss Harrison sustained injuries that initially caused her pain all over her body. The award for damages is not only for the pain and suffering after the injuries were sustained, but also for the initial pain suffered at the time of the accident. Miss Harrison's shock and pain at the time of the incident following impact and which continued for approximately one month, was not accounted for by the learned judge, and as a result, she erred in awarding damages that were disproportionate.

[115] An increase in the award to \$2,000,000.00 is warranted.

(4) Submissions on the issue of the adequacy of the award of damages in the case of Miss Kelly

[116] Mr Reitzin's complaint with respect to Miss Kelly's award for general damages was that the learned judge placed too much reliance on the case of **Errol Finn v Herbert Nagimesi and Percival Powell** (unreported), Supreme Court, Jamaica, Suit No C L 1991 F 117, judgment delivered 5 May 1994 (as set out at page 66, volume 4 of Khan's), and failed to account for the fact that it was at the lower end of the scale. He contended that the learned judge was wrong to reject the case of **Hugh Douglas v Morris Warp & others** (unreported), Supreme Court, Jamaica, Suit No C L 984 D 130, judgment delivered 6 April 1994, (as set out at page 210, volume 4 of Khan's). He submitted that an award of general damages in the sum of \$800,000.00 was a wholly erroneous estimate of Miss Kelly's injuries and that an award closer to \$2,000,000.00 was more appropriate.

[117] Mr Gordon contended that the learned judge made no error as the case of **Hugh Douglas** was properly distinguished by her, and she properly applied the case of **Errol Finn**, instead.

(5) Disposal of the issue of the adequacy of the award of damages in the case of Miss Kelly

[118] Miss Kelly, who was 61 years old at the time of the accident, gave evidence that upon the impact of the accident, she had been jerked “up into the seat in front and then back again”. She was frightened and felt dizzy. She could hardly see. She felt pain in her little toe on her left foot, which she later found out was broken. She also felt pain in her left ankle, in her left leg below the knee down to the ankle and pain in her left elbow. Her pain, she said was of a magnitude of 10 (on a scale of 1 to 10). Miss Kelly was taken to the Saint Ann’s Bay Hospital for treatment. She was examined, sent to do an x-ray and had a bandage applied. A board was put under her broken toe. She received a prescription for medicine and was sent home.

[119] By 14 July 2012, she had pain in both thighs and shoulders, especially the left shoulder and left arm. She had numbness and cramps in her left hand, and pain and swelling in the left toe and the left leg. On that day, she went to Avalon Medical Centre for treatment. The details of her examination and treatment there are contained in the report of Dr Mariyappa, who noted findings of: tenderness and swelling over left little toe and painful range of motion; mild tenderness of left lateral malleolus, tenderness over left elbow; tenderness to left shoulder with limited and painful range of motion; mild tenderness over bilateral trapezius muscle; apprehension test was positive, and Bryan’s test was positive.

[120] She was assessed as having a fracture to the proximal phalanx of the left little toe, multiple blunt traumas to the left shoulder with rotator cuff tear and cervical spondylosis. Her left little toe was splinted, and she was treated with oral analgesics and anti-inflammatory medication. Miss Kelly was reviewed on 4 August 2012, complaining of mild pain in her ankle and her left little toe. She had mild tenderness of the left lateral malleolus

and little toe. By the time of her last review on 5 May 2016, she was ambulating and functioning normally. Her X-rays revealed generalized moderate osteoporosis, early proximal interphalangeal joint and interphalangeal joint degenerative changes, and soft tissue thickening related to the lateral aspect of the 5th metacarpophalangeal joint.

[121] The doctor found that Miss Kelly had no impairment resulting from the accident and that her prognosis was early resolution except for the little toe which was symptomatic for three weeks.

[122] Following the accident, based on her evidence, Miss Kelly's temporary disabilities included: inability to stand or walk normally for several months; difficulty sitting and standing; difficulty sleeping due to pain; inability to lift objects for several weeks after the accident, inability to carry out domestic chores for several months after the accident, pain in the hands while washing clothes, anxiety and fear of travelling on the road and, inability to engage in pre-accident social, domestic and sporting activities. By the trial date, however, she was back to normal except for cramping in the little toe, sometimes.

[123] The learned judge considered the case of **Hugh Douglas**, cited by counsel for the appellant. In that case, the claimant was beaten with a baton by a police officer and was also fisted and kicked all over his body. He suffered bruises to the right upper limb with weals over the right shoulder, bruising of the left upper limb with swelling to the left arm, tenderness over the humerus, and swollen and tender left forearm and thigh. He was awarded a sum of \$195,000.00 in April of 1994, which, at the date of trial, updated to \$2,214,062.50.

[124] The learned judge also considered the case of **Errol Finn** cited by counsel for the respondents. In that case, the claimant, who had been in a motor vehicle accident, suffered a compound fracture of the 5th metatarsal of the left foot, and a wound at the fracture site which required stitches. He was awarded \$64,365.00 in May 1994, which was updated to \$715,896.42 at the date of trial. The learned judge took the view that **Hugh Douglas** was of no assistance and that the injury in **Errol Finn** was more severe

because Miss Kelly was never assigned a disability rating and her toe was placed in a splint rather than a cast. The learned judge awarded her \$800,000.00 for pain and suffering and loss of amenities.

[125] I agree with the learned judge, in some respects, that the case of **Hugh Douglas** bears little resemblance to Miss Kelly's case. I can only assume that it was cited because the claimant in that case would have felt pain all over his body and multiple blunt traumas over his body from the beating. In that respect, an accident which results in blunt trauma to the body may produce similar pain and suffering. However, at the other end of the spectrum, there is little evidence to suggest that the claimant in **Errol Finn** suffered greater pain and suffering than Miss Kelly. The injury to the claimant in **Errol Finn**, going by the report, seemed to have concentrated on the foot only. Miss Kelly's injuries did include a fractured toe but, unlike the claimant in **Errol Finn**, she also suffered blunt trauma all over her body and a rotator cuff tear to her left shoulder. Therefore, to say her injuries were less serious because she did not wear a cast on her toe but rather a splint and had no disability rating assigned, was an error in judgment which resulted in a wholly erroneous and disproportionate award. Like Miss Harrison, Miss Kelly's injuries were a result of a direct hit into a large metal, mechanical earth moving vehicle. There would have been initial shock, pain and suffering to the body. Miss Kelly described her pain as a 10. There was suffering and loss of amenities for some time. An award of \$1,600,000.00 is more appropriate in this case.

Conclusion

[126] The learned judge properly exercised her discretion to dismiss Mr Carter's case, in his absence from trial, and I find no error on her part in doing so.

[127] The cause of the accident was entirely that of the driver of the front-end loader, Mr Stone, and the learned judge erred in finding Mr Carter 50% liable.

[128] The awards of general damages for pain and suffering and loss of amenities made to the appellants Miss Harrison and Miss Kelly were based on wholly erroneous

assessments and are disproportionate. I would, therefore, allow the appeal in part, with costs in the appeal to the appellants.

[129] On Mr South's claim (Claim No 2013 HCV 01505, I would affirm the orders of the learned judge.

[130] On Miss Harrison's claim (Claim No 2016 HCV 03472), I would set aside the orders of the learned judge, and substitute therefor the orders that judgment be granted for Miss Harrison against the 2nd and 3rd respondents, Mr Morgan and Mr Stone, jointly and severally. General damages should be awarded to Miss Harrison for pain and suffering and loss of amenities in the sum of \$2,000,000.00, with interest at 3% per annum, from the date of service of the claim, to the date of judgment in the court below. Costs should be awarded to Miss Harrison against the 2nd and 3rd respondents to be agreed or taxed, in keeping with the principle that costs follow the event.

[131] In Miss Kelly's claim (Claim No 2016 HCV 03473), I would set aside the orders of the learned judge, and substitute therefor, orders that judgment be granted for Miss Kelly against the 2nd and 3rd respondents Mr Morgan, and Mr Stone, jointly and severally. I would award general damages for pain and suffering and loss of amenities in the sum of \$1,600,000.00, with interest thereon at 3% per annum, from the date of service of the claim to the date of the judgment in the court below. In keeping with the principle that costs follow the event, I would award costs to Miss Kelly against the 2nd and 3rd respondents, Mr Morgan and Mr Stone, to be agreed or taxed.

[132] I would award costs to Mr Carter in his appeal, for although two of the grounds of appeal in respect of orders made against him failed, he did succeed on the more substantial grounds in respect of orders made against him for liability and damages. In keeping with the principle that costs follow the event Mr Carter having ultimately prevailed is entitled to his costs in this appeal against Mr Stone and Mr Morgan.

SIMMONS JA

[133] I, too, have read the draft judgment of Edwards JA and agree with her reasoning and conclusion.

STRAW JA

ORDER

i) The appeal is allowed, in part.

ii) Claim No 2013 HCV 01505

Orders i, ii, iii and iv of the orders of Wiltshire J, made on 27 September 2021, are affirmed.

iii) Claim No 2016 HCV 03472

Orders i, ii and iii of the orders of Wiltshire J, made on 27 September 2021, are set aside. Substituted therefor are orders that:

a. Judgment for the claimant Miss Harrison, against Mr Morgan, the 2nd defendant, and Mr Stone, the 3rd defendant, jointly and severally.

b. General damages awarded to Miss Harrison in the sum of \$2,000,000.00 for pain and suffering and loss of amenities with interest at 3% per annum from the date of service of the claim form to the date of judgment.

c. Costs to Miss Harrison against the 2nd and 3rd defendants to be taxed if not agreed.

iv) Claim No 2016 HCV 03473

Orders i, ii and iii of the orders of Wiltshire J, made on 27 September 2021, are set aside. Substituted therefor are orders that:

- a. Judgment for the claimant, Miss Kelly, against Mr Morgan, the 2nd defendant, and Mr Stone, the 3rd defendant, jointly and severally.
 - b. General damages awarded in the sum of \$1,600,000.00 for pain and suffering and loss of amenities with interest at 3% per annum from the date of service of the claim form to the date of judgment.
 - c. Costs to the claimant against the 2nd and 3rd defendants to be taxed if not agreed.
- v) Costs of the appeal to the appellants against Mr Stone and Mr Morgan, to be agreed or taxed.