[2021] JMCA Civ 33

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CIVIL APPEAL NO 89/2005

BETWEEN	**STEADLY MOULTON**	**1ST APPELLANT**
AND	**DOREEN HARRISON**	**2ND APPELLANT**
AND	**WADMAR CONSTRUCTION LIMITED**	**1ST RESPONDENT**
AND	**RAJIV KNIGHT**	**2ND RESPONDENT**
AND	**THE ADMINISTRATOR GENERAL FOR JAMAICA (Representative of the Estate of Ainsworth Boreland, Deceased, Intestate)**	**3RD RESPONDENT**

Miss Renae Barker instructed by K Churchill Neita & Co for the appellants

Walter Scott QC and Miss Anna Gracie instructed by Elizabeth Salmon for the 1st and 2nd respondents

Mrs Geraldine Bradford for the 3rd respondent

23, 24 July 2019 and 5 July 2021

F WILLIAMS JA

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

P WILLIAMS JA

[2] This appeal concerns proceedings arising from a tragic motor vehicle accident which occurred in the early morning of 1 May 2010, along the White River main road, in the parish of Saint Mary. There were two motor vehicles involved. Mr Steadly Moulton ('the 1st appellant'), and Miss Doreen Harrison ('the 2nd appellant'), were passengers in one of the motor vehicles, a Toyota Corolla motor vehicle with registration number 1287 ET, which was driven by Mr Ainsworth Boreland. Both appellants and Mr Boreland were injured, and sadly, Mr Boreland later succumbed to his injuries. Mr Rajiv Knight ('the 2nd respondent'), was the driver of the other motor vehicle, a Toyota Tundra motor truck with registration number 9334 FJ, which was owned by Wadmar Construction Limited ('the 1st respondent'). The Administrator General ('the 3rd respondent') was appointed administrator ad litem for Mr Boreland's estate, he having died intestate, for the purpose of the claim.

Proceedings in the court below

[3] The appellants filed their claim against the respondents in the Supreme Court on 19 July 2011. On 19 September 2011, the 1st and 2nd respondents filed their defence and an ancillary claim against Mr Boreland. On 13 February 2012, the 3rd respondent, the Administrator General, was appointed administrator ad litem. On 25 May 2012, the appellants filed an amended claim form along with an amended particulars of claim in which they asserted that the accident was caused by the negligence of the 2nd respondent and/or Mr Boreland. On 12 March 2015, they filed another amended particulars of claim. The particulars of negligence, as outlined in this amended particulars of claim were as follows:

> "PARTICULARS OF NEGLIGENCE OF THE SECOND [RESPONDENT]
>
> i. Driving at an excessive speed;
>
> ii. Disobeying the Police Officers' command by failing to stop;

iii. Driving in a dangerous and reckless manner;

iv. Overtaking or attempting to overtake a line of traffic without first ascertaining or ensuring it was safe to do so and/or when it was unsafe and dangerous so to do;

v. Overtaking or attempting to overtake a line of traffic thereby colliding into motor vehicle registered **1287 ET**;

vi. Failing to keep any or any proper look-out or to have any or any sufficient regard for other traffic on the road;

vii. Failing to give adequate warning of his approach;

viii. Failing to see motor vehicle registered **1287 ET** which was in the process of making a u-turn in sufficient time or at all in order to avoid the collision;

ix. Failing to stop to slow down, to swerve or in any other way so as to manage or control the motor vehicle so as to avoid the collision;

PARTICULARS OF NEGLIGENCE OF [MR] BORELAND, DECEASED

i. Drove in a reckless and dangerous manner;

ii. Failed to have any or any adequate regard for other users of the roadway;

iii. Failed to see and/or observe in sufficient time or at all the presence or approach of the first [respondent's] said motor vehicle;

iv. Failed to have any proper look out in the circumstances;

v. Attempted to make a u-turn without first ascertaining whether and ensuring that it was safe to do so and a time when it was manifestly unsafe to do so;

…"

[4] The 1st and 2nd respondents countered that the collision was caused solely or materially contributed to by the negligence of Mr Boreland. In their defence and ancillary claim, filed on 19 September 2011, they set out the particulars of negligence as follows:

> "**PARTICULARS OF NEGLIGENCE OF [MR] BORELAND, DECEASED**
>
> [Mr Boreland], deceased, was negligent in that he:
>
> a) Drove in a reckless and dangerous manner.
>
> b) Failed to have any or any adequate regard for other users of the roadway.
>
> c) Failed to see and/or observe in sufficient time or at all the presence or approach of the [respondents] said motor vehicle.
>
> d) Failed to have any or any proper look out in the circumstances.
>
> e) Without due care and attention drove motor vehicle number 1287 ET across the path of the 1st [respondent's] motor vehicle thereby causing the collision.
>
> f) Failed to stop, slow down, swerve, or take any precaution to avoid the collision."

[5] In the ancillary claim, the 1st and 2nd respondents claimed not only indemnity and/or contribution from the 3rd respondent in relation to the appellants' claim, but also sought to recover damages and expenses incurred because of the damage caused to their motor vehicle (the Toyota Tundra motor truck).

[6] On 28 June 2012, the 3rd respondent filed its defence and its ancillary claim denying that Mr Boreland was negligent or that the collision was caused, as alleged, or by any negligence on his part. The 3rd respondent asserted that the collision was caused by the negligence of the 2nd respondent. The following were the particulars of negligence alleged:

"Particulars of Negligence of the 2nd [respondent].

(a) Driving at an excessive speed in the specific circumstances;

(b) Driving on to the wrong side of the road and there collided with motor vehicle licence number 1287 ET;

(c) Failing to have any due regard for other users of the road;

(d) Failing to keep any or any proper look-out or to have any or any sufficient regard for other traffic, particularly on-coming traffic on the road;

(e) Failing to stop, to slow down, to swerve or in any other way so to manage or control the motor truck so as to avoid the collision;

(f) Driving without due care and attention;

(g) Overtaking or attempting to overtake a line of traffic thereby colliding with motor vehicle licence number at 1287 ET"

[7] The trial commenced on 1 July 2015 before E Brown J ('the learned trial judge'). On 2 July 2015, he gave judgment in favour of the appellants against the 3rd respondent in the following terms:

"1. Judgment for the [appellants] against the [3rd respondent] with damages assessed as follows:

First [appellant]

a. General Damages in the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00) with interest at 3% per annum from the 28th July, 2011 to the 2nd July, 2015.

b. Special Damages in the sum of Twenty Two Thousand Five Hundred Dollars ($22,500.00) with interest at 3% per annum from the 1st May, 2010 to the 2nd July 2015.

Second [respondent]

c. General Damages in the sum of Four Million Five Hundred Thousand Dollars ($4,500,000.00) with interest at 3% per annum from the 28th July, 2011 to the 2nd July, 2015.

d. Special Damages in the sum of One Hundred and Forty Thousand Two Hundred and Sixty Dollars ($140,260.00) with interest at 3% per annum from the 1st May, 2010 to the 2nd July, 2015.

2. Special Damages to the 1st and 2nd [respondents] in the sum of One Million Eighty One Thousand One Hundred and Forty Three Dollars and Ninety One Cents ($1,081,143.91) with interest of 3% per annum from the 1st May, 2010 to the 2nd July, 2015.

3. Costs awarded to the 1st and 2nd [appellants] against the 3rd [respondent] to be agreed or taxed.

4. Costs awarded to the 1st and 2nd [respondents] against the 3rd [respondent] to be agreed or taxed."

[8] The learned trial judge subsequently gave written reasons for his decision which, in effect, agreed with one of the appellants' assertions that the accident was caused by the negligence of Mr Boreland.

The appellants' case at trial

[9] The 2nd appellant had no recollection of how the accident occurred and as such, the appellants' case depended solely on the evidence of the 1st appellant. It was his evidence that sometime after 1:00 am on 1 May 2010, he was travelling in the motor vehicle being driven by Mr Boreland, at a moderate speed, along the Prospect main road. He was seated in the front passenger seat, beside Mr Boreland, and the 2nd appellant was seated in the back. They stopped at a bar in the vicinity of the Couples Sans Souci Hotel. The bar was located on the left-hand side of the roadway, travelling from Ocho Rios.

[10] Two police vehicles were parked on the soft shoulder on the left side of the road. Mr Boreland drove past these two vehicles and parked. In his witness

statement/evidence-in-chief, the 1st appellant said that Mr Boreland had parked in front of the police vehicles. Under cross-examination, he explained that Mr Boreland had actually parked "on the inside of the police vehicle", beside them, close to the soft shoulder, whereas the police vehicle was closer to the main road. He also went on to explain that contrary to what was in his witness statement, he did not see four to five police officers sitting in "the car". He could not recall how many of them were standing there. He noticed that the police officers had a speed gun but could not recall how many of them did.

[11] After Mr Boreland parked, the 1st appellant exited the vehicle and went into the bar, where he spent five minutes before returning to the vehicle. Upon re-entering the vehicle, Mr Boreland switched on the engine and the 1st appellant heard the "loud sound of an engine coming from below". He went on to describe, in his evidence-in-chief, how he immediately looked behind and observed flashes of light coming from the direction from which they had travelled. He observed three vehicles. Under cross-examination, he described how Mr Boreland, after getting permission from the police to proceed, had positioned the vehicle with the front wheel on the white line, and, at that time, was intending to go back to Ocho Rios, the direction from which they had travelled.

[12] Under further cross-examination, the 1st appellant resiled from saying that he had seen flashes of lights. He maintained that it was the revving of engines that he had heard. The sounds were coming from the direction of Ocho Rios. He also said he had seen two vehicles first before seeing the third.

[13] The 1st appellant also said that he noticed one of the police officers signalling vehicles to stop, by putting up his left hand and pointing to the location where the vehicles ought to park. Two of the vehicles pulled over to the left near the bar and parked on the same side as Mr Boreland's vehicle was parked. There was not enough space for the third vehicle to park and so, this was when the police officer signalled Mr Boreland to proceed from where he had been parked. Mr Boreland then drove out and positioned his vehicle with the front wheel on the white line to go across the other side of the roadway. While

in this position, the third motor vehicle (driven by the 2nd respondent), overtook the parked vehicles and collided with the right side of Mr Boreland's vehicle. He stated that, in his view, "it was the driver of the black van [the 2nd respondent] overtaking the parked vehicles who disobeyed the signal of the police, and this caused the accident".

[14] Under cross-examination, however, the 1st appellant said that he did not see the police officer signalling the 2nd respondent to stop. He explained that since he was not the driver, he had no reason to look on the road before the Mr Boreland had driven out his motor vehicle. He maintained that he had seen the 2nd respondent's vehicle approaching at an excessive speed from the Ocho Rios direction. He explained that the accident occurred "right on the line in the middle of the road". Although the 1st appellant had seen the 2nd respondent's vehicle on the right side of the road coming up, he denied that it was Mr Boreland who drove into the path of the 2nd respondent's vehicle.

The respondents' case at trial

[15] The 2nd respondent's account of how the accident occurred, as contained in his witness statement, was as follows:

> "....
>
> (c) While travelling along a section of the White River main road in the parish of St. Mary heading towards Tower Isle I noticed two (2) vehicles parked along the soft shoulder on the left side of the road. As I was passing the second vehicle, I noticed a vehicle just drove out from the same left hand side of the road into the road way.
>
> (d) When the vehicle drove out I applied my brake, but it was too close and I still collided in the right front and back door of the vehicle. Both vehicles stopped and we came out of the vehicle. The police came on the scene and assisted. I then went to the Police Station and gave a statement."

[16] Under cross-examination, the 2nd respondent testified that, at the date of the accident, he was 24 years old and had gotten his driver's licence when he was about 17

or 18 years old. On the night of the accident, he was on his way home from a party in Priory in the parish of Saint Ann, which he had left at approximately 10:30 pm or 11:00 pm. He was accompanied by his girlfriend and some friends. He said that at the party, he had had two drinks of Appleton Red Rum and Red Bull. Approaching the area where the accident happened, he could see straight ahead, and while driving along the road, he had observed vehicles travelling in front of him, but he could not recall how many and did not know what had happened to the vehicles or whether they had driven past the scene of the accident.

[17] The 2nd respondent acknowledged that he was a frequent user of that roadway. He was aware of white lines in the road, he described them as being broken on the side for drivers going towards Saint Mary and unbroken for those travelling in the opposite direction.

[18] He said that, just before the impact, he had pressed on his brakes and his vehicle travelled about 15 feet before it collided with Mr Boreland's vehicle. At that time, he was on the left side of the road. He first saw Mr Boreland's vehicle when it was "right in the road", in front of him and he could do nothing but "press his brake".

[19] He was insistent that he did not know if the vehicle had reached the middle of the road before the impact. He never saw the vehicle while he was coming along the road. He did see two vehicles parked along the roadside near the collision site but denied having to drive around these vehicles to pass them. They were not police vehicles, and he did not see any police vehicles and could not recall seeing any more vehicles. He denied driving on the right side of the road going towards Saint Mary however his front wheel was probably over the white line, onto the other side of the road, by about a foot because of the vehicles parked on the sidewalk. As explained, he "was not going to pass them that if they open their door [he] hit off their door".

[20] When pressed by the court, the 2nd respondent explained that the vehicle he collided with was coming between the two vehicles that were parked there before the

collision. He was permitted to use some small toy cars to demonstrate what he described had happened.

[21] The 2nd respondent went on to admit that he had seen police officers at the location before the collision had occurred. He explained that he knew that the area was a police checkpoint. He, however, maintained that, on that night, he had not seen any of the police officers signalling to him to stop. He knew the speed limit in the area to be 60 kmph and he was travelling that night at approximately 45 kmph.

[22] The 2nd respondent denied that he was completely on the opposite side of the road and attempted to get back on his correct side of the road when he came across Mr Borland's stationary vehicle across the middle of the road. He agreed that he would put the point where the collision occurred in the middle of the road.

[23] In answers to the court, the 2nd respondent indicated that, at the point of collision, he was completely on his correct side of the road.

[24] The respondents had, prior to the trial, obtained permission to call Sergeant Nicola Lewis of the Jamaica Constabulary Force Accident Investigation and Reconstruction Unit, as an expert, and for the reconstruction report, she had prepared, to be tendered into evidence. She (then an Inspector of Police) testified on behalf of the respondents and the report, having already been admitted into evidence, was identified by her.

[25] Inspector Lewis explained that based on skid marks she had observed, she calculated the speed of the 2nd respondent's vehicle, before the collision, to be 47 kmph or 27 mph. She explained that this was the speed after the brake had been pressed. Under cross-examination, she agreed that the speed prior to the depressing of the brake would have been greater but could not say by how much. She was invited to comment on the positioning of the small cars that the 2nd respondent had displayed representing his view as to the position of the vehicles at the collision. Inspector Lewis stated that it did not represent what she had reconstructed. She was permitted to demonstrate her conclusion of how the collision had occurred.

[26] She went on to describe seeing skid marks measuring 11.4 to 12 meters on the right side of the centre line in the direction of Saint Mary. She opined that those skid marks had been laid down by the 2nd respondent's vehicle. She explained that scuff marks were also on the right side, closer to the point of impact, and was caused by the "obstructing vehicle" which would have been in motion at the time of impact. She maintained that these marks would not have been caused by the 2nd respondent's vehicle. She also explained that a gouge mark that was seen on the white continuous line in the centre was made because of the impact. Inspector Lewis agreed that the accident occurred "round about in the middle of the road". She maintained that she was unable to conclude from the damage seen on the vehicles whether speed was a contributory factor in the accident.

The learned trial judge's findings

[27] The learned trial judge accepted that the accident occurred in the centre or middle of the road; and, at that time, Mr Boreland's vehicle was situated across the road facing a southerly direction. He rejected the 1st appellant's evidence that Mr Boreland's vehicle came to that position in obedience to a signal from a police officer and was stationary at the material time. He indicated that the 1st appellant had not impressed him as a reliable witness and that the evidence that Mr Boreland's vehicle was stationary when the accident occurred was contradicted by the scuff marks. He accepted that the scuff marks indicated that Mr Boreland's vehicle was in motion at the time, which supported the 2nd respondent's evidence.

[28] The learned trial judge found that Mr Boreland, having parked on the nearside of already parked vehicles, drove out from this position and into the path of the 2nd respondent's approaching vehicle. The learned trial judge found that Mr Boreland was under a duty of care to ensure that the way was clear, before proceeding to enter the roadway from that parked position, intending to go across the lane for traffic travelling from Saint Mary. He opined that from that parked position, Mr Boreland "created a double optical impairment: his view of the oncoming traffic from Ocho Rios was obstructed and

the view of his vehicle was equally obstructed to the drivers approaching from the direction of Ocho Rios". He found that Mr Boreland, in proceeding as he did, "displayed a level of competence well below that expected of the ordinarily competent driver" and was clearly negligent.

[29] The learned trial judge accepted that the 2nd respondent drove partially on the right-hand side of the road as he approached the place where the accident had occurred. He stated that, having seen the 2nd respondent in the witness box, he accepted the reason given for doing so and that there was no other reason apparent on the evidence. He considered the explanation given for doing so as being, "to avoid the happenstance of a door opening into his path". He found this explanation to be entirely reasonable. The learned trial judge opined that this showed that the 2nd respondent was keeping a proper lookout and encroaching the right lane, in these circumstances, did not, by itself, make him negligent.

[30] The learned trial judge recognised that, on the facts, there was no other vehicle traversing the roadway at the time the 2nd respondent encroached upon the opposite side. He acknowledged that this manner of driving was in breach of the Road Code. However, he found that this breach did not make the 2nd respondent guilty of negligence. He found support for this position in the case of **Nuttall v Pickering** [1913] 1 KB 14. At paragraph [30] of his reasons for judgment, he had this to say about the case:

> "In the judgment of Lord Alverstone C. J. the essence of the offence is not allowing free passage which is predicated upon the presence of other vehicles wishing to pass and is prevented from doing so on account of the vehicle in front not keeping to its left. He declared, at page 16, that on the [facts], 'it was impossible to hold that the appellant committed the offence'. The Chief Justice went on to say '[i]t has been laid down over and over again that in the absence of other traffic the driver of a vehicle is entitled to go on any part of the road that he wishes to'. Channel J was of the same opinion, '[w]here there is no other traffic on the road it is not an offence for the driver of a motor vehicle to be in the middle or on the off side of the road'."

[31] The learned trial judge found that, with no other vehicle on the road at the time, when the 2nd respondent came upon the vehicles parked on the soft shoulder, he had every right to encroach on the off side of the road, for the sake of caution, in the event a door opened in his path. He opined that this fact, by itself, did not make the 2nd respondent a negligent driver, but rather, demonstrated the skill and care expected of the reasonable and prudent driver.

[32] The learned trial judge further found that although the 2nd respondent was keeping a proper lookout, it was virtually impossible for him to have seen Mr Boreland's vehicle emerging from the soft shoulder beyond another parked vehicle. He reasoned that having regard to the place from which Mr Boreland's vehicle emerged, it would have required extraordinary foresight from the 2nd respondent to guard against the possibility of danger created thereby. Further, he found that it would not be reasonable to have expected any more evasive action than braking, indicated by the skid marks.

[33] In conclusion, the learned trial judge stated at paragraph [33]:

> "So then, it was Mr Boreland who created a dangerous situation in seeking to enter the roadway from a position which obscured his view of traffic approaching from the direction of Ocho Rios. Having created that situation, he was obliged to guard against it instead of recklessly driving across the road in the direction of Ocho Rios. In that endeavour, he was the sole cause of the resulting motor vehicle accident which, unfortunately, resulted in his death."

The appeal and counter-notice of appeal

[34] On 11 August 2015, the 1st and 2nd appellants filed notice and grounds of appeal, in which they challenged the judgment on the following grounds:

> "a. The learned trial Judge erred in finding the [2nd respondent] as a credible witness.
>
> b. The learned trial Judge failed to accord the proper weight to the evidence of Woman Sergeant N. Lewis who was deemed an expert witness and whose

Reconstruction Report was tendered into evidence as an expert report.

c. The learned trial Judge's finding that the [2nd respondent] was not speeding was not supported by the evidence and said was made on [inference] drawn from an aspect of the [2nd respondent's] evidence and not any direct evidential basis.

d. The learned trial Judge erred in rejecting the objective findings of the expert witness Woman Sergeant N. Lewis."

[35] On 5 February 2019, the 3rd respondent filed its counter-notice and grounds appeal. The grounds were as follows: -

"**Ground 1**: That the learned Judge erred in fact in discounting [the 1st appellant's] evidence that Mr. Boreland came to be in the position he did because he was signalled by a police officer. [The 2nd respondent] in his evidence corroborates the fact that there were police officers that he saw before the collision. He further asserted that that [sic] the scene of the accident was a police check point.

Ground 2: The learned Judge erred in accepting [the 2nd respondent's] evidence that Mr. Boreland drove from between two vehicles. This amounts to speculation as [the 2nd respondent's] evidence does not indicate that he saw Mr. Boreland driving out.

Ground 3: The learned Judge erred in finding that Mr. Boreland only, was under a duty of care. He did not take account of the fact that [the 2nd respondent] in his evidence stated that he was coming from a party at which he was drinking Appleton Red Rum and Red Bull which could have impaired his sensibilities; or that [the 2nd respondent] in his evidence said that there were other vehicles before him. He therefore knew that other vehicles traversed this particular road at the particular time of morning.

Ground 4: The learned Judge erred in accepting that driving on the incorrect side of the road is against the rules of the road but, however, does not by itself make [the 2nd respondent] guilty of negligence.

> **Ground 5**: The learned Judge erred in fact in finding that [the 2nd respondent] encroached on the offside of the road for the sake of caution in the event a door was opened in its path. The Judge is imputing to [the 2ndrespondent] action that would not make him negligent.
>
> **Ground 6**: The Judge erred in fact in accepting that braking was the only evasive action that could be taken. If [the 2nd respondent] was driving at a reasonable speed and with due care and caution for other road users he would have reduced his speed especially having knowledge of the fact that this is a usual police check point. And had he been travelling at a reasonable speed he could have changed lane so as to avoid a collision.
>
> **Ground 7**: The Judge erred in fact in not giving greater weight to the expert evidence of Inspector Lewis.
>
> **Ground 8**: The Judge erred in fact that Mr. Boreland was the sole cause of the motor vehicle accident." (Emphasised and underlined as in original)

Submissions

The 1st and 2nd appellants' submissions

[36] Miss Renae Barker, on behalf of the appellants, submitted that the 2nd respondent's credibility was of paramount importance to the determination of liability. She indicated that there were glaring inconsistencies in his testimony with regard to whether he had seen Mr Boreland's motor vehicle before the collision, the point of impact and the location of the damage to Mr Boreland's vehicle. She stated that the 2nd respondent could not assist the court in determining how the collision occurred, as he did not see Mr Boreland's vehicle, prior to the collision and entering the roadway. Nonetheless, his evidence relating to where the accident occurred, factored heavily in the learned trial judge's determination of liability (as seen in paragraph [32] of his reasons for judgment).

[37] Miss Baker also submitted that the learned trial judge erred when he failed to consider whether the 2nd respondent's speed was a contributory factor to the collision. She further contended that the learned trial judge's finding that the 2nd respondent was not speeding, was not supported by the evidence, and was made on an inference drawn

from an aspect of the 2nd respondent's evidence. She pointed to Inspector Lewis' report which indicated that the speed of deceleration of the 2nd respondent's motor truck was 47 kmph. Counsel argued that Inspector Lewis' failure to specifically identify the role of speeding in the collision, was not an indication that she had completely excluded it as being among the causes of the collision. Additionally, she contended that, on the face of the evidence, the 2nd respondent's speed inhibited him from stopping, even after pressing his brakes. As a consequence, the 2nd respondent's speed, prior to the collision, was of utmost relevance, she said, because this would have impacted his ability to stop in a timely manner.

[38] Counsel submitted that if the learned trial judge had accorded the proper weight to the objective evidence of Inspector Lewis as to the width of the roadway, he would not have drawn the inference that the 2nd respondent had good reason to encroach on the other side of the road. She noted that Inspector Lewis' evidence as to the width of the road, differed substantially from that of the 2nd respondent. In her view, the respondent deliberately provided an inaccurate estimate of the roadway, in an attempt to convince the learned trial judge, that he had entered the incorrect driving lane, to avoid impacting vehicles parked on the soft shoulder (implicitly he would be at a greater risk of doing so at a width of 12 feet rather than at any greater measurement).

[39] Counsel further submitted that no reasonable explanation had been given by the 2nd respondent as to why he had encroached onto the incorrect side of the road, given the objective findings by the expert (Inspector Lewis) pertaining to the width of the road. She contended that the presence and measurements of the skid marks moving from right to left, indicated that the 2nd respondent was on the wrong side of the road, and was engaged in overtaking vehicles travelling ahead of him, in his lane of travel, and not vehicles that had been parked on the soft shoulder, as he had led the court to believe. Counsel posited that he was in the act of overtaking these vehicles, which were ahead of him and some distance ahead of Mr Boreland's vehicle, when he came upon Mr Boreland's vehicle, which was poised in the roadway to complete its turn to the right. On seeing Mr

Boreland's vehicle, counsel argued that the 2nd respondent jammed at his brakes and skidded into the right side of Mr Boreland's motor vehicle. The learned trial judge would have therefore erred in arriving at the conclusion that the 2nd respondent's encroachment on the right side of the road was to avoid vehicles parked on the soft shoulder.

[40] It was counsel's submission also, that the learned trial judge had failed to accord proper weight to the evidence of Inspector Lewis. She stated that where an expert witness could assist the court on matters regarding measurements and the like, the expert's evidence ought to be given more weight than that of a lay witness bearing stark dissimilarity. Further, she submitted, expert witnesses provide more than reliable evidence as they are bearers of objective evidence. Counsel relied on observations of Laddie J in the case of **Cala Homes (South) Ltd and others v Alfred McAlpine Homes East Ltd** [1995] EWHC 7 (Ch) in support of that contention. She also indicated that she was guided by the principles stated in **West Indies Alliance Insurance Co Ltd v Jamaica Flour Mills Limited** [1995] UKPC 35, in particular, Lord Hutton's endorsement of comments made by Rattray P in the Court of Appeal (although the judgment itself was not shared with the court and the citation given was incorrect). She argued that, had the learned trial judge accorded proper weight to the evidence of Inspector Lewis and accepted her conclusions, he would have found that the 2nd respondent was indeed negligent and therefore liable.

[41] In all those circumstances, she argued, that the learned trial judge had arrived at conclusions, on the 2nd respondent's evidence, which were plainly wrong. She submitted that this court could correct the errors in factual findings of the court below. In support of that contention, counsel relied on **Eurtis Morrison v Erald Wiggan and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 56/2000, judgment delivered on 3 November 2005 and **Clarence Royes v Carlton Campbell and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2002, judgment delivered on 3 November 2005.

The 3rd respondent's submissions on the counter-notice of appeal

[42] Mrs Geraldine Bradford, counsel for the 3rd respondent, prefaced her submissions by stating that the court was being asked to determine that:

> "1. The injuries of the 1st and 2nd [appellants] were not caused by the negligence of the [3rd respondent] [Mr] Boreland solely.
>
> 2. In the alternative, that the Court finds that the 1st, 2nd and 3rd [respondents] were negligent in causing the accident and are jointly liable.
>
> 3. Damages ought not to be awarded to the 1st and 2nd [appellants] against the 3rd [respondent].
>
> 4. In the alternative that the 1st and 2nd [respondents] contributed to the accident and damages should be awarded against them proportionately.
>
> 5. That the findings of The Honourable Mr Justice Evan Brown were demonstrably wrong."

[43] It was counsel's submission that the learned trial judge erred in rejecting the 1st appellant's evidence that Mr Boreland came to be at the centre of the roadway because he was signalled by a police officer to do so, and had erred too, in discrediting him as a witness. She submitted that the 2nd respondent, in his evidence, corroborated the fact that there were police officers at the scene of the collision and that he saw them before the collision. It was therefore foreseeable, she submitted, that the police officers would have indicated to motorists when they were free to move along and re-enter the roadway.

[44] It was also counsel's submission that the learned trial judge failed to give some latitude to the 1st appellant's inconsistent statements, which she posited could be attributed to faulty recollection, having regard to the effluxion of time. She contended that the learned trial judge also failed to consider the fact that a non-driver or passenger would consider a vehicle to be stationary, notwithstanding the possibility that the 'park gear' was not engaged, which could account for the rolling of the vehicle and the resultant scuff marks.

[45] Counsel submitted that the learned trial judge erred in accepting the 2nd respondent's evidence that Mr Boreland drove out from between two vehicles, in that, it amounted to speculation, as the 2nd respondent's evidence does not indicate that he saw Mr Boreland driving out. Counsel pointed the court to page 71, lines 14 to 17 of the transcript, where the 2nd respondent, in indicating where he saw Mr Boreland's vehicle said: "like I **think** it came out between in the middle of the two vehicles because there was an SUV and I **think** there was like a car" (emphasis supplied by counsel). It was counsel's contention that, from this bit of evidence, it was clear, that the 2nd respondent was not absolutely certain as to the position of Mr Boreland's vehicle.

[46] Counsel submitted that the duty of care rests with all road users to keep a proper lookout, have due regard for other users of the road, to stop, slow down or swerve or, in any other way, to stop, to manage or control the motor vehicle so as to avoid a collision. She argued that, in determining the issue of negligence, the law places a duty of care on all road users. She submitted that the law is clear as to what is required in establishing this duty and referred to the well-known authority of **Donoghue v Stevenson** [1932] AC 562.

[47] Counsel also cited section 51(2) of the Road Traffic Act which states:

> "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."

[48] Counsel further relied on **Donohoe v Killeen** [2013] IEHC 22, stating that it is authority for the proposition that where a complete and proper lookout is kept by a motorist, then evasive action can be taken, if not, it results in a degree of fault on the parties. She referred to **Baker v Market Harborough Industrial Cooperative Society Ltd; Wallace v Richards (Leicester) Ltd** [1953] 1 WLR 1472, where Denning LJ held that, even assuming that one of the vehicles was over the centre line and thus to

blame, the absence of any avoiding action by the other vehicle, made that vehicle also to blame. Once both were to blame, and there was no means of distinguishing between them, the blame should be cast equally on each.

[49] Counsel reminded the court of certain aspects of the evidence at trial and the qualifications and experience of Inspector Lewis. She submitted that, on the evidence, both drivers had a duty of care and ought to have been driving in a manner so as to avoid the collision. They had both failed to exercise this duty and so contributed to the collision. In support of this contention, she highlighted the following:

1. The learned trial judge had recognised, during the cross-examination of the 2nd respondent, that he had admitted to having driven 'partially' on the "opposite side" of the road.
2. The fact that a door may be opened out into the road does not require an unnecessary encroachment on the wrong side of the road. The learned trial judge was therefore imputing to the 2nd respondent, an action that would not make him negligent.
3. The learned trial judge failed to consider that if the 2nd respondent was driving at a reasonable speed, and with due care and caution for other road users, he could have reduced his speed, especially since he said that he knew that the area was a usual police check point. Driving at a reasonable speed would have allowed him to change lanes, swerve or take other evasive action to avoid the collision.
4. The 2nd respondent had said in his evidence that there were other vehicles travelling before him. He therefore knew that other vehicles traversed this particular road at the particular time of the morning.

5. Counsel pointed to the evidence from the 2nd respondent about what he had had to drink at the party. She contended, in reliance on **Gallagher v McGeady** [2013] IEHC 100, that the learned trial judge did not consider the fact that the 2nd respondent's consumption of alcohol could have impaired his sensibilities resulting in the accident.

[50] In making submissions on the issue of contributory negligence, counsel referred to **Hummerstone and another v Leary and another** [1921] 2 KB 664, **Davies v Swan Motor Co (Swansea) Ltd and another** [1949] 2 KB 291 and **Natalie Gray v Donald Pryce and Noel Newsome** [2015] JMSC Civ 118. She submitted that, on the strength of these authorities, this court should look at the facts that caused the damage that was suffered and consider who was liable for causing the damage. She contended that it was primarily the 2nd respondent who caused the collision, but if Mr Boreland was found to have contributed, he had exercised sufficient caution, such that, liability should be apportioned 70:30, the greater portion being that of the 2nd respondent.

[51] In all the circumstances, counsel argued that there should have been a finding of negligence on the part of the 2nd respondent, as the duty of care arose, and that duty was breached causing harm to the appellants. Accordingly, the learned trial judge was plainly wrong when he relied on the observations of the court in **Nuttall v Pickering**, in support of his finding that the 2nd respondent was not negligent in his manner of driving.

[52] Learned counsel ended her submissions by urging that this court to reverse the learned trial judge's decision. She relied on the authority of **Watt (or Thomas) v Thomas** [1947] 1 All ER 582 which, she submitted, set out the principle guiding this court on the question of whether there is sufficient justification for reversing the conclusion reached in the court below. The merits of the case, she submitted, favours this court exercising its jurisdiction to instead find that the 1st and 2nd respondents were negligent, as a duty of care arose, which was breached, causing harm to the appellants.

Submissions of the 1st and 2nd respondents in response to the appeal and counter-appeal

[53] Mr Walter Scott, Queen's Counsel for the respondents, reminded this court that, in accordance with the relevant authorities, it is only if this court finds that the learned trial judge was plainly wrong that his decision can be disturbed. Queen's Counsel submitted that when one closely considered the evidence before the court, there was no basis to disturb any of the findings of the learned trial judge in the court below.

[54] It was submitted that the grounds of the notice and counter-notice of appeal were based solely on findings of fact and not on errors of law. He invited the court to have regard to the decision of the Judicial Committee of the Privy Council in **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 303, where the well-known principle that an appellate court does not lightly interfere with a trial judge's finding of fact is laid out.

[55] Queen's Counsel submitted that this court has had the benefit of the learned trial judge's reasons for judgment and the learned trial judge had the benefit of assessing the demeanour of the witnesses and their reactions and expressions under cross-examination. The printed word, without more, it was submitted, was insufficient for this court to arrive at a conclusion that differed from that of the learned trial judge.

[56] It was accepted that the driver of a motor vehicle has a duty to observe and exercise care and skill towards persons using the roadways whom he could reasonably foresee as likely to be affected. It was acknowledged that the common law duty of care is also imposed by statute as seen in portions of section 51 of the Road Traffic Act. However, it was contended that, on consideration of all the evidence, there was no breach of the duty of care on the part of the 2nd respondent, as it was not foreseeable that a motorist would have attempted the manoeuvre which Mr Boreland attempted from the position his vehicle was in. Any reasonable person could have foreseen that a sudden entry into the roadway, in attempting to merge with traffic on the near lane and to execute a 180-degree turn to merge with traffic in the far lane, would not have afforded

an oncoming driver, such as the 2nd respondent, sufficient time to react and take precaution or evasive action, save and except to apply the brakes.

[57] It was submitted that the learned trial judge was correct to find that Mr Boreland was solely in breach of the duty of care in that:

> "a. he failed to ensure it was safe to enter the main road;
>
> b. he failed to see the 2nd Respondent who was already on the road and in the circumstances would have had the right of way;
>
> c. he attempted a reckless and complicated manoeuvre, that is, a U-turn, and generally used the road in a careless manner; and
>
> d. he failed to realize that driving across the road in the manner he did, endangered other road users including the 1st and 2nd Respondents."

[58] In answer to the question of whether contributory negligence arose on the part of the 2nd respondent, Queen's Counsel noted that, from the evidence, it was undisputed that Mr Boreland did not drive out from a minor road nor a premises. He contended that if it were that either was in existence at that location, it could be argued that the 2nd respondent ought to have been on the lookout. Further, he noted, that given that there were police vehicles parked on the side of the road and there were two other motor vehicles which had been stopped by the police, Mr Boreland was on the inside of the vehicles and attempted to make a U-turn from the soft shoulder, which was a manoeuvre no reasonably prudent driver in the 2nd respondent's position could have foreseen.

[59] Mr Scott contended that the 2nd respondent was unimpeded on a straight road and was not negligent merely because he had driven in the right lane. He submitted that the principal duty resided on Mr Boreland, coming from the soft shoulder and making a U-turn. Queen's Counsel further submitted that the 2nd respondent explained his manner of driving, which was accepted by the learned trial judge, and it has not been demonstrated that he was plainly wrong to do so.

[60] Queen's Counsel submitted that, taken as a whole, the evidence of the 1st appellant is questionable at best. He highlighted the following as inconsistencies between his witness statement and his evidence at trial:

(i) Instead of seeing the flashing lights of three vehicles, he heard only the revving of engines.

(ii) He saw two vehicles and then a third with no explanation as to the lapse of time in between.

(iii) He did not see the police officers signal the driver of the Toyota Tundra (the 2nd respondent) to stop.

[61] Mr Scott, with regard to the issue of the 2nd respondent's "overtaking", submitted that the 2nd respondent was not overtaking in the strict sense, but was attempting to manoeuvre around obstructions, as parked vehicles were not vehicles in motion. Queen's Counsel pointed the court to section 51(3)(c) of the Road Traffic Act which defines overtaking as "including passing or intending to pass another vehicle proceeding in the same direction".

[62] Further, Mr Scott submitted, were the 2nd respondent considered to be overtaking, his doing so would not have been negligent, as there were no vehicles approaching from the opposite direction and the only prohibition when overtaking is set out in section 51(1)(g) of the Road Traffic Act, which states that a motor vehicle "shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead". The evidence, counsel submitted, was that the roadway was, at the time, straight, clear, and unobstructed.

[63] It was foreseeable, counsel submitted, that following the "overtaking" of the vehicles, the 2nd respondent would have merged in his correct lane once he had cleared the final vehicle which was what he was properly in the process of doing when he observed Mr Boreland's vehicle in his path.

[64] Queen's Counsel ended the submissions on this issue by asking the court to uphold the findings of the learned trial judge that the 2nd respondent was not negligent, and that the accident occurred solely because Mr Boreland drove into the path of the 2nd respondent.

[65] On the issue of the learned trial judge's treatment of the evidence from Inspector Lewis, Mr Scott submitted that contrary to the complaints in the grounds of appeal, the learned trial judge had placed exceptional reliance on the findings of the expert. Queen's Counsel noted that the learned trial judge referred to the observations and opinion offered by Inspector Lewis especially in arriving at his significant finding that the accident occurred in the middle of the road and, at the time, Mr Boreland's vehicle was in motion, as evidenced by the scuff marks that she had noted and her explanation of them. Queen's Counsel submitted that the conclusion arrived at by the expert based on her re-construction of how the accident had occurred was based on her opinion which was not grounded in law. In any event, it was Queen's Counsel's submission that the learned trial judge was not obliged to accept the conclusion.

[66] Queen's Counsel ultimately invited the court not to lose sight of the fact that there was an ancillary claim before the learned trial judge and that although counsel for the 3rd respondent was present at the trial, she did not participate, but accepted that she was only watching.

The issues

[67] It seems to me that the grounds in both the notice and counter-notice of appeal raise the following issues for consideration:

(i) Whether the learned trial judge erred in his findings of fact which led him to conclude that the 2nd respondent was not negligent and therefore not liable (grounds (a) and (c) of the notice of appeal and grounds (1), (2), (3), (5) and (6) of the counter-notice of appeal).

(ii) Whether the learned trial judge erred in law in accepting that although driving on the incorrect side of the road is against the rules of the road, it did not make the 2nd respondent guilty of negligence (ground (4) of the counter-notice of appeal).

(iii) Whether the learned trial judge erred in his treatment of the evidence of the expert Inspector Lewis (grounds (b) and (d) of the notice of appeal and ground (7) of the counter-notice of appeal).

(iv) Whether there was contributory negligence (ground (8) of the counter-notice of appeal).

Issue (i): Whether the learned trial judge erred in his findings of fact which led him to conclude that the 2nd respondent was not negligent and therefore not liable (grounds (a) and (c) of the notice of appeal and grounds (1), (2), (3) (5) and (6) of the counter-notice of appeal).

[68] The approach that this court should take on an appeal from findings of fact of a trial judge, sitting without a jury, is well-settled. The Privy Council recently restated the principle in **Ming Siu Hung and others v J F Ming Inc and another** [2021] UKPC 1. Lord Briggs, writing on behalf of the Board, had this to say:

> "20. It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties' dispute is not rendered ineffective by undue appellate activism. The general reasons for appellate restraint are well summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, para 114, as follows:
>
> > '114. Appellate courts have repeatedly been warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled

> to do so. This applies not only to findings of primary fact, but also to evaluation of those facts and to inferences to be drawn from them… The reasons for this approach are many. They include
>
> > i) The expertise of a trial judge is in 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 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.'"

[69] Ultimately, this court must recognise that a trial judge has the benefit of seeing the witnesses and thus is better able to assess them and consider the evidence as it emerged. We will be reluctant to interfere with a trial judge's findings of fact in circumstances where the findings had evidence to support them or were not based on a misunderstanding of the evidence presented. However, where the conclusion reached was one which no reasonable judge could have reached having had the advantage of seeing and hearing the witnesses, this court will undoubtedly have to interfere.

Ground (a) of the notice of appeal and ground (2) of the counter-notice of appeal

[70] In ground (a) of their notice of appeal, the appellants fault the learned trial judge for accepting the 2nd respondent as a credible witness. The appellants framed their complaint in this ground largely on the question of whether the 2nd respondent could be believed when he said he did not see Mr Boreland's vehicle before it drove from the soft shoulder onto the road. This, it was submitted, would be a glaring inconsistency as the point of impact was found by the learned trial judge to be the centre of the roadway. The appellants are seemingly suggesting that for the point of impact to be at the centre of the roadway, Mr Boreland's motor vehicle must have entered the roadway prior to the approach of the 2nd respondent's motor vehicle and, therefore, should have been seen by the 2nd respondent.

[71] The 1st appellant had testified that Mr Boreland had stopped on the inside of the police vehicles. The learned trial judge did not accept the 1st appellant's evidence that Mr Boreland's vehicle was stationary when the accident occurred because it was contradicted by the presence of scuff marks seen by Inspector Lewis and which she stated in her report indicated that the vehicle was in motion. In the absence of evidence of the distance and speed at which Mr Boreland travelled to the point of impact but based on the evidence of the position of Mr Boreland's vehicle, Mr Boreland would have taken a short time to cover the distance between where he was parked and the centre of the road where the collision had taken place. With Mr Boreland moving towards the centre of the roadway to make the U-turn, and the 2nd respondent executing the manoeuvre which had him driving on to the right side of the road before returning to his correct side (the left side), it seems to me, that the learned trial judge was not plainly wrong for finding that, even with keeping a proper lookout, it could have been possible for the 2nd respondent not to see Mr Boreland before he entered the roadway, especially with the presence of other motor vehicles along the soft shoulder.

[72] In my view, there was no inconsistency with the fact that the 2nd respondent stated that he did not see Mr Boreland's vehicle when it drove out from the soft shoulder

and the fact that the learned trial judge found that the accident happened in the centre of the roadway.

[73] In his reasoning, the learned trial judge demonstrated an appreciation of the fact that the two bits of evidence were consistent. At paragraph [32] of his reasons for judgment, he stated:

> "[32] Accepting that the skid marks were left by the [2nd respondent's] vehicle, it is clear that [the 2nd respondent] saw Mr Boreland's vehicle as he himself was returning to the left lane. Hence, the point of impact was in the centre of the road. Although [the 2nd respondent] was keeping a proper lookout, it was virtually impossible for him to have seen Mr Boreland's vehicle emerging from the soft shoulder beyond another parked vehicle. Having regard to the place from which Mr Boreland's vehicle emerged, it would have required extraordinary foresight from [the 2nd respondent] to guard against the possibility of danger created thereby. If that is correct, it would not be reasonable to have expected any more evasive action than braking, indicated by the skid marks."

[74] The appellants relied on one aspect of the 2nd respondent's evidence to say that the learned trial judge erred in finding him credible. To my mind, the learned trial judge demonstrated a careful analysis of all the relevant evidence. It cannot be ignored that he had the opportunity to observe the demeanour of 2nd respondent, which would have assisted him in assessing the 2nd respondent's credibility. In the circumstances, I find that the appellants have failed to establish that the learned trial judge was clearly wrong in finding that the 2nd respondent was a credible witness.

[75] I think it convenient to now consider ground (2) of the counter-notice of appeal which is also based on the learned trial judge's assessment of this aspect of the evidence. The 3rd respondent, on this ground, complained that the learned trial judge erred in accepting the 2nd respondent's evidence that Mr Boreland drove from between two

vehicles and contended that such a finding amounted to speculation since the 2nd respondent did not indicate that he saw Mr Boreland drive onto the roadway.

[76] Firstly, I find it necessary to recognise that the learned trial judge did not have any evidence from the 2nd respondent claiming to have actually seen Mr Boreland drive out from between two vehicles. It is therefore not entirely accurate for the 3rd appellant to assert that this was the 2nd respondent's evidence and then to go on to fault the learned trial judge for accepting it.

[77] It was the evidence of the 1st appellant that Mr Boreland had, in fact, driven out from a position of being on the soft shoulder, inside the parked police vehicles. The learned trial judge expressly stated that the 2nd respondent "assumed" that Mr Boreland's vehicle came from between the parked vehicles. In his review of the evidence of the 2nd respondent, at paragraph [18], the learned trial judge stated:

> "… With the assistance of toy cars he demonstrated that the parked vehicles were on the soft shoulder. The first one he came upon was an SUV and the second a car. He assumed Mr Boreland's vehicle came from between the parked vehicles as [sic]had not completed passing the SUV when Mr Boreland drove into his path."

[78] The learned trial judge, in his findings and analysis, stated at paragraph [25] that:

> "[25] On [the 1st appellant's] account, Mr Boreland drove from the nearside of another parked vehicle. [The 2nd respondent] opined that Mr Boreland drove from between two parked vehicles. **The effect of [the 2nd respondent's] evidence was that Mr Boreland drove out from beyond the parked vehicles.** Having parked on the nearside of the already parked vehicle, I accept that he drove from that position into the path of [the 2nd respondent's] approaching vehicle."

[79] Nowhere in the reasons for his decision does the learned trial judge say that he accepted any evidence from the 2nd respondent that Mr Boreland drove from between two vehicles. It was from the learned trial judge's own evaluation of the facts he had

found and the inferences he drew from them, that he came to what seems to me to be the correct conclusion as to where Mr Boreland had driven from. There is, to my mind, no merit in this ground of the counter-notice of appeal.

Ground (c) of the notice of appeal

[80] The basis of the complaint on this ground was that the learned trial judge's finding that the 2nd respondent was not speeding was not supported by the evidence. The only direct evidence as to the speed at which the 2nd respondent was travelling came from him (the 2nd respondent). He testified that he was driving at an estimated speed of 45 kmph in a 60 kmph zone.

[81] In the particulars of claim, the assertion was made that the 2nd respondent had been driving at an excessive speed. In his witness statement, the 1st appellant said that he saw flashes of lights coming up the road and further, that he observed the 2nd respondent's vehicle overtaking other vehicles that the police officers had stopped and slammed into Mr Boreland's vehicle. Indeed, he opined in his witness statement that "it was the driver of the black van [the 2nd respondent] overtaking the parked vehicles who disobeyed the signal of the police, and this caused the accident".

[82] Under cross-examination, the 1st appellant resiled from the assertion that he had seen flashing lights and insisted that he had heard "revving of engines". He also stated that he could not recall the police stopping the 2nd respondent's vehicle and even went on to admit that since he was not the driver, he had no reason to look on the road. When pressed he maintained that he had seen the 2nd respondent's vehicle approaching at an excessive speed. It was not made clear over what distance the 1st appellant would have been able to observe the2nd respondent's vehicle. However, at no point was he invited to give an estimate of the speed at which the 2nd respondent's vehicle was travelling. It seems to me that the evidence of the 1st appellant would not have assisted in making a determination as to whether the 2nd respondent had in fact been speeding.

[83] The other evidence about the possible speed at which the 2nd respondent was travelling was from the reconstruction report and the evidence of its maker, Inspector Lewis. At section 6, paragraph 2 of that report, the following was stated:

> "The [2nd respondent's vehicle] laid down the skid marks based on the examination of the tyres and marks seen on them. As a result, the calculated speed was 47 kph or 27 mph, which is within the speed limit for that section of the Prospect Main Road."

Inspector Lewis went on to accept that that was the speed after the brakes had been depressed, and she agreed that, prior to this being done, the speed would have been greater. She was, however, unable to say how much greater.

[84] The final question asked of Inspector Lewis was on this matter of speeding and the following exchange is recorded at page 106, lines 12-19 of the transcript, as having taken place:

> "Q. From your experience and based on your expertise, and having regard to the damage on the vehicles that you saw, was speed a factor in this matter, was speed a contributory factor?
>
> A. No, I can't conclude that.
>
> Q. You can't conclude that?
>
> A. No."

[85] In his review of the evidence, the learned trial judge rehearsed this bit of evidence, and nowhere in his reasons does he expressly come to a determination as to whether 2nd respondent had been speeding. Indeed, he focused on evidence depicting how the 2nd respondent had been driving, prior to the collision, particularly in relation to the 2nd respondent's encroachment on the right side of the road. I do not think the learned trial judge can be faulted for doing so in the circumstances. To seek to challenge the learned trial judge's decision on the basis that he made a finding that the 2nd respondent was not speeding when he made no such finding, must clearly fail.

Ground (1) of the counter-notice of appeal

[86] The main focus of this complaint was that the learned trial judge erred in rejecting the 1st appellant's evidence that Mr Boreland ended up in the position that he did, in the centre of the road, because he was signalled to do so by the police officer.

[87] The 1st appellant had stated in his witness statement that he saw the police officer signal to Mr Boreland to proceed from where he was parked. He was pressed, under cross-examination, on that assertion and the following exchange took place:

> "Q. Were you looking at the road before your driver drove out?
>
> A. No.
>
> Q. So you didn't see the police in the road signal to your driver?
>
> A. Police -- we were facing that way (indicates) the police was behind of us is so after I get in my car the police was behind me at that time." (See page 32, lines 8-16 of the transcript)

[88] In rehearsing the evidence on this issue, the learned trial judge concluded with the following at paragraph [12] of his reasons for judgment:

> "Asked if he was looking at the road before Mr. Boreland drove out, his first response was, 'I am not really…no, ma'am, I wasn't the driver. I don't have any reason to look on the road'. When the question was repeated, he simply said no. From that platform it was suggested to him that he did not see the police in the road signal to Mr. Boreland. His response was evasive."

To my mind, this was a fair assessment by the learned trial judge of the evidence given by the 1st appellant on the issue.

[89] Indeed, the learned trial judge resolved this issue by rejecting the 1st appellant's evidence in the following terms:

> "[24] I reject [the 1st appellant's] evidence that Mr Boreland's vehicle came to be in that position in obedience to a signal from a police officer and was stationary at the material time. [The 1st appellant] did not impress me as a reliable witness and his evidence that Mr Boreland's vehicle was stationary when the accident occurred is contradicted by the scuff marks. I accept that the scuff marks indicate that Mr Boreland's vehicle was in motion at the time, which supports [the 2nd respondent's] evidence."

[90] It seems to me that the evidence rejected was not limited to the question of whether the police officer had signalled Mr Boreland to proceed but encompassed what may be viewed as the more important issue of whether Mr Boreland's vehicle was in motion at the time of the collision. The learned trial judge satisfactorily demonstrated why he rejected that latter assertion and I think he quite properly did so. In any event, the state of the evidence was such that the learned trial judge was not plainly wrong to have rejected the 1st appellant's evidence that he saw the police officer signal to Mr Boreland to proceed on to the main road.

[91] Ultimately, the learned trial judge took careful note of all the 1st appellant's evidence, and in his review of the evidence, he recognised the inconsistencies in it, examples of which are as follows:

> (1) When taxed in cross-examination, the 1st appellant said that Mr Boreland's vehicle was parked on the inside of the two police vehicles, which were parked bumper to bumper on the soft shoulder. This was a departure from his witness statement where he had asserted that Mr Boreland had parked in front of the two police vehicles. The learned trial judge noted that having said that he could not recall what was said in the witness statement "after reading that portion of his statement, with some reluctance, he admitted having said so".

(2) Although the 1st appellant had stated in his witness statement that he had seen the police officer signal the 2nd respondent to stop, which was disobeyed and the 2nd respondent had proceeded to overtake the parked vehicles and then to collide with Mr Boreland's vehicle, the learned trial judge noted that, under cross-examination, the 1st appellant "admitted that he never saw the police officer signal to the [2nd respondent] the driver of the Tundra to stop".

(3) In his witness statement, the 1st appellant stated at paragraph 7 that:

> "No sooner as I went back in the car… I immediately looked behind and observed flashes of light coming from the directions [Mr Boreland] was coming from…"

The learned trial judge noted that, under cross-examination, the 1st appellant insisted that it was the revving of engines that he had heard and that he had not seen flashing of lights.

(4) The learned trial judge also noted that the 1st appellant "also varied his evidence that he saw three vehicles approaching. The correct version was that he heard the revving of engines coming" (see paragraph [10] of his reasons).

[92] These were in addition to what the learned trial judge found to be his evasive answers about whether the 1st appellant had actually seen the police officer signal to Mr Boreland to proceed from the soft shoulder. In these circumstances, the learned trial judge cannot be faulted for finding that the 1st appellant did not impress him as a reliable witness. Ground (1) of the counter-notice of appeal therefore fails.

Ground (3) of the counter-notice of appeal

[93] This ground was underlined by an assertion that the learned trial judge erred in finding that only Mr Boreland was under a duty of care, having regard to his failure to take account of the fact that the 2nd respondent had given evidence that he was coming from a party where he had had two alcoholic drinks which could have impaired his sensibilities.

[94] I think it is important to note the context in which the learned trial made a reference to a duty of care. He commenced his findings and analysis by indicating that he accepted that the accident occurred in the centre of the road. He also accepted that at the time Mr Boreland's vehicle was positioned across the road. The learned trial judge posited that the answer to the question of how it came to be in that position would be "substantially dispositive of the question of who was the negligent driver".

[95] It was against that background that the learned trial judge considered the evidence of how Mr Boreland came to end up in the position he did, and eventually, had this to say on the matter of the duty of care expected from Mr Boreland:

> "[26] Entering the roadway from the parked position, especially since he intended to go across the lane for traffic travelling towards St. Mary, Mr Boreland was under a duty of care to ensure that the way was clear before proceeding..."

This, to my mind, was, in the circumstances of this case, an entirely correct statement.

[96] It is however true that the learned trial judge did not use the expression "duty of care" when he went on to consider the driving of the 2nd respondent. However, he accepted that the 2nd respondent drove partially on the right side of the road and accepted the explanation for doing so. He ultimately concluded that the 2nd respondent had demonstrated the skill and care expected of the reasonably prudent driver.

[97] There was no sufficient basis for the learned trial judge to have concluded that the fact that the 2nd respondent had admitted to having had two drinks (Red Rum and Red

Bull) meant that his senses were impaired. Further, to say that the inevitable conclusion was that the 2nd respondent had breached his duty of care, in those circumstances, is, to my mind, unjustified.

[98] It would be incorrect to say that because the learned trial judge had used the expression duty of care when assessing Mr Boreland's manner of driving he had found that only Mr Boreland was under a duty of care. He was fair in his assessment of the evidence of the driving of both men and it has not been shown that he reached a wrong conclusion which ought to be disturbed. Accordingly, this ground was without merit and must also fail.

Grounds (5) and (6) of the counter-notice of appeal

[99] These two grounds can conveniently be dealt with together since, in my view, they are challenging the learned trial judge's acceptance of the 2nd respondent's explanation as to why he had encroached on the right side of the road and why he was only able to depress his brakes as an evasive action. I think that it is first useful to bear in mind that, quite simply, the learned trial judge was entitled to accept the evidence of the 2nd respondent that he found credible.

[100] The learned trial judge stated that having seen the 2nd respondent in the witness box, he accepted the reason for driving on the right side of the road. He noted that there was no other reason apparent on the evidence. He found the 2nd respondent's explanation of driving on the right side to avoid the happenstance of a door opening in his path entirely reasonable. He noted that, on the facts, there was no other vehicle traversing the roadway at the time the 2nd respondent encroached on the opposite lane.

[101] In relation to the second issue, under cross-examination, the 2nd respondent stated:

> "Q. And when you first saw the motor car that you said drove off -- drove out on you, when was the first time you saw the motor car, how far would you say your vehicle was when you first saw it?

A. When I saw it, it was right in the road I hit it. I couldn't do anything, I just press the brake.

HIS LORDSHIP: How far ahead of you?

WITNESS: Right in front of me. I don't know. I just press the brake, sir." (See page 65, lines 5-15 of the transcript)

[102] The learned trial judge accepted the evidence of the 2nd respondent and could not have been plainly wrong to find that there was no other evasive action than braking, open to the 2nd respondent at the time. As indicated, the learned trial judge stated that:

> "[32] … Having regard to the place from which Mr Boreland's vehicle emerged, it would have required extraordinary foresight from [the 2nd respondent] to guard against the possibility of danger created thereby. If that is correct, it would not be reasonable to have expected any more evasive action than breaking, indicated by the skid marks."

There was no discernible mistake in the learned trial judge's evaluation of the evidence to justify any finding that he had erred in the manner complained of. In my view, grounds (5) and (6) of the counter-notice of appeal must fail.

Issue (ii): Whether the learned trial judge erred in law in accepting that although driving on the incorrect side of the road is against the rules of the road, it did not make the 2nd respondent guilty of negligence (ground (4) of the counter-notice of appeal).

[103] The learned trial judge relied on the case of **Nuttall v Pickering** to arrive at the conclusion he did. At paragraphs [29] and [30] of his reasons for judgment, he stated:

> "[29] That failure, however, does not by itself make [the 2nd respondent] guilty of negligence. **Nuttall v Pickering** [[1913] 1 KB 14], is authority for the proposition that driving on the incorrect side of the road, even where it is made an offence, will only make the driver culpable if the circumstances warrant. In **Nuttall v Pickering**, a wagon was being driven beyond the centre line so much so that there was not enough room for a motor car to pass it on its off side. The motor car passed on the wagon's near side, upon the urging of the wagon driver. The latter was subsequently convicted

> under the Highway Act for not keeping to the left or near side of the road for the purpose of allowing free passage of other vehicles.
>
> [30] In the judgment of Lord Alverstone C.J. the essence of the offence is not allowing free passage which is predicated upon the presence of other vehicles wishing to pass and is prevented from doing so on account of the vehicle in front not keeping to its left. He declared, at page 16, that on the fact, 'it was impossible to hold that the appellant committed the offence'. The Chief Justice went on to say '[i]t has been laid down over and over again that in the absence of other traffic the driver of a vehicle is entitled to go on any part of the road that he wishes to'. Channel J was of the same opinion, '[w]here the is no traffic on the road it is not an offence for the driver of a motor vehicle to be in the middle or on the offside of the road'."

[104] In **Leighton Samuels v Leroy Hugh Daley** [2019] JMCA Civ 24, this court considered an issue like this and Foster-Pusey JA, writing on behalf of the court, stated:

> "[67] … As the relevant authorities have shown, the mere fact that an individual breaches the Road Traffic Act or the rules of the road, does not, inexorably, mean that the person should be held liable in the event of the occurrence of an accident."

[105] She went on to consider the case of **Powell v Phillips** [1972] 3 All ER 864 and, at paragraph [70], made the following observation:

> "Stephenson LJ commented on section 74(5) of the Road Traffic Act 1960 (UK), which is in pari materia with section 95(3) of the Act In delivering the main judgment of the court, the judge stated, at page 868, paragraphs b-d:
>
> > 'What then was the effect of those breaches in law and in fact? In law a breach of a Highway Code has a limited effect, as the wording of section 74(5) shows… It is, however, clear that a breach creates no presumption of negligence calling for an explanation, still less a presumption of negligence making a real contribution to causing an accident or injury. The

> breach is just one of the circumstances on which one party is entitled to rely in establishing the negligence of the other and its contribution to causing the accident or injury. Here it must be with all the other circumstances including the explanation given by Mr Wakeman. It must not be elevated into a breach of statutory duty which gives a right of action to anyone who can prove that his injury resulted from it.'"

[106] For completeness, it is necessary to note that section 95(3) of the Road Traffic Act provides that:

> "The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings."

[107] Given this clear pronouncement on the applicable principle, I am satisfied that the learned trial judge was entirely correct in his finding that driving on the incorrect side of the road did not of itself make the 2nd respondent guilty of negligence. This ground therefore fails.

Issue (iii): Whether the learned trial judge erred in his treatment of the evidence of the expert Inspector Lewis (grounds (b) and (d) of the notice of appeal and ground (7) of the counter-notice of appeal).

[108] The complaint on these grounds is that the learned trial judge did not accord the weight he should to Inspector Lewis' evidence, and further, had he done so, he would not have found the 2nd respondent's reason for encroaching on the right side of the road a reasonable one, given the width of the road.

[109] As an expert witness, Inspector Lewis was expected to provide "independent assistance to the court by way of objective unbiased opinion in relation to matters within [her] expertise" (see rule 32.4(2) of the Civil Procedure Rules). However, it is incontrovertible that the learned trial judge should have regard to the evidence in so far

as it could assist him in determining the issue of liability but was not obliged to accept the opinion of the expert witness or to act upon it.

[110] A careful appreciation of the learned trial judge's reasons shows that he had regard to aspects of Inspector Lewis' evidence. It was her observation of scuff marks and her explanation of them that led him to find that Mr Boreland's vehicle was not stationary when the collision occurred. It was his acceptance of her observation of the location of skid marks and her explanation of the significance of those marks that led him to find that the 2nd respondent had encroached on the right side and was returning to the left when he saw Mr Boreland's vehicle emerging and was forced to depress his brakes. These were two significant findings made by the learned trial judge, based on the evidence of the expert, that clearly assisted him to resolve the matter in the way that he did. It seems to me wholly unmeritorious to say that he failed to accord proper weight to her evidence. Grounds (b) of the notice of appeal and (7) of the counter-notice of appeal therefore fail.

[111] The conclusion of the expert was as follows:

> "1. Base [sic] on all the evidence gathered, the Toyota Tundra motor truck [the 2nd respondent's vehicle] was travelling easterly along the Prospect main road via the right lane. While in the process of changing to the left lane, met an obstacle which was the Toyota Corolla motorcar positioned in a southerly direction. As a result, it collided into the right side of the motorcar.
>
> 2. I therefore conclude that the driver of the Toyota Tundra motor truck [the 2nd respondent], failed to obey the road marks for that section of the Prospect main road, which indicated that vehicles must travel in the left lane only, when travelling easterly towards Tower Isle. The driver however went to the right of the road disobeying the continuous white line resulting in a collision."

[112] It seems to me that the expert was here giving an opinion of how the accident had happened, as she was properly entitled to do, and which the learned trial judge was entitled to accept or reject. It was the learned trial judge's remit to determine if the

manner in which the 2nd respondent's vehicle was driven and the subsequent collision, was due to the 2nd respondent's negligence, thus making him liable for the damages flowing from the collision. This was not a matter for the expert to determine, nor was she expected to do so.

[113] In my view, the learned trial judge largely accepted the expert's opinion of how the collision had occurred. The 2nd respondent had indeed been travelling on the incorrect side of the road and the collision had occurred in the middle of the road when he was attempting to return to his correct side of the road. The learned trial judge, however, accepted the explanation given by the 2nd respondent for this manner of driving. Having considered all the evidence, the learned trial judge found that Mr Boreland's vehicle, which the expert described as being the obstacle, was at fault for having ventured into the road in the manner that it did. In these circumstances, I do not think it is correct to say that the learned trial judge had totally rejected the objective findings of the expert. He accepted those parts of it that assisted him in determining who was liable. Accordingly, there was also no merit in ground (d) of the notice of appeal.

Issue (iv): Whether there was contributory negligence (ground (8) of the counter-notice of appeal).

[114] I think that the necessary starting point for a discussion on this issue is an appreciation of what is contributory negligence. For the purposes of this matter, it is sufficient to note the definition given by Lord Denning LJ in the case of **Froom v Butcher** [1975] 3 All ER 520, at page 524:

> "Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is man's carelessness in breach of duty to others. Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself. See *Jones v Livox Quarries Ltd* [1952] 2 QB 608]."

[115] In arriving at the conclusion that Mr Boreland was solely responsible for the collision, the learned trial judge found that it was Mr Boreland who had created a dangerous situation in seeking to enter the roadway from a position which obscured his view of traffic approaching from the direction of Ocho Rios. He also found that Mr Boreland was under a duty of care to ensure that the way was clear before proceeding. As noted by counsel for the 2nd respondent, the collision occurred at a point where the 2nd respondent would not have foreseen that someone would have been seeking to enter the main road in the manner that Mr Boreland did. As the learned trial judge found, the 2nd respondent took the only evasive action he could when Mr Boreland drove his vehicle across the left side of the road to the middle of the road creating an obstacle. The 3rd respondent failed to demonstrate that the learned trial judge erred in any of his findings of fact and that therefore his conclusion on the issue of liability was wrong.

[116] In the circumstances, as found by the learned trial judge, Mr Boreland was negligent and was, unfortunately, the author of his fate. I am satisfied that the issue of contributory negligence does not arise on the findings of fact as determined by the learned trial judge.

[117] The 3rd respondent also failed to show that the 2nd respondent had failed to take such care as a reasonable man for his own safety and that that failure contributed to the accident and the resultant injuries and loss to himself and the appellants. Accordingly, ground (8) of the counter-notice of appeal must fail.

Conclusion

[118] In my view, there is no basis upon which to interfere with any of the learned trial judge's findings of fact. Further, it has not been demonstrated that the learned trial judge misunderstood or misapplied the law relevant to his determination of liability. I would therefore order that both the appeal and the counter-notice of appeal be dismissed. Finally, with regards to costs in this matter, I would invite written submissions from the parties within 21 days of this judgment.

FOSTER PUSEY JA

[119] I too have read in draft the judgment of P Williams JA and agree with her reasoning and conclusion. There is nothing further that I wish to add.

F WILLIAMS JA

ORDER

1. The appeal and the counter-notice of appeal against the decision of E Brown J delivered on 2 July 2015 are dismissed.
2. The parties are to make written submissions on the costs of the appeal and the counter notice of the appeal within 21 days of the date of this order.