[2013] JMCA Civ 38

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 52/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**DEBBIE POWELL**	**APPELLANT**
AND	**BULK LIQUID CARRIERS LTD**	**1ST RESPONDENT**
AND	**OSMOND PUGH**	**2ND RESPONDENT**
AND	**CARIBIC VACATIONS LTD**	**3RD RESPONDENT**

Mrs Nicole Superville-Hall and Raymond Samuels instructed by Norman O Samuels for the appellant

Ms Tanania Small and Mrs Terri-Ann Gibbs instructed by Livingston Alexander and Levy for the 1st respondent

David Johnson instructed by Samuda and Johnson for the 2nd respondent

Patrick Foster QC and Mrs Camille Wignall-Davis instructed by Nunes Scholefield DeLeon and Co for the 3rd respondent

22, 23, 25, 28, 29, January and 27 September 2013

HARRIS JA

[1] I have read, in draft, the judgment of Brooks JA and fully agree with his reasoning and conclusions therein.

PHILLIPS JA

[2] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusions.

BROOKS JA

[3] On 29 September 1994, when Miss Debbie Powell accepted a ride in a tour bus from an acquaintance, Mr Roderick Ellis, little did she know that the trip from Ocho Rios in the parish of Saint Ann, to Montego Bay in the parish of Saint James, would have ended in tragedy. While traversing the main road at Rose Hall in the parish of Saint James, the tour bus that Mr Ellis was driving crashed into the rear of a parked tractor/trailer rig. Mr Ellis died in the crash and Miss Powell suffered severe injuries as a result of it. Her injuries have caused her significant loss and expense.

[4] She filed a claim against three parties in a bid to recover damages for her injuries and loss. The first defendant to the claim is Bulk Liquid Carriers Ltd (BLC), the owner of the flat-bed trailer into which the bus crashed. BLC's goods were on the trailer at the relevant time. The second defendant is Mr Osmond Pugh, the owner of the tractor-head, to which the trailer was attached at the relevant time. It was Mr Pugh who had parked the tractor/trailer rig at the ill-fated spot. The third defendant is Caribic Vacations Ltd (CVL), the owner of the bus and Mr Ellis' employer. The claim against BLC and CVL was filed on 14 October 1997, whilst that against Mr Pugh was filed on 27 April 2000. All the defendants denied liability, and the consolidated claims came on for trial before Sykes J between September and December 2009.

[5] Among the issues joined during the trial were, firstly whether BLC had any separate responsibility for its trailer while it was attached to Mr Pugh's tractor-head; secondly, whether an employer/employee relationship existed between BLC and Mr Pugh; thirdly, whether Mr Pugh had negligently parked the vehicle at the spot; and fourthly, whether Mr Ellis was acting within the scope of his employment at the time of the crash. Sykes J decided those issues in favour of the defendants and, on 19 March 2010, gave judgment for them. As a result of that decision the learned trial judge found that ancillary claims between BLC and CVL did not arise for consideration.

[6] Miss Powell has appealed against that decision. All three defendants are respondents to Miss Powell's appeal. Neither BLC nor CVL has filed any counter-notice of appeal and they have supported the learned trial judge's decision. As a result, the issues that were raised at the trial remain live before this court. In addition to those issues, Miss Powell has complained that the learned trial judge:

a. acted in such a manner that there is a real possibility that he was biased against her case;

b. erred in refusing an application that he should recuse himself from the trial; and

c. erred by refusing to admit into evidence, a letter penned by an executive of CVL, in respect of Mr Ellis' movements on the day in question, which letter CVL failed to disclose in accordance with court orders.

[7] Mrs Superville-Hall, advanced the arguments for Miss Powell in a commendably organised manner. Learned counsel grouped the several grounds of appeal under four main headings. Although the headings have been expressed below in a slightly different way from the way Mrs Superville-Hall had formulated them, and will be assessed in a slightly different order, they may be identified as follows:

a. Bias

b. Disclosure

c. Vicarious liability for Mr Ellis' actions

d. Liability of Mr Pugh

e. Vicarious liability for Mr Pugh's actions

It is under those headings, and in that order, that this judgment will assess the appeal.

Bias

[8] The essence of Miss Powell's first complaint against the learned trial judge is that his comments at the beginning of the trial indicated a real possibility of bias against her case. Mrs Superville-Hall submitted that this was demonstrated when the learned trial judge indicated that he was of the view that BLC's counsel was correct in submitting that Miss Powell could not prove that Mr Pugh was employed to BLC. According to Mrs Superville-Hall, the learned trial judge, having heard submissions from CVL's counsel (concerning CVL's ancillary claim against BLC), relented and proceeded with the trial "without further comment" on the matter.

[9] According to Mrs Superville-Hall, the learned trial judge's comments on the issue, in his judgment, further justifies the complaint. Learned counsel intimated that those comments indicate that although the learned trial judge proceeded with the trial, he really had not resiled from his stance toward Miss Powell's case. Using language borrowed from Lord Hope of Craighead's judgment in **Porter v Magill** [2000] 2 AC 455, Mrs Superville-Hall submitted that "a fair minded and informed observer, having considered all the facts, would conclude that there was a real possibility that the tribunal was biased". In those circumstances, learned counsel submitted, the learned trial judge ought to have acceded to the application that he should recuse himself. That application was made at the time that he had decided to proceed with the trial. Mrs Superville-Hall was at pains to point out that there is no suggestion being made that the judge was actually biased.

[10] Learned counsel representing each of the respondents resisted these arguments. Ms Small, on behalf of BLC, argued that the papers in the trial bundle before the learned trial judge supported his stance. The papers indicated, learned counsel submitted, that both Mr Pugh and BLC had denied any employer/employee relationship. Yet, Miss Powell, on paper, had not advanced anything that supported an alternative position. Learned counsel pointed out that the learned trial judge made his comments in response to a submission by counsel (not Ms Small) who appeared for BLC at the trial. Ms Small submitted that the question of bias was a fact-specific issue, and that, in the instant case, it cannot be fairly said that, when he made his comment, the learned trial judge

had arrived at a concluded view. She relied on **JSC BTA Bank v Mukhtar Ablyazov** [2012] EWCA Civ 1551, in support of her submissions.

[11] The relevant test in assessing a complaint of bias in respect of a tribunal, was re-stated in **Porter v Magill**. The re-stated test, which has been accepted as representing the law, may be expressed as follows:

> "The [appellate] court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility...that the tribunal was biased." (Paragraphs 102-103)

[12] Lord Hope of Craighead, who fashioned that re-statement, also condensed it somewhat, by saying, at paragraph [103] of his judgment:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[13] That fair-minded and informed observer was invested with additional characteristics by the court in **Gillies v Secretary of State for Work and Pensions** [2006] 1 All ER 731. Lord Hope of Craighead said, in part, at paragraph [17] of his judgment:

> "…The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed . . . that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at.

> It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant."

[14] Against the background of the abovementioned re-statement of the test, Rix LJ, in **JSC BTA Bank**, carried out a comprehensive assessment of the authorities dealing with various scenarios in which a complaint of apparent bias may arise. At several points in his judgment, Rix LJ quoted from decided cases to demonstrate the point that the possibility of bias should not be inferred merely because a judge had expressed a provisional view as to the possible merits of a party's case.

[15] The learned law lord, at paragraph 46 of his judgment, quoted from the judgment in **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 451 in order to place the reasoning in context. The points that he extracted from that judgment, in relation to this issue, were that judges:

a. are sworn to be impartial;

b. have a duty to try cases;

c. are required to bear in mind the need to recuse themselves in the event that they may seem not to be impartial; but

d. should be astute not to encourage parties to believe that they may secure a more favourable tribunal merely by suggesting an appearance of bias against that judge.

[16] At paragraph 49, Rix LJ, quoted Lord Bingham in **Locabail**, in order to make the following point:

> "...The mere fact that a judge, earlier in the same or a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection...."

[17] He reinforced the point by referring, at paragraph 62, to the case of **Morel v France** (2000) 33 EHRR 47, where the court in that case said:

> "…Furthermore, the mere fact that a judge had taken decisions before the trial cannot in itself be regarded as justifying anxieties about his impartiality. What matters is the scope of the measures taken by the judge before the trial."

[18] Those *dicta* are in line with the decision in **Lanes Group plc v Galliford Try Infrastructure Ltd (trading as Galliford Try Rail)** [2012] EWCA Civ 1617; [2012] Bus LR 1184. In that case, Jackson LJ addressed an allegation of apparent bias, made against an adjudicator who had informed the parties of his preliminary position. Jackson LJ said, at paragraph [56] of his judgment:

> "There is nothing objectionable in a judge setting out his or her provisional view at an early stage of proceedings, **so that the parties have an opportunity to correct any errors in the judge's thinking or to concentrate on matters which appear to be influencing the judge**. Of course, it is unacceptable if the judge reaches a final decision before he is in possession of all relevant evidence and arguments which the parties wish to put before him. There is, however, a clear distinction between (a) reaching a final decision prematurely and (b) reaching a provisional

> view which is disclosed for the assistance of the parties." (Emphasis supplied)

[19] Having set out the relevant principles that should guide this court in considering the issue on appeal, it is now necessary to outline "the circumstances which have a bearing on the suggestion that the judge was [possibly] biased". Mrs Superville-Hall disputed the accuracy of the learned trial judge's record of the relevant events, but in the absence of affidavit evidence, it is that record that will inform this analysis.

[20] The learned trial judge's notes of the relevant portion of the trial shows that before the trial commenced on 23 September 2009, learned counsel appearing for Miss Powell, applied for an adjournment of the trial. The application resulted in the case being adjourned to 2:00 pm on that day. The notes of what occurred on resumption state as follows:

> "Further application for adjournment refused. Court told that witness needed by claimant was absent. After enquiry court told that the claimant is present. Court rules that trial begins.
>
> Application for court to recuse itself on basis of bias. Court refuses. No reason advanced except that enquiries made of [counsel appearing for Miss Powell] about establishing the case for the claimant in light of defence and apparent absence of evidence to refute the defences advanced."

Nothing further, in that regard, appears in the notes of the proceedings.

[21] The learned trial judge did, however, speak to the matter in the latter part of his judgment. He described the circumstances in which the issue arose and gave his

reasons for rejecting the application that he should recuse himself. He said at paragraphs 25-29:

> "25. When this matter came on for trial, the court asked [counsel appearing for Miss Powell] how he intended to succeed against BLC in light of the pleadings and witness statements. Learned counsel was of the view that that inquiry by the court was unwarranted because the matter had been set for trial. He even suggested that the court should recuse itself on the grounds of bias. The court did not accept these submissions for these reasons.
>
> 26. It has to be recognised that a judge's powers of case management does not end merely because a case comes up for trial. A judge is still under an obligation to see that the court's resources are utilised efficiently which means that judicial time is not spent on [sic] case which has no real prospect of success.
>
> 27. In the case of ***Evans v James*** [2001] C.P. Rep 36, the trial judge on his own motion raised the issue of whether summary judgment should be granted. On the first day of trial the judge indicated that having read the documents and witness statements concluded that the defendant had no real prospect of successfully defending the claim and entered judgment against the defendant. The defendant appealed. It was conceded that the trial judge had the jurisdiction to make the decision that he did. The Court of Appeal pointed out that had there been rigourous case management the case would not have reached the trial and the weakness of the defence would have been patent. This decision by the English Court of Appeal is [a] reminder that a trial is not Columbus-like voyage of exploration where the litigant hopes to reach the promised land by an unknown route but if given sufficient time he may find some other route to success...."
>
> 28. This court therefore holds that it is always appropriate for any judge having read the documents to question whether a trial ought to proceed if the judge is of the

> view that either party has no real prospect of successfully presenting or resisting the claim. The issue of bias does not arise. It is all about case management and effective use of the public good of judicial time.
>
> 29. The consequence in the case at bar is that Miss Powell is now saddled with costs of two additional defendants **that ought to have been dismissed from the case long ago**." (Emphasis supplied)

[22] In assessing the circumstances as a whole, it would be obvious to the fair-minded and informed observer that the learned trial judge, in making enquiries "about establishing the case for the claimant in light of the defence" was not expressing a confirmed view. The enquiry would, instead, have indicated to that observer that the learned trial judge was, borrowing the terminology from **Lanes Group plc**, giving Miss Powell's counsel "an opportunity to correct any errors in the judge's thinking or to concentrate on matters which appear to be influencing the judge".

[23] The fact that, at the end of the trial and having heard all the evidence, the learned trial judge was of the same opinion as his preliminary enquiry could have suggested, does not mean that he had closed his mind on the issue. This is despite his expressed opinion that two of the defendants, "ought to have been dismissed from the case long ago". A judge's inclination may sway from one side to the other, and back again, as arguments are advanced or evidence is adduced throughout the proceedings. In the instant case, it may fairly be stated that the learned trial judge, having had a response to his enquiry, was convinced to listen to the evidence to determine if his enquiry would have been addressed. It seems that the learned trial judge found, after

hearing all the evidence, that the evidence that he had, at the beginning, thought necessary, was in fact essential, and yet had not been adduced. That does not suggest that he had prematurely reached a final decision on the matter.

[24] Although the learned trial judge was not in error in revealing his thinking to the parties, trial judges finding themselves in similar positions should bear in mind that the parties and their respective counsel have, after completing the case management process, prepared for a witness trial. To be faced, in that context, with the court, of its own motion, suggesting that there should be summary judgment would be more devastating than an adverse decision at the end of a trial. This is not to suggest that plainly unmeritorious cases should be allowed to utilise precious judicial time but a balance must be struck bearing all these issues in mind.

[25] Based on the circumstances of the instant case, the learned trial judge was not in error in refusing to recuse himself. The complaints under this head are unfounded.

Disclosure

[26] Although CVL's failure to disclose a document, in accordance with case management orders, was argued by counsel after the issue of vicarious liability for Mr Ellis' actions, it would be convenient to assess it as an issue before considering CVL's liability. This is because, if the document had been wrongly excluded from evidence by the learned trial judge, it would be appropriate to determine whether its admission would have had any effect on the issue of vicarious liability, or, as Mrs Superville-Hall submitted, would require this court to order a new trial.

[27] The facts giving rise to the issue were that CVL wrote a letter dated 21 November 1995, concerning the case, to its attorneys-at-law. CVL's lawyers, under cover of a letter dated 29 November 1995, transmitted a copy of CVL's letter to Miss Powell's attorneys-at-law. Despite orders of standard and of specific disclosure, as part of the case management process, neither party disclosed the letters.

[28] At the trial, counsel for Miss Powell, during the cross-examination of CVL's sole witness, Mr Oliver Townsend, placed in the witness' hand, what is thought to be CVL's letter, mentioned above. The notes of the proceedings, at page 200 of the record of appeal, provide a record of what had occurred:

> "[Witness] (Directed to para 13) [of his witness statement]
>
> Not true Ellis sent back to Montego Bay.
>
> Not true on previous occasion, I said that Ellis was sent back to MoBay on September 29, 1994.
>
> Cannot recall name of [sic] Hugh Thorpe.
>
> I know Gordon Townsend. I can recognise his signature.
>
> (Document given to witness)
>
> (Asked to look at signature)
>
> I recognise signature as that of Gordon Townsend. It appears to be a photocopy of [sic] letter from Caribic Vacations Ltd. I am representing Caribic Vacations today.
>
> (Asked to read the document)
>
> Having read [the] letter, it is false that Ellis was instructed to return to Montego Bay.

> I am au fait with what took place in the company on September 29, 1994."

For completeness, it should be stated that paragraph 13, referred to in the quote from the notes of the proceedings, states as follows:

> "Mr. Ellis was in fact to have been sleeping at Plantation Inn as well [as the passengers on CVL's bus] and leaving there on the following morning with the passengers aforesaid. The dispatch for that day in fact indicated that a room had been reserved for him at the said Plantation Inn."

[29] The notes of the proceedings do not reveal that an application was made, and refused, for the letter to have been admitted into evidence, but it has been accepted by all parties that that did occur. Mrs Superville-Hall submitted that the learned trial judge was wrong in refusing to admit the document into evidence on the application of Miss Powell's counsel.

[30] Learned counsel argued that the letter from CVL would have thrown a different light on CVL's case. She submitted that the learned trial judge should have:

a. applied the policy of achieving the overriding objective;
b. recognised that there was a continuous obligation for disclosure; and,
c. exercised his contining obligation to manage the case.

In addition to doing all of the above, Mrs Superville-Hall argued, the learned trial judge should have admitted the document into evidence. Learned counsel relied on the case of **Gillingham and Others v Gillingham** [2001] EWCA Civ 906 in support of her

position that, in light of the learned trial judge's failure to admit the document, a new trial ought to be ordered.

[31] Mr Foster QC, on behalf of CVL, submitted, essentially, that Miss Powell had created the situation whereby the learned trial judge had no option but to refuse the application for the document to be admitted. Learned Queen's Counsel referred to the requirement for disclosure and the continuous nature of the duty to disclose. He also pointed to Miss Powell's failure to disclose the document in issue. Mr Foster then relied on rule 28.14 (1) of the Civil Procedure Rules (CPR), which stipulates that a party who fails to disclose documents "may not rely on or produce any document not so disclosed or made available for inspection at the trial". In the face of that rule, learned Queen's Counsel submitted, the learned trial judge was not permitted a discretion concerning the admission of the document. He argued that even the wide power given to a trial judge, by rule 29.1 of the CPR, to control the evidence to be given at any trial, could not override the specific stipulation of rule 28.14(1).

[32] Learned Queen's Counsel argued that what Miss Powell's counsel sought to do at the trial, was in conflict with the current philosophy of civil litigation of "cards on the table". He submitted that it must have been intended that the document should have been used at the trial and, therefore, not only should it have been disclosed, but that CVL should have been asked, in accordance with rule 28.20 of the CPR, to admit its authenticity.

[33] Mr Foster's submissions, although ironic emanating from a party which failed to put all its "cards on the table", are on firm ground, in respect of rule 28.14. The rule is unequivocal. It states:

> "A party who fails to give disclosure by the date ordered or to permit inspection may not rely on or produce any document not so disclosed or made available for inspection at the trial."

[34] In the face of that specific consequence of a failure to disclose, it was not open to the learned trial judge to apply either the overriding objective or the general power, given by rule 26.9 of the CPR, to rectify matters where there has been a procedural error. In **Totty v Snowden** [2001] 4 All ER 577 at paragraph [34], Kay LJ, with whom the rest of the court agreed, stated that a specific provision precluded the court from applying the overriding objective. He said:

> "Rule 1.2 requires the court to have regard to the overriding objective in interpreting the rules. Where there are clear express words, as pointed out by Peter Gibson LJ in *Vinos*' case [**Vinos v Marks & Spencer plc** [2001] 3 All ER 784], the court cannot use the overriding objective 'to give effect to what it may otherwise consider to be the just way of dealing with the case'. Where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective."

Similarly, rule 26.9 only allows the court to cure procedural errors "where the consequence of failure to comply with a rule, practice direction or order has not been specified by any rule, practice direction or court order".

[35] Reference to the rules of procedure was espoused in **Tombstone Ltd v Raja and Another** [2008] EWCA Civ 1444. At paragraph 78 of the judgment, Mummery LJ

explained the importance of the use of the rules, where they are applicable, as opposed to reliance on the court's inherent jurisdiction. He said:

> "In our judgment, therefore, where the subject-matter of an application is governed by rules in the CPR, it should be dealt with by the court in accordance with the rules and not by exercising the court's inherent jurisdiction. There is no point in exercising the court's inherent jurisdiction if that would involve adopting the same approach and would lead to the same result as an application of the rules. **And it would be wrong to exercise the inherent jurisdiction of the court to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules**." (Emphasis supplied)

[36] The case of **Gillingham**, cited by Mrs Superville-Hall is not relevant to the current issue. **Gillingham** was concerned with the admission of fresh evidence. That issue required a completely different consideration from the present question.

[37] In consequence of the reasoning set out above, the learned trial judge, in refusing to admit the letter into evidence, was correct, in his application of the provisions of the CPR, as set out above. Nonetheless, because of CVL's breaches, it is with some hesitation, that it must be found that the ground under this heading should fail, and that the issue of CVL's liability for Mr Ellis' actions may be considered without taking the letter into account.

[38] This issue should not be concluded, however, without an expression of surprise, to put it mildly, that CVL should have objected to the admission into evidence of a document, which was its document, and which it, in breach of rule 28.4, had failed to disclose. The objection smacks of unfairness and an attempt to benefit from its own

failure to obey the rules and disclose the document. Such an approach must be condemned.

[39] Perhaps the solution to the conundrum, which the situation presented to the learned trial judge, would have been for him to have allowed an adjournment for Miss Powell to have filed and served a notice and supplemental list of documents pursuant to rule 28.13. CVL would thereby have had an opportunity to consider the documents, which Mr Foster surmised, it might have forgotten about, given the long lapse of time.

[40] Had the learned trial judge adopted that procedure and admitted the document into evidence, it is unlikely that he would have come to a decision, other than the one that he, in fact, made. Because of our concern about CVL's stance, this court has viewed the contents of the letter from CVL, which Mrs Superville-Hall classified as relevant. It discloses a statement made after the event. The relevant portion of that letter states:

> "I confirm that we were not aware that Debbie Powell was a passenger on the bus as our Dispatch Log shows that the bus returned to Montego Bay with the driver alone."

[41] The sentence does not state that Mr Ellis was scheduled or required to return to Montego Bay. It rather seems to describe what had in fact occurred, although Mr Ellis, very sadly, did not arrive in Montego Bay, alive. The letter does not provide the support that Mrs Superville-Hall contends exists. In the absence of that support, the re-trial that learned counsel seeks would not assist Miss Powell, as the refusal did not result in a miscarriage of justice.

Vicarious liability for Mr Ellis' actions

[42] CVL's defence to Miss Powell's claim against it, was that Mr Ellis was not acting in the course of his employment when he drove its bus to Montego Bay that evening. CVL went on to say that Mr Ellis was, in fact, acting in contravention of CVL's express policy and instructions to him, when he carried Miss Powell as a passenger in the vehicle. The issue of law raised by the defence has, in recent times, lost much of the stability that it previously enjoyed. Its application to the evidence in the instant case evoked spirited submissions from learned counsel for the parties, particularly from those for Miss Powell and CVL, respectively.

[43] I trust that I do no injustice to Mrs Superville-Hall's submissions on the point by summarising them thus:

a. It is presumed that a vehicle being operated on the public highway is being operated by the driver with the permission of the registered owner of the vehicle and that the driver is the agent of the owner.

b. The owner of the vehicle is vicariously liable for the tortious acts of the driver, as driver, unless the owner can show that the driver was not acting as his servant or agent.

c. The onus of proof lies on the owner and if he fails to discharge that onus the presumption remains in place.

d. Even if the vehicle is not being driven with the permission of the owner, the owner will be liable if the driver is his employee and acting within the scope of his employment.

e. Mere prohibition of a particular act will not exempt the employer from liability if the driver's actions "were so closely connected with his employment that it would be fair and just to hold the [employer] vicariously liable".

f. Mr Ellis was employed to CVL as a driver and in driving to Montego Bay he was acting within the scope of his employment. In leaving him in possession of the vehicle, CVL remained responsible for his negligent operation of it.

g. In accepting Miss Powell as a passenger, Mr Ellis was acting within the industry norm of giving rides to other workers in the hospitality industry (Miss Powell was a tour guide at the time).

h. There were no signs in the vehicle prohibiting passengers other than CVL's customers.

i. In the circumstances CVL, merely by saying that Mr Ellis should have remained in Ocho Rios with its customers, failed to discharge the onus placed on it and the learned trial judge should have found it vicariously liable for Mr Ellis' negligent driving.

[44] Learned counsel relied on a number of cases in support of her submissions. They include, **Limpus v London General Omnibus Co** [1861-1873] All ER Rep 556, **Mattheson v Soltau** (1933) 1 JLR 72, **Ilkiw v Samuels** [1963] 2 All ER 879, **Kay v ITW Ltd** [1968] 1 QBD 140, **Rose v Plenty and Another** [1976] 1 WLR 141, **Lister and Others v Hesley Hall Ltd** [2002] 1 AC 215, **Clinton Bernard v The Attorney General** [2004] UKPC 47; (2004) 65 WIR 245 and **Wright v Morrison** [2011] JMCA Civ 14.

[45] Mr Foster submitted that for an employer to be liable for the tortious act of his employee, there must be a close connection between the tortious act and the duties of that employee. Learned Queen's Counsel argued that the evidence was that Mr Ellis' duties required him to remain in Ocho Rios with CVL's customers, who were entrusted to his care. His unexplained journey to Montego Bay, without any of those customers, was therefore, not in connection with his employment and duties as a chaperon/driver. CVL could not, on Mr Foster's submissions, be held liable for any negligence committed by Mr

Ellis during his unauthorised trip to Montego Bay. The learned trial judge was therefore, correct, Mr Foster submitted, in ruling against Miss Powell on this aspect of the claim.

[46] Mr Foster also relied, in support of his submissions, on a number of cases, including **Twine v Bean's Express Ltd** [1946] 1 All ER 202, **Williams v A & W Hemphill Ltd** (1966) SC (HL) 31, **Rambarran v Gurrucharran** [1970] 1 All ER 749 and **Morgans v Launchbury and Others** [1972] 2 All ER 606. Learned Queen's Counsel sought to distinguish, on its facts, the decision of this court in **Wright v Morrison**, on which Mrs Superville-Hall placed much reliance. Mr Foster argued that the fact that the driver/employee in **Wright's** case was allowed to keep the employer's vehicle during the nights and on weekends, so that he would be readily able to carry out the employer's wishes, in respect of the latter's children, made the difference. That was the fact, he submitted, that allowed this court, in that case, to find that the driver's negligent act was closely connected to his duties as an employee.

[47] Undoubtedly, prior to the decision in **Lister**, the law regarding vicarious liability for the use of motor vehicles was fairly well settled. The essential principle, for these purposes, rendered an employer "liable for the tortious act of the employee,…provided that the act in question was committed 'in the course of the employee's employment'" (per Lord Phillips in **Various claimants v Catholic Child Welfare Society and Others** [2012] UKSC 56; [2013] 1 All ER 670). If an employee was driving his employer's vehicle on a mission that bore no connection whatsoever with his employer's business, he was said to be "on a frolic of his own". In those circumstances, his

employer was not liable for any negligent driving, on his part, which caused injury and loss to third parties.

[48] The critical issue in deciding vicarious liability in the scenario of an employee driving an employer's vehicle was whether the employee was acting within the course of his employment. Lord Steyn, in **Lister**, at paragraph [15] of his judgment, outlined the test that was applicable up to that time. He said:

> "For nearly a century English judges have adopted Salmond's statement of the applicable test as correct. Salmond said that a wrongful act is deemed to be done by a 'servant' in the course of his employment if 'it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master': *Salmond on Torts*, 1st edn (1907), p.83; and *Salmond and Heuston on Torts*, 21st edn (1996), p.443."

[49] Whether an employer fell on one side or the other of the line of vicarious liability turned, in those days, on what the employee was engaged in doing at the time. This is pointedly demonstrated in the case of **Williams v A & W Hemphill Ltd**. In that case, the driver was engaged to carry some young passengers from one point to another. During their journey, they wished to meet with some other young people, before going to their original destination. Although he knew that he was not permitted to take instructions from them, he allowed them to persuade him to divert from his assigned route. While on that wayward journey, he negligently drove the vehicle, causing injury and death. His employers were held liable on the basis that he was still engaged in his assigned task of transporting his passengers to their destination.

[50] Lord Pearce, in that case, explained that the employer may not have been liable if the driver's deviation had not involved the passengers. He said at page 46:

> "**Had the driver in the present case been driving a lorry which was empty or contained nothing of real importance, I think that so substantial a deviation might well have constituted a frolic of his own**. The presence of passengers, however, whom the servant is charged *qua* servant to drive to their ultimate destination makes it impossible (at all events, provided that they are not all parties to the plans for deviation) to say that the deviation is entirely for the servant's purposes. Their presence and transport is a dominant purpose of the authorised journey, and, although they are transported deviously, continues to play an essential part." (Emphasis supplied)

It is important to note that Lord Steyn, at paragraph [18] of his judgment in **Lister**, did not disapprove of that interpretation of the law. Indeed, he cited it as a "good illustration of the correct approach".

[51] That "correct approach" was utilised in **Zepherin v Gros Islet Village Council And Aurelien Augustin** (1978) 26 WIR 561. The headnote accurately sets out the salient facts. It states in part:

> "On 12th February 1976 the second named respondent was instructed by his employers, the first named respondent, to convey a corpse from Monchy to Gros Islet for burial. He was expressly forbidden from carrying passengers in the tray of the truck or lorry, but, contrary to these instructions, he took not only the corpse but some sixteen to twenty mourners in the tray of the truck and instead of parking the truck outside the house of the clerk of the first named respondent at Gros Islet as he was instructed to do at the end of each day he left Gros Islet with mourners in the tray of the lorry to return to Monchy. On his way the lorry collided with the appellant who was riding a horse on the highway."

[52] In that case, the Court of Appeal of Grenada and West Indies Associated States held that the employer was not liable to the appellant for the driver's negligence. It held that the driver was not acting in the course of his employment. Davis CJ, with whom the rest of the panel agreed, said at pages 564-565:

> "Applying the law to the facts in the case before the court, it is clear that the [employer] would have been liable had the accident occurred during the journey from Monchy to the burial ground at Gros Islet. **When an act is done by a servant for his employer's business, it is usually done in the course of his employment even though it is a prohibited act. But in this case the accident did not occur then, but at a time when the second defendant was making the return journey to Monchy.** Was this return journey an act done for his employer's business? It was not even suggested to the witnesses for the first defendant that the charge of $30 for conveying the corpse included the return journey to Monchy. Indeed, one of those witnesses deposed that the mourners would travel to the village by another truck. **It may well be that the driver on previous occasions had taken mourners back to their homes and thought he could do so again. This was all very well so long as nothing happened. But when an accident occurs and it is sought to make the employers liable then different considerations must apply.** I can find nothing in the evidence to warrant a finding that the employers in this case are liable. The driver was acting on his own. He was not performing an act for his employer's business he should not have been on the road at that time and it does not matter whether he was conveying passengers or not." (Emphasis supplied)

It must be borne in mind, in contemplating the first sentence of the extract, that the appellant was not a passenger of the vehicle, but another road user. The position of a passenger was explained in **Alfred v Thomas and Another** (1983) 32 WIR 183 at pages 188-189, which will be discussed below.

[53] The law, prior to **Lister**, also exempted the owner of a vehicle, even if he was also an employer, from liability where he had expressly prohibited the driver from taking unauthorised passengers in the vehicle. Thus, in **Twine v Bean's Express Ltd**, an employer was held not to be liable for the injury caused to a passenger in its vehicle by the negligence of its employee/driver. This was due to the fact that the driver was expressly instructed not to take any passengers in the vehicle. A notice to that effect was also placed on the dashboard of the vehicle. The court held that the passenger was a trespasser to whom the employer owed no duty of care and that the driver was acting outside the scope of his authority in transporting that person.

[54] A similar decision was reached in **Alfred v Thomas and Another**. The headnote accurately and concisely states the facts:

> "The first respondent was employed by the second respondent to drive a commercial vehicle which was engaged in the transportation of sand. The first respondent was given express instructions not to carry passengers on the vehicle; **but there was no sign on it forbidding the carriage of passengers**. Despite this, the first respondent offered a lift to the appellant, which she accepted. On the journey the truck developed engine trouble, the brakes failed and the vehicle overturned [injuring the appellant]." (Emphasis supplied)

The court found, applying **Twine v Bean's Express**, that:

> "The first respondent could not be said to have been acting within the scope of his employment when giving a lift to the appellant as he had been forbidden to give such lifts; moreover, the appellant was a trespasser to whom the second respondent owed no duty of care with regard to the driving of the truck; accordingly, the trial judge had properly dismissed the claim against the second respondent."

[55] In **Lister**, the operators of a boarding facility for boys were held vicariously liable for the systematic sexual abuse meted out to some of its charges by the warden of the facility. The majority of their Lordships in **Lister** agreed that the traditional questions posed by Salmond do not always cope ideally with cases of intentional wrongs, in order to determine vicarious liability. Their Lordships, including Lord Steyn, proposed that in cases where the traditional questions were inadequate, a test that assessed the closeness of the connection between the nature of the employment and the particular tort, would be more appropriate.

[56] In the years since **Lister**, the courts have, in large measure, refined and agreed on the essential question to be asked in determining the issue of vicarious liability. Lord Steyn, at paragraph [18] of **Bernard v Attorney-General of Jamaica**, suggested what he viewed to be, the "correct approach". After reviewing **Lister** and other cases involving intentional torts, Lord Steyn stated:

> "...[**Lister**] held that the traditional test of posing, in accordance with *Salmond's* well-known formula, the question whether the act is 'a wrongful and unauthorised mode of doing some act authorised by the master' is not entirely apt in cases of intentional wrongs...This test may invite a negative answer, with a terminological quibble, even where there is a very close connection between the tort and the functions of the employee making it fair and just to impose vicarious liability. **The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable.** In deciding this question a relevant factor is the risks to others created by an

> employer who entrusts duties, tasks and functions to an employee....While the facts in **Lister** are very different from the circumstances in the present case, the principles enunciated in **Lister** are of general application to intentional torts." (Emphasis supplied)

[57] In **Gravil v Carrol and Another** [2008] EWCA Civ 689, Sir Anthony Clarke, in delivering the judgment of the court, posed as a question, the test laid down in **Lister**. He continued at paragraph 21 to point out the manner in which the answer to the question should be analysed:

> "In answering that question the court must take account of all the circumstances of the case, as Lord Steyn put it, looking at the matter in the round. The authorities show that it will ordinarily be fair and just to hold the employer liable where the wrongful conduct may fairly and properly be regarded as done while acting in the ordinary course of the employee's employment (per Lord Nicholls). This is because an employer ought to be liable for a tort which can fairly be regarded as a reasonably incidental risk to the type of business being carried on (per Lord Steyn)."

[58] **Gravil** involved a deliberate assault by one rugby player of a player on the opposing team, during the course of a game. Both players were semi-professionals and the offender was contracted to a club. The victim sued both the offender and the club, which was sued as his employer. The learned Master of the Rolls went on, at paragraph 22 to say:

> "The critical factor is the nature of the employment and the closeness (or otherwise) of the connection between the employment and the tort. The question what is fair and reasonable must be answered in the context of the closeness or otherwise of that connection. **The answer to the question in each case of course depends upon its particular facts**." (Emphasis supplied)

The court concluded, at paragraph 40, that the assault was fairly and properly to be regarded "as having been carried out while the [offending player] was acting in the ordinary course of his...albeit part time employment, as a rugby player". It therefore found that the club was liable to the victim on the basis that the assault was "a reasonably incidental risk to the playing of rugby pursuant to the contract" of employment.

[59] In **Leanne Wilson v Exel UK Ltd** [2010] CSIH 35, Lord Carloway held that a prank played by one employee on another, which resulted in injury, did not render the employer liable, despite the fact that the incident occurred on the employer's premises during work time. In addressing the issue, Lord Carloway not only identified the definitive question to be asked, but seemed to opine that the test laid down by **Lister** did not alter some established principles. At paragraph [25] of his judgment he repeated the test laid down by Lord Steyn in **Lister**. He then analysed and applied the test thus:

> "The test is an extremely broad one which may, no doubt, be an important one where new circumstances of potential liability are to be examined. **From a practical point of view, however, the ground in this case, of pranks between co-employees, is well trodden**. Within the context of the broad test is the well established and fundamental principle of finding vicarious liability applicable when the actings of the employee can be said to be within the scope of his employment." (Emphasis supplied)

[60] It may fairly be said that **Lister** is a watershed case in the law concerning vicarious liability. It does not, however, represent a complete break from the past. By

2012, Lord Phillips in **Various claimants v Catholic Child Welfare Society and Others** explained that the law, in respect of vicarious liability, had, with the decision in **Lister** and others, moved on. He formulated, at paragraph [20] of his judgment, what he regarded to be the relevant principles. As far as those principles are relevant to the instant case, he said:

> "Since Ward LJ and I cut our teeth the courts have developed the law of vicarious liability by establishing the following propositions: (i) ... (ii) D2 may be vicariously liable for the tortious act of D1 even though the act in question constitutes a violation of the duty owed to D2 by D1 and even if the act in question is a criminal offence: **Morris v CW Martin & Sons Ltd** [1966] 1 QB 716; **Dubai Aluminium; Brink's Global Services Inc v Igrox Ltd** [2010] EWCA Civ 1207; [2011] IRLR 343. (iii) Vicarious liability can even extend to liability for a criminal act of sexual assault: **Lister v Hesley Hall Ltd** [2001] UKHL 22; [2002] 1 AC 215. (iv) ..."

[61] Lord Phillips admitted that the developments have resulted in the law being more difficult in its application. He said at paragraph [21]:

> "The [propositions mentioned in paragraph [20]] have, however, made it more difficult to identify the criteria that must be demonstrated to establish vicarious liability than it was 50 years ago…."

[62] In applying this learning to the instant case, it may first be stated that a submission by Mrs Superville-Hall that Mr Ellis' actions fell within the class of intentional wrongs, because he intentionally drove the vehicle, is misguided. There is no indication that Mr Ellis intentionally crashed that vehicle. This was, therefore, not an intentional wrong. As Harris JA pointed out in **Wright v Morrison**, however, the test established

in **Lister** does not depend on the distinction between intentional and non-intentional wrongs. The learned judge said at paragraph [22], that the "'close connection test' does not displace the traditional test but rather, in widening its scope, it permits the court to adopt a broader perspective of the law".

[63] As there is no dispute concerning Mr Ellis being employed to CVL, the essential question, as identified by the authorities, may be formulated in the instant case, thus:

> Was Mr Ellis' negligent driving so closely connected with his employment, that is, what was authorised or expected of him, that it would be fair and just to hold CVL vicariously responsible?

[64] Mrs Superville-Hall submitted that Mr Ellis was doing what he was employed to do, that is to drive CVL's bus. In those circumstances, she submitted, there is a close connection between the tort and the nature of the employment. This submission is also, with respect to learned counsel, misguided. Were that to be the test, there would never have been a case that a person employed to drive, could be held to have been on a "frolic of his own". The submission flies in the face of the principle pointed out in **Williams v A & W Hemphill Ltd** and, as mentioned above, accepted by Lord Steyn in **Lister**. The submission also ignores the evidence that Mr Ellis should have remained in Ocho Rios with CVL's customers and that a room had been reserved at the hotel to facilitate CVL's instructions to him in that regard.

[65] An assessment of the evidence suggests that the trip to Montego Bay that evening was not authorised or expected of Mr Ellis. It was, in fact, contrary to his instructions. In his evidence in chief, Mr Townsend, after stating that the customers were to be spending the night in Ocho Rios, stated at paragraphs 13 and 18 of his witness statement:

> "13. Mr Ellis was in fact to have been sleeping at Plantation Inn as well and leaving there on the following morning with the passengers aforesaid. The dispatch for that day in fact indicated that a room had been reserved for him at the said Plantation Inn.
>
> 18. At the time of the incident in question Mr. Ellis ought not even to have been travelling to Montego Bay."

[66] In respect of taking, as passengers, persons who were not CVL's customers, Mr Townsend said in his witness statement:

> "6. Our vehicles are not licenced to pick up passengers generally. We operate under a contract licence...The words 'Contract Carriage' are in fact noted on all our buses...
>
> 7. For this reason, it is a condition of a driver's employment with us that he is not allowed to pick up passengers....This would in any event be in breach of our contract/licence...as aforesaid.
>
> 9. Mr. Ellis was at the time of his engagement and at other times during the course of his employment with us advised of our policy as aforesaid with regards to the carriage of unauthorised passengers...
>
> 10. ...I further warned [drivers employed to CVL] that any driver found to be involved in this unauthorised and illegal activity [of carrying unauthorised passengers] would be deemed to have terminated his position with the company by his action."

[67] Mr Townsend was not shaken in cross-examination on either of these issues. He rejected suggestions that Mr Ellis had been instructed to return to Montego Bay that evening. This evidence, contrary to Mrs Supeville-Hall's submission, does rebut the presumption that the vehicle was being used for CVL's business at the time of the crash. Is CVL still vicariously liable nonetheless?

[68] It is now necessary to address **Wright v Morrison**, on which Mrs Superville-Hall placed great reliance. In that case, an employer was held by this court to be liable for the negligent operation of his vehicle by the person who had been employed to drive the vehicle. The employer testified that on the day that the crash occurred, causing injury to the claimant, he had not assigned any duties to the driver of his vehicle. He said that he had not granted him permission to use the vehicle on that day.

[69] This court found that the critical question was "whether the driver, in making the journey on the day of the accident, was acting in the course of his employment so as to ascribe liability to the respondent" (paragraph [11]). After reviewing the authorities, Harris JA stated the test that should be applied. The learned judge of appeal said, at paragraph [22]:

> "In applying the requisite principles, consideration must first be given to the relative closeness of the connection between the nature of the employment and the particular wrong. Thereafter, an inquiry should be made as to whether the circumstances dictate that it is just and reasonable to assign liability to the employer."

[70] Harris JA, in applying those principles to the facts of that case, emphasised the fact that the employer had given his driver permission to retain possession of the vehicle on weekends and at nights. That fact, she said, "invites the reasonable inference that the driver had general permission in order to facilitate the transportation of [the employer's] children at any time, be it on a weekday or weekend" (paragraph [24]). On that basis Harris JA, with whom the rest of the panel agreed, held that "by permitting retention of the vehicle by the driver, the respondent [employer] created the risk of the appellant [third party] sustaining her injuries and therefore cannot escape liability" (paragraph [25]). Earlier in that paragraph the learned judge of appeal said:

> "In our view, the respondent is taken to have retained control of the vehicle at all times notwithstanding that it was in the driver's possession. It would have been reasonably foreseeable that the driver could have been involved in an accident. It was incumbent on the respondent to have ensured that the vehicle was not used in an unlawful manner. He would have known or ought to have known that if the truck was used in an unlawful manner by the driver, some harm could come to a third party."

[71] Mrs Superville-Hall, following closely that reasoning, submitted that it was reasonably foreseeable that Mr Ellis, in carrying out his duties as a driver, could have been involved in an accident. She argued that as it was incumbent on CVL to see that its vehicle was used in a lawful manner, by allowing Mr Ellis to retain control of the vehicle after transporting the passengers to Ocho Rios, it should be held liable for his negligent use of it.

[72] In applying the primary test, that is the "relative closeness of the connection between the nature of the employment and the particular wrong", to the facts of this case, it cannot be said that the learned trial judge was wrong in accepting that Mr Ellis' trip to Montego Bay had nothing to do with CVL's business. On this point the learned trial judge said, at paragraph 6 of his judgment:

> "...On the face of it there was no need for Mr. Ellis to be traveling [sic] back to Montego Bay for any reason connected with company business."

[73] The learned trial judge made the point more fully at paragraph 8:

> "Despite the valiant effort of [counsel for Miss Powell] I am unable to conclude that when Mr. Ellis was driving back to Montego Bay he was still on CVL's business. This trip was not a deviation within the scope of his employment. The evidence points to the conclusion that it was Mr. Ellis' independent decision to return to Montego Bay without any known reason when the totality of the evidence suggest [sic] that he would have no need to do so."

[74] Those are eminently reasonable findings, based on the evidence cited above, that Mr Ellis was required to stay in Ocho Rios with his passengers. The learned trial judge was, therefore, entitled to find that evidence to be "satisfactory proof", to use the words of Clark J in **Mattheson v Soltau**, that Mr Ellis was not acting as CVL's servant or agent at the time of the crash. In the face of that evidence it would neither be just nor reasonable to assign liability to CVL.

[75] Despite that finding that the learned trial judge was correct, it is to be conceded that there is, in the instant case, a close similarity to the material circumstances in **Wright v Morrison**. Undoubtedly, as in **Wright**:

a. Mr Ellis was allowed to keep possession of the vehicle;

b. that possession was to enable him to carry out the next task of driving that his employer wished him to do; and,

c. there was no task assigned to him at that time that required the use of the vehicle.

[76] Unlike in **Wright**, however, where the employer merely testified that his driver, "was not assigned any duties on the day of the accident and he had not granted him permission to use the vehicle on that day", Mr Ellis had a specific assignment that night. He was required to remain with the passengers. Mr Townsend's evidence in that regard, in paragraphs 13 and 18 of his witness statement, has been quoted above. In cross-examination on this point he said:

> "[Mr Ellis] [d]rives and guide [sic] host and stay with guests the entire time. I know of the instructions given to Mr. Ellis which was [sic] to stay with guests and be with them."

Mr Ellis was, therefore, not "on call" to drive, as the driver in **Wright** seemed to be. Mr Ellis had a distinctly different task at the time that the crash occurred. On that basis, **Wright** may be distinguished on the facts and the dictum on which Mrs Superville-Hall sought to rely is not applicable on the evidence in this case.

[77] Using Salmond's statement of the applicable test, this was not a case in which Mr Ellis was carrying out an authorised task in an unauthorised way; this was a case in which his trip was not authorised at all. Based on that reasoning this ground also fails.

Whether Mr Pugh is liable

[78] The issue of whether or not BLC is liable to Miss Powell depends on whether Mr Pugh is responsible, in any respect, for the crash. For this reason, although Mrs Superville-Hall did not argue the issues in this sequence, the question of Mr Pugh's liability will be assessed before the issue of BLC's liability. It is only if Mr Pugh is found to be liable, that it will be necessary to assess whether BLC is vicariously liable for Miss Powell's injuries.

[79] The issue of Mr Pugh's liability turns essentially on questions of fact. The first question is whether or not the rig had been parked with its marker lights illuminated. The second question is whether Mr Pugh had parked the rig substantially off the roadway or mostly on the roadway. The first of these questions of fact was answered by the learned trial judge after having seen and heard the witnesses at the trial. He found it unnecessary to resolve the second.

[80] It has long been established that an appellate court will not lightly disturb findings of fact by the tribunal fixed, at first instance, with that responsibility (see **Watt v Thomas** [1947] AC 484, 485-486 and **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 303). In the latter case, the headnote accurately states the principle:

> "An appellate tribunal should only upset findings of fact by a trial judge if it is satisfied that, on evidence **the reliability of which it was for him to assess**, he had plainly erred in reaching his conclusions of fact; and the appellate tribunal should be even more cautious when it does not have the advantage of seeing a verbatim transcript of the evidence." (Emphasis supplied)

It is to be noted that there was no verbatim transcript in the instant case.

[81] In **Watt**, Viscount Simon stated, at page 486, that if "there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide". Bearing in mind those principles, it is necessary to set out the relevant evidence and juxtapose against it, the findings of the learned trial judge. Before doing so, however, the respective submissions of counsel will be outlined.

[82] Mrs Superville-Hall argued that the learned trial judge erred in this context because he failed to give proper weight to the evidence of Mr Llewelyn Reid who testified on behalf of Miss Powell. As a result of that failure, learned counsel submitted, the learned trial judge arrived at the wrong conclusions on the facts. On her submissions:

a. the positions of the vehicles after the crash,

b. the lack of lighting in the area,

c. the fact that it was a straight stretch of road in that area,

and

d. the fact that there were no drag marks from the bus,

all indicated that it was more likely than not that the rig was parked mostly on the roadway and that there was no indication of its presence, by lights or otherwise. In that situation, she argued, the inference that the learned trial judge should have drawn was that Mr Ellis, described as a good worker and sober man, made no attempt to avoid the crash because he could not see the rig.

[83] Mr Johnson, on behalf of BLC, defended the learned trial judge's findings as being supported by the evidence. Learned counsel submitted that, when looked at as a whole, it could not be said that the learned trial judge was "palpably wrong" in rejecting Mr Reid's testimony and preferring that of Mr Pugh, on the question of whether the rig was lit at the time of the crash.

[84] On the issue of the rig being lit, Mr Reid's evidence was that "there were no lights on either the front or back of the trailer nor were there any warning signs on the road either in front or [sic] back of the said trailer" (paragraph 12 of his witness statement). He maintained that stance in cross-examination. Mr Reid said that he came to the scene immediately after the crash had occurred. He stated that he had heard the bang but did not witness the crash. He helped to take Miss Powell out of the bus and took her to the hospital. He testified that he had not seen anything on the flat-bed trailer.

[85] His failure to see any cargo on the trailer proved pivotal for the learned trial judge. Mr Reid's evidence conflicted, in this respect, with that of Mr Pugh and Mr Chester Chung, who was BLC's witness. Mr Pugh testified that the trailer was fully loaded with drums of kerosene. In addition, Mr Pugh spoke to the lighting on the rig.

At paragraph 7 of his witness statement he said that "all the lights were on, including the trailer lights, the tractor head lights, the side lights and the cabin lights. These lights were stable lights".

[86] Mr Chung testified that he went to the crash site that night. He confirmed that Mr Pugh was transporting cargo for BLC. He also said that when he got there, lights were on, that is illuminated, on the back and the side of the trailer.

[87] Mr Townsend also attended the scene of the crash that night. He said that when he got there the vehicles had not yet been removed. He also testified, in cross-examination, that there were steel drums on the trailer. In cross-examination he could not recall having seen lights on the vehicles.

[88] In his judgment, the learned trial judge referred to the conflict of evidence concerning the presence of cargo on the trailer. In that context, the learned trial judge said at paragraph 21 of his judgment:

> "…I find that the trailer had cargo on it. The trailer in question was a flat bed trailer. If this is so, then it is difficult to understand how Mr. Reid could have failed to see that there was cargo on the flat bed if he were there for as long as three quarters (3/4) of an hour. Mr Pugh's evidence was that the flat bed had a full load. **If Mr Reid is unreliable on this point, which is significant, then is he likely to be reliable on the question of whether the trailer was lit or not**? I think that in this case Mr. Reid should be regarded as not very observant. From this I conclude that Mr. Reid ought not to be relied on when dealing with the question of whether the trailer and trailer [sic] head were lit." (Emphasis supplied)

In contemplating that extract, it is to be remembered that **Industrial Chemical Co** is authority for stating that reliability of the evidence is solely a matter for the trial judge to assess.

[89] After pointing out that both Mr Chung and Mr Townsend attended the scene some time after the crash had occurred, the learned trial judge found that "the only two persons who can really assist with whether the trailer was lit at the time of the accident are Mr. Pugh and Mr. Reid". Having rejected Mr Reid's testimony on the point, the learned trial judge turned to Mr Pugh's testimony and said "I accept Mr Pugh's evidence that the trailer was lit at the time of the accident" (paragraph 23). Significantly, the learned trial judge then continued at paragraph 23 to say:

> "On this premise, it does not matter too seriously whether the trailer was mostly off the road or on the road at the time of the accident because Mr. Ellis ought to have seen the trailer. If he did not see the trailer he was negligent. If he saw it and still ran into the rear of the trailer, then in the absence of an explanation, the conclusion would have to be that he was negligent."

[90] The learned trial judge's reasoning cannot be faulted. There was ample evidence to support his findings. Mrs Superville-Hall is, therefore, not correct when she states that Mr Reid's testimony ought to have been accepted. The guidance from **Watt** and **Industrial Chemical Co** is applicable.

[91] Although the learned trial judge did not place much emphasis on the position of the rig, all the witnesses, except for Miss Powell, who, for lack of recollection, could give no evidence concerning the crash, testified that the bus, impaled on the back of the

trailer as it was, was partially off the roadway. Mr Townsend, who was the least generous to Mr Pugh, in that regard, said in cross-examination that "[to my] best recollection, the two left rear wheels [of the bus] were off the road. The right wheels were on the road". It is patent from that evidence that the bus left the roadway, at least partially, where it crashed into the trailer. That evidence, and the absence of any indication of an attempt to apply the bus' brakes, supports the learned trial judge's findings that Mr Ellis was negligent. This ground of appeal also fails.

Vicarious liability for Mr Pugh's actions

[92] As Mr Pugh was correctly found by the learned trial judge, not to be liable for the crash, the issue of vicarious liability on the part of BLC does not arise. It, therefore, is unnecessary to address the comprehensive and interesting submissions made, in this regard, by Mrs Superville-Hall and Ms Small as to whether or not Mr Pugh was an independent contractor. Similarly, as the trailer was joined to the tractor-head to constitute the rig as a single vehicle under Mr Pugh's control, there could be no independent liability resting on BLC in respect of the trailer as a separate vehicle.

Conclusion

[93] Having applied the law to the facts of the case it is apparent that the learned trial judge by enquiring of Miss Powell's counsel how he intended to prove the case against BLC, was not displaying a closed mind but was exposing his thinking to counsel "so that the parties [had] an opportunity to correct any errors in the judge's thinking or to

concentrate on matters which appear[ed] to be influencing the judge". The accusation of bias against him is, therefore, ill-founded.

[94] The learned trial judge was justified, on the evidence, in finding that Mr Ellis took an independent decision to drive to Montego Bay that evening and that "the totality of the evidence [suggested] that he would have no need to do so". The letter that Miss Powell's counsel sought to adduce into evidence would not have undermined that finding. In those circumstances, Mr Ellis' trip was not connected to his employment and was, indeed, a "frolic of his own". CVL could not, therefore, be found vicariously liable for his negligence.

[95] The learned trial judge was also justified, on the evidence, in finding that Mr Pugh's rig was illuminated while parked along a straight stretch of roadway, when Mr Ellis crashed the bus into it. In the circumstances, Mr Pugh was not negligent and the issue of BLC being vicariously liable for Mr Pugh's actions did not require assessment.

[96] Based on all the above, I would dismiss the appeal and award costs to each of the respondents. The costs are to be taxed if they are not agreed.

HARRIS JA

ORDER

1. The appeal is dismissed.
2. Costs are awarded to the respondents to be taxed if not agreed.