[2024] JMCA Civ 26

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE BROWN JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2023CV00005

BETWEEN	**KEVRON TURNER**	**1ST APPELLANT**
AND	**KERRON PATRICE ST CLAIRE YOUNG**	**2ND APPELLANT**
AND	**JOHNICA MARSHALL**	**1ST RESPONDENT**
AND	**ANDRUS MOLLY**	**2ND RESPONDENT**
AND	**JEROME KADIAN WILKS**	**3RD RESPONDENT**

Written submissions filed by Frater Ennis & Gordon for the appellants

Written submissions filed by Kinghorn & Kinghorn for the 1st respondent

14 June 2024

Damages – assessment of - Negligence – Whether claimant guilty of contributory negligence - Claimant failing to wear seat belt- Whether a seat belt was available –Disturbance of finding of fact of the court below – Road Traffic Act, 1938, ss 43A, 43B

(Considered on paper pursuant to rule 1.7(2)(j) of the Court of Appeal Rules 2002)

P WILLIAMS JA

[1] I have read and agree with the draft judgment of my sister G Fraser JA (Ag).

BROWN JA

[2] I, too, have read the draft judgment of my sister and I agree with her reasoning and conclusions.

G FRASER JA (AG)

[3] This appeal emanates from orders issued by Jarrett J (Ag) (as she then was) ('the learned trial judge') which are contained in a written judgment delivered on 18 November 2022, with neutral citation [2022] JMSC Civ 199. The subject matter of the impugned orders pertains to the claim for damages brought by Johnica Marshall (the 1st respondent), arising from injuries sustained in a motor vehicle collision. Subsequent to the assessment of damages, conducted upon the entry of judgment on admission, the learned trial judge's award granted the 1st respondent damages in the following terms:

> "1. The Claimant is awarded General Damages against the 3rd and 4th Defendants in the sum of $1,123,012.20 plus interest at the rate of 3% from 4th day of March 2019 to the 18th day of November 2022.
>
> 2. Cost[s] to the Claimant to be agreed or taxed."

The appeal

[4] The appellants, dissatisfied with the award made by the learned trial judge, sought a reduction in the award of damages, among other things, and accordingly, on 12 January 2023, filed notice and grounds of appeal challenging the same. The grounds were:

> "i. The Learned Trial Judge erred when she found that on a balance of probabilities, she was not satisfied that a seatbelt was available to the First Respondent.
>
> ii. The Learned Trial Judge, having accepted that the First Respondent was not wearing a seatbelt, erred when she found that the First Respondent was not liable for contributory negligence."

[5] They additionally sought the following orders:

> "1. An Order that the execution of the said Judgment be stayed until a determination of this Appeal.
>
> 2. An Order that the First Respondent be found contributory negligent and liability for damages be apportioned with 25% to the First Respondent and 75% to the Appellants.
>
> 3. That the Appellants be granted leave to file Supplemental Grounds of Appeal.
>
> 4. Costs to the Appellants to be agreed or taxed.
>
> 5. Such further and other relief as this Honourable Court deems just."

[6] On 20 November 2023, the appellants sought and were granted an extension of time by the court to file and serve notice and grounds of appeal in this matter. The order made by the court included a consent order for "the matter is set for hearing on paper in the week commencing 19 February 2024". Subsequently, the appellants filed their grounds of appeal, and written submissions in support thereof. Written submissions in response, were filed for and on behalf of the 1st respondent. No oral arguments were heard in this appeal, this appeal was dealt with on paper pursuant to rule 1.7(2)(j) of the Court of Appeal Rules, 2002 ('CAR'), which provides that, except where CAR provide otherwise, this court may deal with a matter on the written representations submitted by the parties as an alternative to holding an oral hearing.

Background

[7] The agreed facts are that on 13 September 2017, the 1st respondent was a passenger in a taxi motor car travelling along the Saint Thomas Main Road in the parish of Saint Andrew. The motor vehicle was owned by Mr Jerome Wilks ('the 3rd respondent') and was driven by Mr Andrus Molly ('the 2nd respondent') at the material time. The 1st respondent had boarded the vehicle from downtown Kingston and was seated on the rear passenger seat with three other passengers; she was not wearing a seatbelt. On reaching the vicinity of Abbsycino Court, Bull Bay, Saint Andrew, a motor vehicle travelling in the opposite direction collided head-on with the motor vehicle in which the 1st respondent

was a passenger. This second motor vehicle was driven by Mr Kevron Turner ('the 1st appellant') and was owned by Kerron Young ('the 2nd appellant'). The head-on collision occurred when the 1st appellant attempted to overtake a bus and a truck travelling on his side of the road. The collision was inevitable despite the attempts of the 2nd respondent to avoid the same, as he manoeuvred his vehicle to his far left and climbed the sidewalk.

[8] On impact, the 1st respondent was consequently thrown forward, hitting into the dashboard of the motor vehicle in which she travelled. She allegedly sustained injuries during her encounter with the dashboard, and subsequently, on 26 September 2018, she filed her suit, Claim No 2018 HCV 03705 in the Supreme Court. The 1st respondent averred that the appellants and the 2nd and 3rd respondents were negligent, and she was entitled to recover damages against them.

[9] The 1st and 2nd appellants admitted that the collision resulted from the actions of the 1st appellant, and hence, their defence filed was limited to quantum. They, however, did not admit the particulars of negligence averred by the 1st respondent. In addition, the appellants further denied the particulars of injury pleaded; they contended that if the 1st respondent sustained the injuries alleged, she suffered those injuries partly because of her contributory negligence in failing to wear a seat belt, consequently, damages should therefore, be apportioned.

[10] Having regard to the facts as agreed by the parties, judgment on admission was entered in favour of the 1st respondent against the appellants, with damages to be assessed. Although there were initially four respondents, on the assessment of damages, the claim had proceeded against the two appellants only.

Proceedings in the court below

[11] The important findings made by the learned trial judge in making her assessment after a review of the evidence were as follows:

1. "On cross-examination, the claimant said that the medical report of Dr Wong on which she relies is correct..." (see para. [5])

2. "She reported that she had been [sic] the middle unrestrained back seat passenger in a motor vehicle involved in an accident. She complained of pain to the forehead, both shoulders, legs and lower back." (see para. [6])

3. "Put another way: what if any responsibility does she bear for her injuries? Her evidence is that on that day she was the back middle seat passenger in a taxi travelling from Downtown Kingston to Bull Bay. When the taxi collided with an oncoming motor vehicle, she was flung forward as 'nothing was holding her back'." (see para. [21])

4. "She admitted that this was because she was not wearing a seat belt, and that the injuries she received were because she was flung forward at the time of the accident. It was also her evidence that she did not think that the middle seat of the taxi carried a seat belt." (see para. [21])

5. "It is clear on the authority of **Jacinth Morgan-Collie and Shawn Collie v Natasha Clarke**, that whether the claimant is to be held contributory negligent depends on whether a seat belt was available to her at the time of the accident. Given the state of the evidence, I am not satisfied on a balance of probabilities that a seatbelt was available to her. In the circumstances, I cannot find that she was contributory negligent." (see para. [25])

[12] The appellants are now contending, that the learned trial judge erred in arriving at her conclusions in determining the quantum of damages awarded and that she erred as a matter of fact and in law as set out below:

> "**(a) Findings of fact**
>
> 1. That the Learned Trial Judge erred when she found that on a balance of probabilities, she was not satisfied that a seatbelt was available to the Claimant.
>
> 2. That the Learned Trial Judge erred in not making a finding that the Claimant had a duty of care to herself to ensure that she was travelling in a motor vehicle which provided a seatbelt.
>
> 3. That the Learned Trial Judge erred when she failed to make a finding that had the Claimant been restrained, her injuries would have been prevented or minimized.

(b) Findings of Law

1. That the Learned Trial Judge erred when she found that the Claimant was not liable for contributory negligence.

2. That the Learned Trial Judge erred in not finding that in failing to wear a seat belt, the Claimant was in breach of the Road Traffic Act."

The submissions

Appellants' submissions

[13] Counsel on behalf of the appellants, in written submissions, relying on **Ronald Chang and another v Frances Rookwood et al** [2013] JMCA Civ 40, quite rightly recognized that this court will not disturb the finding of a tribunal of fact unless it is shown that the learned trial judge was plainly wrong. Counsel submitted, that where a trial judge had misdirected herself when determining a question of fact, an appellate court, which is disposed to come to a dissimilar decision on the evidence, should not do so. Unless it is satisfied, that the decision arrived at cannot be explained by the advantage she enjoyed, having seen and heard the witnesses. Counsel nonetheless contended that the learned trial judge erred in her interpretation of the law and facts before her and urged this court to interfere by varying the award made by the learned trial judge.

[14] Counsel posited that the learned trial judge, by placing any reliance on the 1st respondent's evidence, "that she 'did not think' a seat belt was available" fell into error. In support of this submission, counsel argued that the evidence relied on by the learned trial judge was speculative and of no evidential value, leading to a conjecture of any conclusion drawn from it. Counsel on behalf of the appellants submitted further that, if the 1st respondent intended to make an issue of fact of the existence and non-existence of a seat belt, then she should have filed and served a reply to the appellants' defence limited to quantum (see **Enoch Karl Blythe v Paget DeFreitas et al** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 43/2008, Application No 84/2009, judgment delivered 18 December 2009, Morrison JA (as he then was) at para.

[20]). Counsel contended that the principle in that case applied to the case at bar, as at paras. 6 and 7 of their defence the appellants raised the defence of contributory negligence. It was, therefore, incumbent on the 1st respondent to file a reply.

[15] In furtherance of the first ground of appeal, it was submitted that an unappealing precedent would be set if a claimant is permitted to trounce the defence of contributory negligence by the scant statement that they did not think a seat belt was available. Counsel reiterated the principles of contributory negligence enunciated in the often-cited case of **Jones v Livox Quarries Ltd** [1952] 2 QB 608, as applicable in the present circumstances. Where the claimant did some act or made an omission that contributed to the injuries sustained, the damages awarded to the claimant should be curtailed to the extent that their fault contributed to the injuries sustained. In the written submissions, counsel accepted that the learned trial judge accurately stated the law on contributory negligence, but the complaint lay in her application of the law.

[16] The appellants, through counsel, contended that the learned trial judge fell into error when considering whether a seat belt was available to the 1st respondent. Counsel contended that the 1st respondent chose to sit in the middle passenger back seat. That meant that in the event of an accident, there existed a greater likelihood of her being thrown into the dashboard, and that was what happened during the collision. Counsel contended that the decision of the 1st respondent to sit where she did in the vehicle was a careless one that led to her injuries.

[17] It was also submitted that the case of **Froom & Others v Butcher** [1975] 3 ALL ER 520 ('**Froom v Butcher**'), ought to be considered in the context of the time in which it was made. In that case, the plaintiff was injured in a car accident caused by the defendant's negligence, but the plaintiff was not wearing a seatbelt at the time of the accident. The English Court of Appeal found the plaintiff to be 25% at fault for his own injuries due to not wearing a seatbelt, and the damages were accordingly reduced by 25%. In that case, Lord Denning referred to the failure to wear a seat belt when one is available.

[18] Counsel submitted further that, since the delivery of that decision, Parliament has codified this principle in the Road Traffic Act ('RTA'), mandating the wearing of seat belts. There is, therefore, as contended by counsel, a legal obligation on individuals to use taxis equipped with seat belts for their protection. It was on this basis, counsel stated, that he argued in the court below that if the learned judge found that a seat belt was not available to the 1st respondent, then the fact that she could have chosen not to utilize that specific taxi ought to be considered. A finding by the learned trial judge that the 1st respondent made such a decision, ought to have propelled a further finding of contributory negligence.

[19] The appellants argued that the learned trial judge should have made a finding that the 1st respondent's scant regard for her safety contributed to her injuries. The findings of fact by the learned trial judge that the appellants say show a lack of regard by the 1st respondent for her safety, were:

> "(a) The 1st Respondent was not wearing a seat belt,
>
> (b) The 1st Respondent's body flung forward into the dashboard because she was not wearing a seat belt,
>
> (c) The 1st Respondent received injuries; and
>
> (d) The 1st Respondent admitted that the injuries she received were because she was flung forward at the time of the accident"

Counsel also contended that in keeping with the decision of **Jacinth Morgan-Collie and Shawn Collie v Natasha Clarke** the usual apportionment of damages for contributory negligence should obtain. Therefore, counsel submitted that the appeal should be allowed.

Respondent's submissions

[20] The 1st respondent submitted that the learned trial judge did not fall into error, in finding that, she was not satisfied that a seat belt was available. Counsel on her behalf contended that the burden of proof lies on the party who asserts and not the party

defending the assertion. Counsel argued that to satisfy this burden of proof, the appellants had to prove the 1st respondent contributory negligent to the requisite standard. What was to be established was that on the day in question, the 1st respondent's actions were reckless when compared to the actions of a prudent woman in similar circumstances. Counsel noted that at the trial, that was not a position advanced by the appellants.

[21] Counsel stated that the appellants were duty bound to place before the court, satisfactory evidence which, on a balance of probabilities established that the claimant was contributory negligent. Primarily, in that regard, counsel submitted that the appellant was obligated to produce evidence proving that a seat belt was available. In support, of that contention reliance was placed on the case of **Kevin Brooks v Christopher Edwards** consolidated with **Dahlia Byfield v Christopher Edwards** [2018] JMSC Civ 167.

[22] Counsel, on behalf of the 1st respondent, highlighted paras. [21] and [22] of the learned trial judge's written judgment and submitted that she was correct in her statement of the law and ultimately her finding that the appellants had failed to discharge the burden of proof which was their responsibility to discharge. Further counsel argued that the only evidence concerning the availability of a seat belt came from the 1st respondent, which was her response in cross-examination that she was uncertain whether seat belts were available in the back seat of the motor vehicle in which she travelled as a passenger. On consideration of that evidence before the learned trial judge, counsel submitted that she could not have made a finding of contributory negligence, having not been satisfied even on a balance of probability of the availability of a seat belt.

[23] The 1st respondent, through her counsel, submitted that by law not all public passenger vehicles are required to be equipped with a seat belt in the rear seats of the taxi motor vehicle. Counsel maintained that the learned trial judge's finding about the seat belt was above reproach. He submitted that it was for those reasons that her findings as a matter of law and fact cannot be faulted. Counsel asked this court to determine that

this appeal had failed on both grounds pleaded by the appellants and that the orders of the learned trial judge be upheld.

Discussion and Analysis

Complaints of the findings of fact

[24] The crux of the learned trial judge's deliberation centred on whether the 1st respondent was contributory negligent. Before pronouncing her award on general damages, the learned trial judge judiciously addressed the issue of contributory negligence. In addition to assessing the evidence, the learned trial judge conducted an extensive analysis of the law relative to contributory negligence, and its development from common law to its embodiment in the Law Reform (Contributory Negligence) Act ('the LRCNA') in 1951. The learned trial judge acknowledged that contributory negligence became a part of the law of remedies in Jamaica, given the promulgation of the 1951 legislation. Therefore, the appellants were entitled to raise the issue. Delving into the RTA, the learned trial judge acknowledged the mandate for seat belts in contract and hackney carriages but expressed that no specific evidence was elicited regarding the classification of the "taxi" in question.

[25] Drawing on her evaluation of **Jacinth Morgan-Collie and Shawn Collie v Natasha Clarke** [2019] JMCA Civ 6, the learned trial judge's decision hinged on the availability, at the material time, of a restraining device being provided in the motor vehicle in which the 1st respondent was a back seat passenger. The learned trial judge found that the 1st respondent's non-compliance with seat belt usage was insufficient to establish contributory negligence. Relative to the standard of proof, she concluded that insufficient evidence existed to establish the 1st respondent's contributory negligence.

[26] The proceedings in the court below hinged significantly on the pleadings and evidence, pivotal to the ultimate determination. The learned trial judge astutely assessed the weight of evidence before her in rendering her judgment; it is to be noted that the entirety of the evidence was called by and on behalf of the 1st respondent. The 1st

respondent's evidence was primarily her witness statement, which stood as her evidence in chief, her further evidence consisted of answers given by her in extensive cross-examination undertaken by counsel for the appellants. The evidence also included a medical report prepared by Dr H Wong of the Kingston Public Hospital. The parties eventually agreed upon this document, which was tendered and admitted as an exhibit in the trial. In stark contrast, the appellants failed to proffer any evidence during the proceedings, abstaining from even submitting witness statements for or on their behalf.

[27] The 1st respondent's narrative recounted her being propelled upon impact, precipitating a descent between the front seats and a subsequent confrontation with the dashboard, resulting in injury to her forehead. Under cross-examination, the 1st respondent admitted to being thrust forward due to the absence of any restraint (seat belt). She underscored the accuracy of Dr Wong's medical report which documenting the 1st respondent's location as the back middle seat of the taxi motor car. Dr Wong's findings revealed complaints of pain in the forehead, shoulders, legs, and lower back; he diagnosed the 1st respondent with soft tissue injury. The 1st respondent testified that she was unable to work for approximately a month and a half, that she underwent six physiotherapy sessions, and incurred expenses for her medical treatment and transportation as a result of her injuries caused by the appellants' negligence.

[28] The subsequent submissions from the parties concentrated on the quantum of damages to be awarded to the 1st respondent. Counsel, on behalf of the 1st respondent, focused his submissions on the precedent set by prior court decisions regarding the assessment and award of general damages in circumstances where similar injuries were established. In contrast, the appellants, though conceding liability for the accident, argued vehemently for the consideration of contributory negligence, contending that the 1st respondent's failure to wear a seat belt warranted a proportional reduction in damages. They, accordingly, proposed a 75:25% apportionment of damages in the 1st respondent's favour, emphasizing the 1st respondent's responsibility to mitigate harm by wearing appropriate restraint.

[29] In rebuttal, counsel for the 1st respondent adroitly submitted that contributory negligence pertains to liability and, in the context of damages assessment, was irrelevant. Counsel also cited Section 43(A)(1)(c) of the RTA, asserting the appellants' burden to establish the mandatory seat belt requirement for back seat passengers as alleged.

[30] On a critical evaluation of the learned trial judge's reasons for judgment, it is noteworthy to indicate that she correctly identified the issues that arose on the evidence for her determination. The learned trial judge in her analysis acknowledged the injuries sustained by the 1st respondent, then went on to consider the further evidence of the 1st respondent and her admission that she was not wearing a seat belt at the time of the impact. It was an admitted fact that the 1st respondent was not wearing a seat belt at the time of the collision. It, therefore, became pertinent for the learned trial judge to consider whether that was a contributory cause of the 1st respondent's injuries and by extension, the appellants' entitlement by law to have the quantum of damages awarded to the 1st respondent reduced if the circumstances permitted. Given the injuries suffered by the 1st respondent and her acceptance that the injuries sustained were the result of her being thrown onto the dashboard, the learned trial judge had evidence before her to find as she did, that the 1st respondent's injuries would have been lessened if a seat belt had been worn.

[31] After giving due consideration, to the circumstances of the case before her, and making her conclusion that 1st respondent's injuries could have been avoided or reduced if she was wearing a seat belt, she reasoned that the finding of contributory negligence was dependent on whether a seat belt was available to the 1st respondent. Therefore, the ensuing issue for her consideration was the availability of a seat belt. The learned trial judge reasoned that the appellants did not show proof that the 1st respondent had failed to wear a seat belt that was available to her. Her finding was made in the absence of direct evidence connecting the 1st respondent's failure to wear a seat belt, with sufficient evidence as to the availability of a seat belt, on which the success of the appellants' averment of contributory negligence was hinged.

[32] Consequently, the learned trial judge refrained from apportioning damages. After meticulously considering the evidence and medical findings, she ruled in favour of the 1st respondent as deserving 100% award of the damages assessed. Relative to the quantum of the award, the learned trial judge relied on the precedent in **Marion Llandell v Judah Campbell** (unreported), Supreme Court, Jamaica, Claim No 2006 HCV 01324, judgment delivered 4 December 2009 ('**Marion Llandell**'), which she deemed most instructive in analogous circumstances. However, she discerned that the injuries in the present case were less severe, warranting an adjustment downwards. She granted judgment as articulated in para. [3] above.

[33] The cardinal point of the appellants' complaint on both grounds of appeal, concerned the treatment by the learned trial judge, of the question of whether the evidence was assessed properly in the determination that a seat belt was not available to the 1st respondent. The appellants contend that the learned trial judge should not have given any weight to the evidence of the 1st respondent, that she did not think a seat belt was available to her, as such evidence was mere speculation. Further counsel for the appellants submitted that, even if it was the finding of the court below, that a seat belt was not available, the court ought to have considered that the 1st respondent was not obligated to take that particular taxi. So, the decision to ride in a taxi that was not equipped with seat belts, meant that the 1st respondent ought to have been found contributory negligent.

The law relating to findings of fact of the court below

[34] Gleaned from the grounds of appeal and the submissions of the appellants, it is evident to this court that it is being asked to disturb the finding of fact arrived at by the learned trial judge and her evaluation of the evidence. This court has pronounced on numerous occasions that it will not lightly disturb the findings of fact made by the first instance tribunal, tasked with the duty to do so. This court must approach the consideration of this appeal on the guidance of **Watt v Thomas** [1947] AC 484 and **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35. The authoritative principle

of those decisions is that this court will only disturb the decision of the court below if it is unsupported by the evidence and/or plainly wrong, or if the tribunal did not make use of the benefit of having seen and heard the witnesses. Disturbance of the first instance tribunal is not to be done on the basis that if it was this court deciding the case at the trial stage we would have done so differently. Their Lordships in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 reaffirmed and re-emphasised this principle, stating at para. 12:

> "...It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong.' See, for example, Lord Macmillan in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 at 590, [1947] AC 484 at 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45, 2004 SC (HL) 1 (at [16]–[19]). This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1991] IRLR 309 at 312, [1992] ICR 85 at 92 (Lord Donaldson of Lymington MR). Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence…"

[35] It is to be noted that, the argument put forward by the appellants' counsel that the 1st respondent's decision to take a taxi not equipped with the requisite seat belt, gave rise to the inescapable conclusion that the learned trial judge should have found in the appellants' favour for contributory negligence of the 1st respondent, is an issue requiring further exploration by this court. Because the assessment and apportionment of damages is essentially an evaluative exercise involving the comparison of degrees of fault and causal contribution, an appellate court will not lightly interfere with the decision regarding

the quantum of damages determined by a trial judge (see **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2014] JMCA Civ 29, at para. [60], which reaffirmed **Flint v Lovell** [1935] 1 KB 354).

[36] What this court agrees with, however, is Lord Denning's admonition to passengers travelling in both private and public motor vehicles (**Froom v Butcher** at page 525) that:

> "Seeing that it is compulsory to fit seat belts, Parliament must have thought it sensible to wear them. But it did not make it compulsory for anyone to wear a seat belt. Everyone is free to wear it or not, as he pleases. Free in this sense, that if he does not wear it, he is free from any penalty by the magistrates. Free in the sense that everyone is free to run his head against a brick wall, if he pleases. He can do it if he likes without being punished by the law. **But it is not a sensible thing to do.** If he does it, it is his own fault; and he has only himself to thank for the consequences.
>
> **Much material has been put before us about the value of wearing a seat belt.** It shows quite plainly that everyone in the front seats of a car should wear a seat belt." (Emphasis added)

On page 528 he went further opined that:

> "Everyone knows, or ought to know, that when he goes out in a car he should fasten the seat belt. It is so well known that it goes without saying, not only for the driver, but also the passenger. … Under the Highway Code a driver may have a duty to invite his passenger to fasten his seat belt, but adult passengers possessed of their faculties should not need telling what to do. If such passengers do not fasten their seat belts, their own lack of care for their own safety may be the cause of their injuries."

Contributory negligence limited to quantum

[37] By virtue of section 3(1) of the Law Reform (Contributory Negligence) Act, the court is empowered to reduce the amount of award of damages recoverable by a claimant who has some fault for the damages incurred due to the injuries suffered. The percentage of the reduction is to be decided, having given regard to the claimant's portion of blame.

[38] In **Froom v Butcher**, at page 524e it was the pronouncement of the court that:

> "Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a 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…
>
> …But in seat belt cases the cause of the accident is one thing. The cause of the damage is another. The accident is caused by the bad driving. The damage is caused in part by the bad driving of the defendant, and in part by the failure of the plaintiff to wear a seat belt. If the plaintiff was to blame in not wearing a seat belt, the damage is in part the result of his own fault. He must bear some share in the responsibility for the damage and his damages fall to be reduced to such extent as the court thinks just and equitable."

[39] A passenger's failure to wear a seat belt gives rise to contributory negligence when apportioning blame for any injury sustained. It is the oft-cited rule of law that he who asserts must prove. It is for the appellants to prove on a balance of probabilities that the 1st respondent was contributory negligent. In **Owens v Brimmell** [1976] 3 ALL ER 765 Tasker Watkins, J at page769 said that:

> "…in such cases, as in every other case where contributory negligence is alleged, the burden of proving on the balance of probabilities that a plaintiff has contributed to the cause of damage suffered lies on him who alleged it, namely the defendant..."

[40] The above proposition was affirmed by the House of Lords in **Platform Home Loans Ltd v Oyston Shipways Ltd and others** [1999] UKHL J0218-2). Morrison P, in **Jacinth Morgan-Collie and Shawn Collie v Natasha Clarke**, highlighted that **Froom v Butcher** is still good authority for the proposition that where evidence shows that if a seat belt was worn then the injury to the passenger could have been avoided altogether, then a 25% reduction may be made (see para. [15]). Conversely, where the evidence is

such to suggest the injury may have been considerably less, then a reduction by 15% may be more appropriate.

[41] At para. [17] of **Jacinth Morgan-Collie and Shawn Collie v Natasha Clarke,** Morrison P indicated:

> "These decisions clearly establish that, upon the occurrence of a motor vehicle accident which is said to have been caused by the negligence of the driver of the motor vehicle, a passenger's failure to wear a seat belt when one is available will amount to contributory negligence when it comes to apportioning responsibility for any damage or injury which he or she may have suffered. It is a matter for the trial judge in each case to determine the degree to which the passenger should be held responsible for his or her own misfortune. In cases in which the evidence shows that the failure to wear the seat belt would have made no difference, and the damage would have been the same even if the seat belt had been worn, then there should be no deduction from the damages awarded to the passenger."

It is not only imperative for the courts to be satisfied that the passenger failed to wear a seat belt, but it must also be proved that a seat belt was available at the time of the collision.

[42] These authorities clearly establish the following principles:

(1) A claimant (passenger) in a motor vehicle accident is contributory negligent for failure to wear a seat belt when one was available.

(2) If the finding is that had a seat belt been worn the injury sustained would have been prevented or reduced, the result is an apportionment of responsibility for any damage or injury suffered.

(3) It is on the party claiming contributory negligence to satisfy the court on a balance of probabilities that the passenger was contributory negligent for the injury suffered.

(4) It is for the trial judge in each case to determine the degree to which the passenger should be held responsible for his or her injury.

(5) Where the evidence shows that the failure to wear a seat belt would have made no difference, and the damage would have been the same if a seat belt had been worn, no reduction should be made to the damages awarded to the passenger.

(6) Where the evidence shows that the failure to wear a seat belt would have made a difference in the injury suffered, then, a reduction of the damages awarded will be the result.

(7) Where a reduction is to be made and if damage is shown to have been preventable altogether if a seat belt was worn, it is suggested that damages be reduced by 25%. If the suggestion is that the injury may have been considerably less, then a reduction by 15% may be more appropriate. An example of when a 15% reduction may be more appropriate was articulated, at page 527 of **Froom v Butcher**:

> "**Some injuries to the head, for instance, would have been a good deal less severe if a seat belt had been worn, but there would still have been some injury to the head.** In such case I would suggest that the damages attributable to the failure to wear a seat belt should be reduced by 15 per cent."

Issues

[43] Given the material facts outlined above and having reviewed the notice and grounds of appeal, and the submissions of counsel, I am of the view that the principal issue for this court's determination, is whether the learned trial judge erred when she found, on a balance of probabilities, that the 1st respondent was not liable for contributory negligence. I have, therefore, treated the appeal as an issue-based consideration rather than addressing the matter as per the grounds filed by the appellants. In the context of this appeal, I have considered that there are pertinent questions about the current law

relating to contributory negligence and the apportionment of damages that deserve attention, therefore the finding of whether the 1st respondent was contributorily negligent for the injuries she sustained because she failed to wear a seat belt, will be considered under three sub-issues as follows:

(a) Where a defendant raises contributory negligence who bears the legal and evidentiary burdens of proof?

(b) In this case was there evidence to establish on a balance of probabilities that a seat belt was available to the 1st respondent for her use and protection?

(c) Does the RTA require a passenger in the back seat of a "taxi" to wear a seat belt?

(a) Where a defendant raises contributory negligence who bears the legal and evidentiary burdens of proof?

[44] The judgment entered on admissions, in this case, meant that the appellants accepted that they were liable in tort, specifically the 1st appellant admitted that he was negligent in the manner of his driving of the relevant motor vehicle and caused the collision between the motor vehicle he was driving and that being driven the 2nd respondent. The 2nd appellant as the principal of the 1st appellant was admittedly vicariously liable. I agree with the learned trial judge's opinion, that any other interpretation in the circumstances would be "incongruous." The learned trial judge had also quite rightly found that the evolution of the law regarding contributory negligence meant that this issue was no longer a matter of a defence but was now a part of the law of remedies and the appellants were entitled to rely on the same in seeking to diminish the quantum of their liability.

[45] The LRCNA in this jurisdiction provides for the 'apportionment' of damages, that is, reduction of the damages to which the claimant is entitled when she has contributed to her injuries/damages. Under the LRCNA, the court has the discretion to reduce the

claimant's damages to the extent the court considers "just and equitable" in relation to the plaintiff's share of responsibility for the harm suffered.

[46] It was the appellants who raised the issue of contributory negligence, and the learned trial judge was obliged to determine who bore the legal and evidential burdens of proof in the case before her. This court recognises that legal and evidential onus can be segregated depending on the circumstances and the issues in contention between the parties.

[47] Undoubtedly, a claimant bears the legal burden of proof in a civil claim, albeit the standard of proof is on a balance of probabilities. In circumstances where the respondent accepts liability, this means there are no issues joined relative to liability, therefore, the claimant automatically overcomes that hurdle and is deemed to have discharged the legal onus of proof as it concerns liability. This was the situation in the case at bar.

[48] In contributory negligence cases, the burden of proof plays a crucial role. It lies on the respondent (appellant in this case) who aims to establish that the claimant's negligence contributed to their harm, to prove contributory negligence successfully. Lord Wright in **Caswell v Powell Duffryn Associated Collieries, Ltd** [1940] AC 152 at page 172 had opined that "If the defendant's negligence or breach of duty is established as causing the death [in this case the injury] the onus is on the defendant to establish that the plaintiff's contributory negligence was a substantial or material co-operating cause". It is important to note that negligence as used in the expression 'contributory negligence' is not used in the usual sense of breach of a legal duty to take care but, rather it is used as expressing the failure by a person to use reasonable care for the safety of himself or his property (see **Davies v Swan Motor Co** [1949] 2 KB 291 at page 309. Expressed in another way the claimant is said to be 'the author of his own wrong.')

[49] The appellants herein, in discharging that onus, must establish the following elements:

1. The claimant had a duty of care to act reasonably to avoid harm to herself.
2. The claimant breached that duty of care through negligence or carelessness.
3. The claimant's breach of duty directly contributed to the harm or injury she suffered.

As a matter of course, the courts evaluate the foregoing elements on the balance of probabilities, meaning that the appellants were obliged to show it was more likely than not that the 1st respondent was negligent, and that negligence played a role in her injury or harm.

(b) In this case was there evidence to establish on a balance of probabilities that a seat belt was available to the 1st respondent for her use and protection?

[50] Different types of evidence could support the appellant's averment of contributory negligence, such as witness statements detailing the claimant's negligent behaviour, expert testimony to establish that the claimant's actions fell below the standard of a reasonable passenger, photographs or video footage showing the claimant's negligence, and other documentation or records that prove the claimant did not follow safety precautions or guidelines or was in breach of some statutory provision. Some other factors that a trial court would consider when determining contributory negligence are; whether the claimant took reasonable precautions to prevent the accident, whether she was aware of potential risks and dangers, and whether she intentionally or recklessly disregarded safety measures.

[51] In this case, no such evidence was proffered by or on behalf of the appellants. In paragraphs 6 and 7 of the 3rd and 4th Defendants' Defence Limited to Quantum ('the defence') filed on 30 July 2021, the appellants had denied the injuries and damages alleged by the 1st respondent and further contended that:

> "…if the Claimant sustained these injuries, and this is not admitted, then the Claimant suffered them partially as a result of the Claimant's contributory negligence in the Claimant

> failing to wear a seat-belt at the time of the accident and therefore Damages should be apportioned accordingly."

Similar averments were made about the claim for special damages. Save and except for these averments, the appellants made no effort to put before the learned trial judge any evidence that could establish that there was even a seat belt provided in the relevant vehicle and available for the 1st respondent's use.

[52] Although the 1st respondent admitted that she was not wearing a seat belt at the relevant time, the failure to wear a seat belt, however, does not automatically establish contributory negligence. The appellants must also show that the injuries suffered by the appellant could have been avoided or minimised by wearing the seat belt. The 1st respondent on cross-examination admitted that had she been restrained she would not have suffered said injuries, this, however, begs the question as to whether she was competent to give what amounts to medical opinion evidence. Even if it could be said that the 1st respondent's admission supplied that requirement, the appellants' obligation did not end there, they were further required to establish that a seat belt was available for the 1st respondent's use, and she failed to avail herself of it. I was fortified in this position on a reading of the Commonwealth Caribbean Tort Law, 5th edition, at page 381 reference is made to the Bahamian case of **Thurston v Davis**, (unreported), Supreme Court of The Bahamas, Common Law Side No 1146 of 1988, judgment delivered 12 June 1992, where Thorne J held that it must be shown that the injured person failed to wear a seat belt **when one was available** and that the wearing of the seat belt would have prevented or minimised the injuries (emphasis added). The learned trial judge had obliquely made that point, which was the basis of her declining to make a finding of contributory negligence.

[53] In ground one of their appeal, the appellants advanced the argument that the learned trial judge was wrong to have relied on the 1st respondent's evidence expressing her uncertainty about whether the taxi in which she travelled had seat belts. They contended that such evidence was "speculative," had "no evidentiary value," and ought

to have been "disregarded by the learned trial judge. They further contended that the 1st respondent had provided no cogent or probative evidence that supported the learned trial judge's conclusion that contributory negligence was not established." By their contention, the appellants by subliminal implication transferred the evidential burden of disproving contributory negligence onto the 1st respondent. I was fortified in this opinion when I examined their further argument in support of ground one. Here the appellants submitted that "if the 1st Respondent had an intention of placing the existence or non-existence of the seatbelt as a fact in issue in this case, then by right the 1st Respondent ought to have filed and served a Reply to the Appellant's Defence Limited to Quantum". This contention led me to an examination of rule 10.9 of the Civil Procedure Rules, 2002 ('CPR') which states that "[a] claimant may file a reply within 14 days of service of the defence". In this case, no such reply was filed. My interpretation of that provision in the CPR is that if an issue is raised that a claimant disputes then it would be sensible for the claimant to state their denial or explanation and indicate the evidence that would be relied on to substantiate their position. The question is, did the appellants raise an issue to be disputed?

[54] In my further exploration of this issue, I also examined rule 10.5 of the CPR, set out below:

> "10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.
>
> (2) Such statement must be as short as practicable.
>
> (3) In the defence the defendant must say-
>
> (a) which (if any) of the allegations in the claim form or particulars of claim are admitted;
>
> (b) which (if any) are denied; and
>
> (c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.

(4) Where the defendant denies any of the allegations in the claim form or particulars of claim –

(a) the defendant must state the reasons for doing so; and

(b) **if the defendant intends to prove a different version of events from that given by the claimant,**

the defendant's own version must be set out in the defence

(5) Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not –

(a) admit it; or

(b) deny it and put forward a different version of events,

the defendant must state the reasons for resisting the allegation.

(6)…

(7)…

(8)…" (Emphasis supplied)

[55] The appellants maintained that the 1st respondent failed to comply with the obligations to answer the averments of contributory negligence as raised in paras. 6 and 7 of the defence as filed by the appellants who were the respondents in the court below. They have not, however, demonstrated their compliance with rules 10.5(4)(b) and (5) of the same rules. A reading of section 10.5 of the CPR, quoted in para. [54] above, makes it pellucid, that, although only a short statement of facts is required to be included in the defence, facts there must be in support of the defendant's case and or denial. In that document, one would have expected to see a statement or statements of 'the particulars' of the 1st respondent's alleged contributory negligence. Certainly, a positive statement of fact or facts detailing the presence of seat belts in the vehicle in which she was travelling. Such evidence coupled with the 1st respondent's admission of not wearing a seatbelt

would have been ample evidence for the consideration of the learned trial judge and a consequent determination of contributory negligence. The reason for the duty imposed in rule 10.5 is to alert a claimant as to the parameters of the defence and to identify the areas of dispute. I find support for this view in a previous decision of this court in **Rasheed Wilks v Donovan Williams** [2023] JMCA Civ 15 at para. [45] where Edwards JA expressed that:

> "[45] … Furthermore, there is, effectively, not much difference between making a claim for damages but not pleading particulars of a head of damages in support of that claim, in breach of the rules, and making a bare denial of a claim, without pleading any brief statement of facts in support of that denial, also in breach of the rules. In my view, the effect is the same. Viewed in any other way, rule 10.5 of the CPR would be made redundant."

[56] I am of the view that the appellants failed to plead facts or provide information in their defence to dispute the 1st respondent's allegations of negligence against them, they had not raised as an issue the availability of seat belts which would have necessitated a direct reply from the 1st respondent if she was disputing the presence of seat belts. This was not the situation herein. The appellants could not subsequently seek to transfer the evidential onus of proof onto the 1st respondent during counsel's submissions. The case of **Enoch Karl Blythe v Paget DeFreitas et al**, on which they relied, does not assist the appellants. The function of a reply was explicated by Morrison JA (as he then was) in para. [20] of the judgment, in making his point he cited paragraph 27.2 from Blackstone's Civil Procedure [2005] which is set out below:

> "Conventionally, a reply may respond to any matters raised in the defence which were not, and which should not have been, dealt with in the particulars of claim, and exists solely for the purpose of dealing disjunctively with matters which could not have been properly dealt with in the particulars of claim, but which require a response once they have been raised in the defence. It has always been a cardinal rule of pleading (which has certainly not been altered by the CPR) that a claim should not anticipate a potential defence (popularly known as 'jumping the stile'). **Once, however, a defence has been**

> **raised which requires a response so that the issues between the parties can be defined, a reply becomes necessary for the purpose of setting out the claimant's case on the point.** The reply is, however, neither an opportunity to restate the claim, nor is it, nor should it be drafted as, a 'defence to a defence'." (Emphasis added)

I reiterate that the appellants had not raised a defence requiring a response from the 1st respondent.

[57] The question is, what if any are the consequences of such a failure? According to counsel's submission made on behalf of the 1st respondent, there was no evidence proffered by the appellants from which the court can infer an assertion that the 1st respondent was contributorily negligent. In my view, those observations made perfectly good sense, otherwise, there would be no need for allegations of facts to support a denial. It is my view that the defence contained bare denials, was in breach of rule 10.5, and was, therefore, incapable of sustaining the averments of contributory negligence.

[58] I am also of the view that the fact, that the 1st respondent had made no reply to the allegation of contributory negligence did not mean that there could be any assumption by the learned trial judge or indeed the appellants that, the averments in the defence were accepted by the 1st respondent. The appellants were not relieved of their evidential onus to provide cogent evidence to buttress their allegations (see **Sandra Zanatta v Metroline Travel Limited** [2023] EWCA Civ 224, per Lady Justice Andrews at para. 52.) During the trial, the appellants had done no more than attempt to rely on the 1st respondent's acknowledgment that she was not wearing a seat belt to ground their case, and on that basis urged the learned trial judge to make a finding of fact relative to contributory negligence. The learned trial judge was not obliged to do so and, correctly, in my view, declined so to do.

[59] The appellants had alternatively submitted that even if no seat belts were provided in the vehicle in which the 1st respondent was travelling, that did not relieve her from liability since the law required seat belts to be worn by passengers, even in a public

passenger vehicle ('PPV'). It was the responsibility of the 1st respondent to have utilized a taxi that provided such safety measures installed for her use, they contended.

[60] Whereas the proposed behaviour of the model passenger would be appropriate in an ideal world, the idea that a user of public transportation was obliged to stop taxi after taxi and refuse to board any if there were no seat belts provided in the back seat is unrealistic. That would be placing too onerous a responsibility on a traveller who relies on PPV to get to their destinations of work, school, and home. In **Consolidated Bakeries and Victor Williams v Pauline Bell (by her next friend Adeline Thompson)** (1968) JLR 11 this court had opined that a motorist was required to exercise reasonable care. He was not required to be a perfectionist. I would adopt and adapt those sage words and say likewise a passenger using PPV is expected to exercise reasonable care for their safety and well-being but are not required to be perfectionists.

[61] Contributory negligence is hinged on the concept of foreseeability of harm to oneself. Lord Justice Denning explained in **Jones v Livox Quarries Ltd** [1952] 2 QB 608 at page 615 that:

> "A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."

This sentiment was similarly propounded in **Lang v London Transport Executive and Another** [1959] 1 WLR 1168 at page 1176 by Havers J:

> "The correct principle was stated by Lord Dunedin when he said: 'If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.' (Fardon v Harcourt-Rivington (1932) 146 LT 391, 392)."

[62] My observations and views, at this point, provide an apposite segue into the following issue.

(c) Does the RTA require a passenger in the back seat of a "taxi" to wear a seat belt?

[63] The learned trial judge's findings cannot be divorced from the provisions of the 1938 RTA, which was the relevant legislation at the time of the collision. Hence, for the 1st respondent to be found contributory negligent, the learned trial judge had to be satisfied that her actions or failure to act brought her within the ambit of the provisions of that legislation.

Road Traffic Act, 1938

[64] Section 43A provides and reads:

> "43A.-(1) Subject to subsections (2) and (3), a motor vehicle shall not be used on a road unless it is equipped with seat belts-
>
> ...
>
> (c) in the case of public passenger vehicles as specified in section 60(1), that is to say-
>
> (i) stage carriages as specified in paragraph (a), on the front seat only;
>
> (ii) express carriages as specified in paragraph (b), on the front seat only;
>
> (iii) contract carriages (except trucks) as specified in paragraph (c), on the front seat and rear seat;
>
> (iv) hackney carriages as specified in paragraph (d), on the front seat and rear seat."

Section 43B went on to state as follows:

> "(1) Subject to subsection (2), every person who, on any road-

(a) drives a motor vehicle specified in paragraph (b), (c), (d) or (f) of section 11(1);

(b) rides in a motor vehicle specified in paragraph (c) (d) or (f) of section 11(1);

(c) rides in the front seat of-

(i) a truck as specified in paragraph (b) of section 11(1);

(ii) a stage carriage as specified in paragraph (a) of section 60(1);

(iii) an express carriage as specified in paragraph (b) of section 60(1),

shall wear a seat belt."

The Transport Authority (Amendment) Act, 2015 ('TAA')

[65] Section 15A elucidates the classification of public passenger vehicles, it states:

"(1) Subject to subsection (2), for the purposes of the Road Traffic Act, and the regulations made under those Acts, public passenger vehicles shall be divided into the following classes-

(a) stage carriages; that is to say, motor vehicles carrying passengers for hire or reward at separate fares for a single journey, stage by stage, and stopping to pick up or set down passengers along a designated route, and any other motor vehicles carrying passengers for hire or reward at separate fares and not being express carriages or hackney carriages as defined in this section;

(b) express carriages; that is to say, motor vehicles not being hackney carriages, as defined in this section, carrying passengers for hire or reward at separate fares for a single journey and for a journey or journeys from one or more points specified in advance to one or more common destinations so specified, and not stopping to take up or set down passengers other than those paying appropriate fares for the journey or journeys in question;

(c) contract carriages; that is to say, motor vehicles carrying passengers for hire or reward under a contract expressed or

> implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum and not standing or plying for hire on any road;
>
> (d) hackney carriages; that is to say, motor vehicles carrying passengers for reward or hire as a whole, used in standing or plying for hire on any thoroughfare or place frequented by the public and which have seating accommodation for not more than five persons, including the driver; and
>
> (e) route taxis; that is to say, motor vehicles, adapted for carrying no more than ten passengers for hire or reward at separate fares along a designated route not exceeding thirty kilometres, and stopping to pick up and set down passengers along that route."

[66] There is a requirement for all motor vehicles to be equipped with seat belts in accordance with section 43A of the Act. Section 43A(1)(c) requires public passenger vehicles to be equipped with seat belts on the front seat only for stage carriages. Provided further by section 43B(1)(c) of the Act, is a requirement for all persons who ride in the front seat of a stage and express carriage to wear a seat belt, failure of which under subsection 3 of 43B is an offence liable for summary conviction. While route taxis are classified under the TAA, they are not one of the listed classifications under section 43A(1)(c) nor 43B(1)(c) of the RTA. Stage carriages and route taxis do however share similar features. There is, nonetheless, only a requirement for the front seat of a public passenger vehicle categorized as stage carriages, to be equipped with seat belts.

[67] Whilst cases exist where back seat passengers are not exempt from wearing a seat belt, passengers in a public passenger vehicle on the back seat do not necessarily fall into that classification. The evidence before the court related that the 1st respondent was travelling in a "taxi." There is no evidence that the "taxi" in question was a "contract carriage" as the 1st respondent was seated on the back seat with three unknown persons and was expected to pay a fare. This vehicle was travelling from downtown Kingston and heading towards Bull Bay, incidentally, the 1st respondent gave her address as Bull Bay St Andrew. By inference, the circumstance lends itself to the conclusion that the vehicle in which the 1st respondent travelled was a route "taxi" and therefore fell within the ambit

of section 43A (1)(c)(i) and (ii) of the RTA. I say this because stage carriages are classified as motor vehicles that carry passengers for hire or remuneration and stop to pick up or set down said passengers along a designated route, "not being express carriages or hackney carriages". Since section 43A(1)(c) compels the wearing of seat belts for passengers seated only in the front of a stage carriage, the class of PPV was therefore a fact for the appellants to allege and prove, as part of their contention that the respondent was contributorily negligent.

[68] If my reasoning is flawed, I nonetheless maintain that the learned trial judge was not wrong in her approach when she declined to conclude that contributory negligence was established. She had expressed a lack of evidence supporting the presence of a seatbelt and the type of conveyance in which the 1st respondent was seated. This meant the appellants had not discharged their evidential burden, even on a balance of probability.

Conclusion

[69] Whereas the appellants had raised the issue of contributory negligence in the defence, it came in the wake of their denial of the 1st respondent's alleged injuries and their demand that she strictly proved the same. Further, in para. 9 of the defence, the appellants denied the relief sought by the 1st respondent or in the alternative that any award of damages was to be apportioned. In my view, those averments amounted to no more than a bald denial of responsibility for the injuries alleged, those averments without supporting evidence, were insufficient to derail a finding by the learned trial judge that contributory negligence was not established. The mere allegation of contributory negligence cannot establish that as a fact. The issue is established only on probative evidence such as an admission by the 1st respondent or by reasonable inference(s) drawn by the tribunal of fact based on the conduct of the 1st respondent. No such evidence existed in this case and therefore the findings of the learned trial judge cannot be said to be plainly wrong.

[70] The criticism concerning the learned trial judge's decision turned on her finding of fact, of whether a seat belt was available to the 1st respondent. Having considered the learned trial judge's finding against the background of the applicable law, it is this court's view that she was not plainly wrong in coming to her decision that the 1st respondent was not liable for damages for her injuries in failing to wear a seat belt. Having examined the reasoning of the learned trial judge and having reviewed the evidence before her in this case, I find it was open to the learned trial judge to make the findings of fact at which she arrived. The findings were not perverse. There is, therefore, no reason to disturb her orders. It is for those reasons that the appellants' appeal should be dismissed.

P WILLIAMS JA

ORDER

1. The appeal is dismissed.

2. Costs to the 1st respondent to be agreed or taxed.