IN THE COURT OF APPEAL OF BELIZE AD 2013
CIVIL APPEAL NO 15 OF 2011

MADRID CRUZ Appellant

v

(1) **JOSE ALVARENGA**
(2) **WENDY HERNANDEZ** Respondents

BEFORE
The Hon Mr Justice Manuel Sosa President
The Hon Mr Justice Dennis Morrison Justice of Appeal
The Hon Mr Justice Samuel Awich Justice of Appeal

N Myles for the appellant.
N Dujon SC for the respondents.

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19 March and 28 June 2013.

SOSA P

[1] I am in agreement with the other members of the Court that the appeal should be dismissed and that the order of Legall J should be varied. I have read, in draft, the judgment of Morrison JA and concur in the reasons for judgment given, and the orders proposed, in it. Accordingly, the order as to costs, as set out at para [81], below, shall stand and be final unless any party shall within 10 days of today's date apply (by letter to the Registrar) for a contrary order, in which event the matter of costs shall be decided

by the Court on written submissions, to be filed and delivered by all parties in 14 days from the date of the making of such application.

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SOSA P

MORRISON JA

The background to this appeal

[2] This is an appeal from a judgment given on 16 February 2011 by Legall J in an action for negligence brought by the respondents against the appellant. The appellant ('Mr Cruz') was adjudged liable to pay damages in the sum of $43,493.50 to the first named respondent ('Mr Alvarenga') and $55,061.96 to the second named respondent ('Ms Hernandez'), plus interest and costs.

[3] The action arose out of a motor vehicle collision, which took place in Belmopan at about 7.50 in the evening of 18 July 2009 along Constitution Drive, at its junction with Forest Drive. Constitution Drive runs from north to south, while Forest Drive runs from east to west, starting from its 'T' shaped junction with Constitution Drive.

[4] At the material time, the Mr Cruz was the owner and driver of a pickup truck, licensed no. CZL-C15763, while Mr Alvarenga was the rider of a motor cycle, licensed no. CY-M0558. Ms Hernandez was the pillion rider on the motor cycle ridden by Mr Alvarenga.

[5] I cannot improve on, and therefore gratefully adopt, the learned trial judge's pellucid introduction to the case (at paras 2 - 4 of the judgment):

> "2. On the night of 18th July 2009, at about 7:50 p.m. the defendant was driving in a north to south direction along Constitution Drive in motor pickup truck licence No. CZL-C-15763. In the truck, with the defendant, was his common-law-wife, Maria Varela, who was sitting next to the defendant in the front seat; his ten year old daughter, Lucely Cruz, who was sitting at the back behind the defendant; and a friend of the defendant, Rodney Griffith who was sitting behind Maria Varela. Riding a motor cycle No. CY-M-0558 along Constitution Drive in the opposite direction of the truck, was the No. 1 claimant. Sitting on the motor cycle, behind the driver on the passenger seat was the second claimant, both of whom are friends.
>
> 3. The truck and the motor cycle collided, and the claimants suffered injuries to their legs and other parts of their bodies. As a result of the collision and injuries, the claimants brought the present claim against the defendant for damages for personal injuries for negligence, and for special damages, interest and costs. The defendant also filed a counterclaim against the No. 1 claimant for $8,000 for damage to the defendant's truck.
>
> 4. The task of the court is to decide how the accident happened and whether there was negligence by any of the parties. This task is made difficult because although the witnesses purport to have seen the same accident, there are opposed versions of how it occurred. The witnesses in the defendant's truck gave a version consistent with his evidence; while the passenger on the claimant motor cycle, the second claimant, gave a version consistent with the rider of the motor cycle."

[6] The learned trial judge accepted the version of how the collision occurred proffered by Mr Alvarenga, the motor cyclist, and Ms Hernandez, his pillion rider and gave judgment in their favour, as already indicated. However, he adjudged Mr Alvarenga to be guilty of contributory negligence and accordingly adjusted the damages awarded to him (but not those awarded to Ms Hernandez) by 20%.

[7] By notice of appeal dated 9 March 2011, Mr Cruz challenged Legall J's judgment on the following grounds:

> "3.1 The Judgement is against the weight of the evidence.

3.2 That the learned Trial Judge erred in finding that the evidence adduced proved on a balance of probabilities that the Appellant's negligence caused the accident on the 18th of July 2009.

3.3 Further, or in the alternative that the learned Trial Judge erred in law in determining that the 1st Respondent's contributory negligence in causing the said accident only amounted to 20%.

3.4 Further, or in the alternative that the learned Trial Judge erred in law in awarding the figure of $55,000 for general damages in relation to the No. 1 Respondent and $50,000 for the No. 2 Respondent."

[8] By their respondents' notice dated 25 March 2011, Mr Alvarenga and Ms Hernandez for their part seek a variation of the judgment, on a single ground, as follows:

> "The learned trial judge erred in law in finding that there was contributory negligence on the part of the 1st Respondent as it was not pleaded by the Appellant and did not in fact form part of the Appellant's case."

[9] The issues that arise for the decision on this appeal are therefore (i) whether the judge's finding that the collision was the result of Mr Cruz's negligence was justified by the evidence; (ii) whether the judge's assessment of the contributory negligence attributable to Mr Alvarenga on the evidence was correct; (iii) whether the judge made a correct assessment of the quantum of general damages to be awarded to Mr Alvarenga and Ms Hernandez; and (iv) whether it was open to the judge to make a finding of contributory negligence in the absence of any pleading to this effect.

The pleadings

[10] The case pleaded on behalf of Mr Alvarenga and Ms Hernandez in their statement of claim dated 11 December 2009 was that, on 18 July 2009, Mr Alvarenga was riding his motor cycle, with Ms Hernandez as the pillion-rider, in a north to south direction along Constitution Drive. Paragraph 5 of the statement of claim alleged that,

upon reaching the intersection of Constitution Drive and Forest Drive, “the Defendant so negligently drove or attempted to drive his motor vehicle across the path of the 1st Claimant that he caused or permitted the same to violently collide into the left side of the said motorcycle causing the said motor cycle to run off the side of the road and into a ditch”.

[11] Particulars of the negligence alleged against Mr Cruz were given as follows:

> “a) Driving at a speed which was excessive in the circumstances.
>
> b) Failing to keep any or any proper lookout.
>
> c) Failing to have any or any sufficient regard for other users of the said road.
>
> d) Turning or attempting to turn from the said Constitution Drive onto Forest Drive across the path of the 1st Claimant when it was unsafe and dangerous so to do.
>
> e) Failing to stop or to wait in the said road until the 1st Claimant passed him in safety before turning or attempting to turn to his left.
>
> f) Failing to see the 1st Claimant in sufficient time to avoid crossing or attempting to cross his path or at all.”

[12] Mr Alvarenga and Ms Hernandez alleged that, as a result of Mr Cruz’s negligence, they both sustained injuries and suffered loss and damage.

[13] In the defence filed on his behalf on 7 January 2010, Mr Cruz denied the allegation of negligence and averred that it was Mr Alvarenga, “who negligently drove his motor cycle into [his] vehicle, as evidenced by the Police Report into the accident which is attached hereto as <u>Exhibit 1</u>”. Mr Cruz also counterclaimed for damages in respect of damage allegedly caused to his pickup truck, “to its left fender, left front bumper, left front headlight and left side of bonnet” [sic].

[14] The police report attached to the defence is dated 11 September 2009. Because the report is the basis of Mr Cruz’s defence, I cannot avoid reproducing it in its entirety:

“**BELIZE POLICE DEPARTMENT**
POLICE REPORT

On Saturday 18th July 2009 at about 7:50 p.m. Jose Alvarenga, 22 years DOB 29.08.88 Belizean Construction Worker of Las Flores Area, Belmopan City, Cayo District was driving a Black Meilun Motorcycle L/P CY-M-0558 on Constitution Drive in Belmopan City traveling in a north to south direction. Accompanying Jose Alvarenga was Wendy Hernandez, 18 years DOB 26.01.91 Belizean Secretary of No. 20 Maravilla Street, Las Flores Area, Belmopan City.

Reaching at the junction of Constitution Drive and Forest Drive, the motorcycle collided head on into a Maroon Ford Ranger Pick-up Truck L/P CZL-C-15763 driven by Madrid Cruz, 36 years DOB `5.05.73 Belizean Technician of New Site, Maya Mopan Area, Belmopan City which was traveling in the opposite direction. Accompanying Madrid Cruz was [sic] his common law wife Maria Varela and his daughter Lucely Cruz, 10 years.

Persons injured:

1. Lucely Cruz received injuries to her lower lip and front tooth broken [sic].
2. Wendy Hernandez was transported to Western Regional Hospital with injuries to her left foot, right wrist and complains of pain to her chest area. She was later transferred to Karl Heusner Memorial Hospital for further treatment.
3. Jose Alvarenga was transported to the Western Regional Hospital with injuries to the right side of his head, two joints broken on his left foot and abrasions to his lower back and left shoulder. He was later transferred to Karl Heusner Memorial Hospital for further treatment.

Black Meilun Motorcycle L/P CY-M-0558 is the property of Jose Alvarenga. It is licensed until August 2009 and insured (Third Party Risk) with Home Protector Insurance Company from 23rd November 2008 to 22nd November 2009. It received extensive damages.

Maroon Ford Ranger Pick-up Truck L/P CZL-C-15763 is the property of Madrid Cruz. It is licensed until 30th September 2009 and insured (Third Party Risk) with Home Protector Insurance company from 22nd June 2009 to 22nd November 2009. It received damages to its left front fender, left front bumper, left front headlight and left side of bonnet.

> From police investigation, Jose Alvarenga appears to be at fault. Madriz Cruz requests no court action but seeks compensation for damages received to his vehicle.
>
> To date, 1st September 2009 no charges have been levied against Jose Alvarenga."

[15] Pursuant to rule 34.2 of the Supreme Court (Civil Procedure Rules) 2005, Mr Alvarenga and Ms Hernandez served a request for further information on Mr Cruz, asking him to state, among other things, whether it was the case "(a) That at the material time referred to in the pleadings it was your intention to turn your vehicle left from Constitution Drive into Forest Drive" and "(b) That you did in fact make the turn into Forest Drive". Mr Cruz's response to both (a) and (b), certified by him to be true on 15 August 2010, was "No".

The evidence

[16] As was the case before Legall J, a proper consideration of the issues on appeal calls for an examination in some detail of the evidence adduced at trial. Both Mr Alvarenga and Ms Hernandez gave evidence in support of their claims. They were supported by the evidence of Dr John Waight, a consultant orthopaedic surgeon with over 30 years of experience, who had examined and treated them both, as well as Corporal Darius Guzman, a police officer, who had visited the scene of the collision some time after it occurred. Mr Cruz, in addition to his own evidence in his defence, relied on the evidence of Mr Rodney Griffith and Maria Varela, his friend and common law wife respectively, both of whom were passengers in his pickup truck at the material time.

[17] Mr Alvarenga's evidence, as contained in his witness statement dated 27 May 2010, was that on 18 July 2009, with Ms Hernandez as his pillion rider, he was riding his motor cycle in a north to south direction along Constitution Drive in Belmopan. On reaching the intersection of Constitution Drive and Forest Drive, a pickup truck, which was proceeding in the opposite direction along Constitution Drive, turned left across his

path “in what appeared to be an attempt to go into Forest Drive”. As a result, his motor cycle was hit on the left side and he immediately felt pain in his left leg. According to Mr Alvarenga, “I then appeared to have lost consciousness for when I came to I was in extreme pain and lying in the drain on the right side of Constitution Drive just beyond its intersection with Forest Drive along with Wendy Hernandez and the motor bike”. Attached to his witness statement were photographs subsequently taken by Mr Alvarenga of his motor cycle, showing the damage to its left side to which he had made reference.

[18] Mr Alvarenga’s evidence was that the pain which he felt immediately after the accident and for several months afterwards was “extreme”. He spent nine days in hospital initially and in April 2010 underwent further surgery. As at the date of his witness statement in May 2010 he was only able to walk with the aid of crutches and had not been able to work since the accident. Before the accident, Mr Alvarenga said, he was a “healthy person…[who] played football and liked to go swimming and hunting”, none of which he was now able to do.

[19] Under a wide-ranging cross-examination by counsel for Mr Cruz (the late Dr Elton Kaseke), Mr Alvarenga said a number of things. He put the time of the accident at 7.50 pm and agreed that it was dark at that time. He was 21 years old as at the date he gave evidence at trial. At the date of the accident, he did not have, and had never had, a licence to drive either a motor cycle or a motor car. He was not insured to ride the motor cycle, which was owned by one Mr Rudy Galdamez. At the time of the accident, he said, “mi gat like four months driving motor cycle”. He was “not going too fast” at the material time and he estimated the speed at which he was travelling at 35 miles per hour. Neither he nor Ms Hernandez was wearing a helmet at the time. He did not see anything after the accident, as he was unconscious and only woke up in hospital.

[20] As regards the actual collision, although he initially appeared to be saying the opposite, it ultimately became clear that Mr Alvarenga agreed that the pickup truck

sustained damage to its left side, as can be seen from the judge's note of his evidence in this aspect of the cross-examination:

> "I agree that the vehicle was damaged on the left side. As the vehicles were moving the left side of the truck was closer to me. It turned left to go into Forest Drive. The truck was damaged to its left side. I said on the right side because of how the picture looked … At the time of the impact I was travelling at 35 miles per hour. I cannot say the speed of the truck at the time of the accident. I cannot say how far I was from the truck when I first saw it. Before the impact I cannot say how fast the truck was travelling. I did not see the truck slow down when it made the turn."

[21] Ms Hernandez's account of the accident supported Mr Alvarenga's in the material respects. In her witness statement dated 29 April 2009, she confirmed that she was the pillion rider on his motorcycle as it proceeded along Constitution Drive and that "upon reaching the intersection of Constitution Drive and Forest Drive a pick up truck coming from the opposite direction along Constitution Drive turned left across our path in an attempt to go into Forest Drive". She appeared to have lost consciousness, "for when I came back around I was in the drain on the right side of Constitution Drive just beyond its intersection with Forest Drive in extreme pain".

[22] Hospitalised immediately after the accident, Ms Hernandez stated that she remained in hospital until 7 September 2009, and, at the date of her witness statement, she was still unable to walk "unaided". She had had to put "on hold" her plans to study international relations and, although she tried to remain positive about her condition, she did "fall into a depressive state from time to time". She described herself, before and after the accident in these terms:

> "Before the accident I was a healthy outgoing person, I liked to dance and attend functions where I would try to improve my PR skills. I can't dance now and have stopped attending functions as my condition becomes the focal point of any conversation that I try to have and detracts from me honing my skills and quite frankly disturbs me. Also whenever the weather changes I experience considerable pain in my leg and hip."

[23] When she was cross-examined, Ms Hernandez was asked about the speed at which the motor cycle was travelling before the collision and her response was that, although she did not know "miles of speed", "[i]t was at a normal pace". She continued as follows:

> "I saw the pick up before the accident occurred. I cannot state the distance at that time. I do not remember which side I was looking. That was the only time I saw the light from far coming. The vehicle was moving it never stopped. I saw the light of the vehicle from far. The red thing. I knew there was a boom. I saw the vehicle moving. I saw the light and then there was a boom."

[24] Dr Waight gave brief evidence, during which the medical reports prepared by him in respect of both Mr Alvarenga and Ms Hernandez were tendered and admitted together as one exhibit.

[25] Dr Waight examined Mr Alvarenga three times on 12 and 14 September 2009 and again on 8 May 2010. He confirmed that Mr Alvarenga sustained injuries as follows:

> "1. abrasions to the left shoulder and hip which have healed with scars as described above and a scalp laceration which has healed without scarring.
>
> 2. a closed fracture of the left femur which was treated by open reduction and internal fixation. The fracture is in an anatomical position and there is radiographic evidence that the fracture is uniting."

[26] The x-rays seen by Dr Waight in September 2009 showed that the fracture of the left femur had been treated after the accident "by internal fixation with a plate and a total of thirteen screws". However, subsequent x-rays done on 15 and 24 April 2010 showed that the fracture had not united, the plate had broken in its central part and had been removed with the exception of one broken screw. At that time, the fracture was in a slightly angulated position. Dr Waight stated his opinion as follows:

> "The left lower limb is now supported in a fibre glass cylinder and he is weight-bearing on that member in an effort to promote callus formation leading to union of the fracture. Said measures may achieve the intended objective; but, should union not occur, further surgery in the form of another internal fixation procedure and the application of a bone graft may then become necessary. It should also be noted that union of the fracture may not even then occur. It is my view that Mr Alvarenga remains medically unfit for remunerative employment for a period of one year since his last surgical procedure."

[27] In the case of Ms Hernandez, who was also examined by him on 12 and 14 September 2009, Dr Waight's opinion was as follows:

> "Opinion: Ms. Hernandez has, as the result of the accident, sustained:
>
> 1. a minimally displaced fracture of the right ischio-pubic ramus of the pelvis which appears to be healing satisfactorily.
>
> 2. a displaced, comminuted, compound fracture of the left tibia which necessitated a prolonged period of in-patient hospital treatment as described above.
>
> The current situation is that, whereas the skin wound over Ms. Hernandez' left leg appears to be healing satisfactorily and without infection, there is a significant defect in the tibia and union of the facture will be difficult to achieve. The treatment plan of her attending orthopaedic surgeon appears to include a bone grafting procedure utilizing homogenous ("banked" as opposed to her own) bone and it is probable that more than one procedure will be required. It can be anticipated that theses [sic] procedures will be performed over a period of several months and will require several admissions to hospital. It is my view that Ms Hernandez' treatment will not be completed for a period of two years and that she will be unable to engage in remunerative employment during this time. It is also possible that in spite of the above treatment regime, the fracture may fail to unite and that Ms. Hernandez situation may eventually lead to a below-knee amputation with its attendant disability.
>
> The above surgical procedures can be performed in the public sector e.g. at the Karl Heusner Memorial hospital, said costs of treatment being highly-subsidized. Homogenous bone is not available in Belize, but can be accessed from distributors abroad, the quantity required for each procedure costing approximately one thousand (Belize) dollars."

[28] The final witness for Mr Alvarenga and Ms Hernandez was Corporal Guzman, a corporal of police stationed in Belmopan. On the evening of 18 July 2009, he was called to the scene of a traffic accident at the intersection of Constitution Drive and Forest Drive. When he arrived at the scene, Corporal Guzman observed Mr Cruz's pickup truck, with damage to its left side, on Forest Drive, "facing away from Constitution Drive" and Mr Alvarenga's motor cycle on the right side of Constitution Drive. Corporal Guzman prepared a sketch plan (described by him as an "office sketch") of the scene of the accident, which was attached to his witness statement and admitted with it as an exhibit in the case. In addition, as it turned out, Corporal Guzman was the author of the police report attached to the defence filed on behalf of Mr Cruz.

[29] Corporal Guzman's sketch plan depicted Mr Alvarenga's motor cycle off the right hand side of Constitution Drive, just beyond its intersection with Forest Drive, and Mr Cruz's pickup truck facing west on the left side of Forest Drive, close to the junction with Constitution Drive. His evidence was that he formed the view that Mr Alvarenga had been riding on his incorrect side of the road, because he saw "debris from off the motor cycle", which he noted on the sketch plan (which is attached as an appendix to this judgment).

[30] Mr Cruz's witness statement dated 1 June 2010 started out with what is now accepted to have been an error, in that he stated that, at the material time, he was driving his pickup truck on Constitution Drive "in a north to south direction". It is common ground that he was in fact travelling in the opposite direction. He was accompanied by his common law wife, Ms Varela, his 10 year old daughter and his friend, Mr Rodney Griffith. This is Mr Cruz's account of what happened:

> "5. Upon reaching the junction of Constitution Drive and Forest Drive, I stopped my vehicle and put my vehicle indicator evincing an intention to turn into Forest Drive.
>
> 6. When I was still at a stop, a motor cycle approached me coming from the opposite direction and travelling in a north to south direction at a speed of approximately 45 to 50 miles an hour.

7. The motor cycle head lamp was on. The headlamps of my own vehicle were bright, and I could see the motor cycle as it approached me, which was the reason why I stopped and put on my indicator so that I could signal that I wanted to turn into Forest Drive and at the same time give way to the motor cycle for it to pass me.

8. Visibility around the area was good since the area was lit with street lights and lights from the nearby Police Training School.

9. As the motor cycle reached where I was stopped, I saw it swerve and hit my vehicle on the left front bumper and grazed the left front wheel side of my vehicle. A copy of a photograph of my vehicle I took after the accident is now produced and shown to me marked **MC 1**.

10. As a result, the motorcycle flew into the air and landed on the left side of the road about 10 to 15 feet from my stationary vehicle.

11. I realized that an accident had occurred since the motor cycle had hit my vehicle, and while I was still in my vehicle, I saw two people flying from the motor cycle (which was in the air) and landing in a ditch which was on the left side of the road about 10 feet from my vehicle."

[31] Mr Cruz and others who came onto the scene assisted in taking Mr Alvarenga and Ms Hernandez from out of the drain and in due course they were transported to hospital in another vehicle. In the meantime, Mr Cruz stated, he moved his pickup truck onto Forest Drive, so that he "would not continue to block traffic". When the police arrived at the scene about 20 to 25 minutes later, by which time the injured persons had already been taken to the hospital, Mr Cruz took them to the scene of the accident and showed them the glass from the headlamps of his vehicle, which had broken upon the impact of the accident. According to Mr Cruz, "[t]he glass was on the right side of Constitution Drive where I had earlier stopped my vehicle when I had indicated my intention to turn into Forest Drive". The pickup truck was damaged to the left front fender, the left front bumper, the left front headlights and the left side of the bonnet, near to the front wheel.

[32] Early in his cross-examination, Mr Cruz was challenged about his response to the request for further information, in which he had answered "no" to the question whether he had intended to turn left from Constitution Drive into Forest Drive. He responded in this way:

> "I see the question on question sheet. I did not intend to turn. The questionnaire was a mistake when I answered the first question. I did not understand the question asked by Mr Kaseke. I was invited to visit Mr Kaseke office [sic] and I went in. I was shown the request form shown. Mr Kaseke said he had questions for me to answer he read the questions and I answered. I thought Mr Kaseke was telling me I took a left turn and I said no. It did not occur to me in answering the second question. I remember signing a defence. My defence makes no mention of an intention to turn. The first time we hear about stopping and intention to turn is in the witness statements."

[33] Mr Cruz was also questioned about the court's visit to the scene of the accident, which took place before the end of his cross-examination. He recalled that, at the court's request, Corporal Guzman had pointed out the point of impact "on the motor cycle side of the road", though, Mr Cruz insisted, that was not the point of impact. However, in re-examination, Mr Cruz is recorded as saying that the point of impact pointed out by the policeman "was off the road". He also emphasised that the document containing his response to the request for further information was not written by him, but by his attorney-at-law, Dr Kaseke. However, he was unable to recall the circumstances under which he signed the document.

[34] Mr Cruz's case was supported by Ms Varela, who was at the material time sitting in the passenger seat of the pickup beside Mr Cruz. In her witness statement dated 1 June 2010, Ms Varela stated that, upon reaching the junction of Constitution Drive and Forest Drive, Mr Cruz, who was on his correct side of the road, "stopped his truck and put the truck's indicator on showing that he wanted to turn into Forest Drive". While the pickup truck was still stationary, "a motor cycle approached us coming from the opposite direction and travelling in a north to south direction at a speed of approximately 45 to 50 miles per hour". As it approached the pickup truck, Ms Varela stated, she saw the

motor cycle "swerve and hit the truck on the left front fender and bumper and it grazed the left front wheel side of the truck …" She described the resultant damage to the pickup truck in precisely the same terms as Mr Cruz had done.

[35] Cross-examined, Ms Varela maintained that the pickup truck had come to a stop at the intersection "for the motor cycle to pass". She also said this:

> "The vehicle did not partly pass when he turned into the motor cycle. By colliding to the side of the motor cycle it propelled the motor cycle into the drain."

[36] Mr Griffith, who was also a passenger in the pickup truck, was at the material time sitting in the back of the cab behind Miss Varela. In his witness statement dated 1 June 2010, he too said that Mr Cruz had come to a stop at the intersection of Constitution Drive and Forest Drive and put on his left indicator; and that, while still in a stationary position, a motor cycle coming from the opposite direction at a speed of approximately 45 to 50 miles per hour had swerved and collided with the pickup truck in the area of the left front fender and bumper.

[37] In cross-examination, Mr Griffith also said a number of things. "The front wheel of the motor cycle hit the left hand corner of the truck". While he did not look at the motor cycle, he nevertheless expressed the view that he "would expect to see damage of the motor bike, either the front wheel, fender or handle". It was, he said, "a traumatic experience" and, when he had first seen the motor cycle coming from the opposite direction, he had shouted "look at that fool", because of his "concern about the speed at which the claimant was riding". The accident occurred seconds after the motor cycle passed the pickup truck. After the accident, the pickup truck "was still parked at the intersection". They (presumably Mr Alvarenga and Ms Hernandez) "flew in the air". The pickup truck was "about to turn, but did not turn".

[38] In re-examination, Mr Griffith estimated the speed of the motor cycle before the collision at about 45 to 50 miles per hour.

The judge's decision

[39] On this evidence, the learned trial judge found for Mr Alvarenga and Ms Hernandez, as already indicated. On the issue of liability, Legall J approached the matter in this way (at para 18):

> "The main question is whether the defendant intended to turn left into Forest Drive, and was in the process of turning left when the accident occurred. Considering the evidence above in relation to the claimants, also the evidence above of the defendant and his witnesses, and based on my observation of the demeanour in the witness box of the claimants and the defendant and witnesses, and how they answered questions, I do not believe the defendant that he had stopped at the junction when the accident occurred. I believe the defendant intended to turn his truck left into Forest Drive, and was in the process of doing so when the collision occurred."

[40] However, the learned judge also found Mr Alvarenga guilty of contributory negligence (at para 26):

> "I think on the facts of this case the No. 1 claimant was guilty of contributory negligence taking into consideration that he was not a licensed driver, with only months of experience as a driver, and that he drove his motor cycle at a speed at night around the middle of his lane on Constitution Drive, rather than on his right side of the said lane, I hold that he contributed to the accident and his resulting injury. I do not find contributory negligence in the No. 2 claimant. She said she did not know whether he had a licence. She presumed he had a licence because she saw him riding the motor cycle 'all the time'. At the time of the accident she was not in control of the motor cycle. Doing the best I can on the evidence before me I find that the No. 1 claimant contributed twenty percent to the accident and his injuries."

[41] On the issue of damages, the learned judge awarded special damages, which are no longer an issue. With regard to general damages, he considered the respondents' "severe fractures, the nature and gravity of the injuries, the pain and suffering, the period of their hospitalization and the loss of amenities" (para 42) and

comparable awards in other jurisdictions, before making an award of general damages to Mr Alvarenga of $55,000.00 (less 20%) and to Ms Hernandez of $50,000.00.

The submissions on appeal

[42] Taking grounds one and two together, Mrs Myles submitted that the learned trial judge had failed to give proper consideration to the evidence of the witnesses for the defence. It was submitted that, in relation to Mr Griffith in particular, who could be regarded as an independent witness, the judge had advanced no valid basis for rejecting his evidence. The judge had also given insufficient weight to the evidence of Corporal Guzman (including the sketch plan) and to the significance of his own finding (at para 26) that Mr Alvarenga "was not a licensed driver, with only months of experience as a driver, and that he drove his motor cycle at a speed at night around the middle of his land on Constitution Drive, rather than on his side of the said lane…" Referring to the decisions of this court in **Charles McLaren v Allison Pow** (Civil Appeal No 7 of 1992) and **Arthur Hoy Jr and another v Aurora Awe, et al** (Civil Appeal No 2 of 2006), Mrs Myles submitted that, notwithstanding the usual reluctance of an appellate court to interfere with the findings of a trial judge, this was a case in which such a course was justified.

[43] The submission on ground three, which was in the alternative to grounds one and two, was that, on the findings of the trial judge, he erred in determining that Mr Alvarenga was only 20% contributory negligent. In this regard, Mrs Myles referred us again paragraph 26 of Legall J's judgment and to Corporal Guzman's evidence in relation to the debris from the accident, which, she said, "was found in the middle of the road". These were factors which, it was submitted, "pointed to a higher degree of culpability" in Mr Alvarenga. In reliance on **Baker v Market Harborough Industrial Co-operative Society Ld, Wallace & Richards (Leicester) Ld** [1958] 1 WLR 1477 and **Shiner v Webster** (1955) Times, 27 April, Mrs Myles contended for, at the very least, an equal division of blame in the instant case.

[44] On ground four, the submission was that Legall J erred in law in his assessment of the general damages in respect of both Mr Alvarenga and Ms Hernandez. In particular, it was submitted, in reliance on a dictum of Sachs LJ in **George v Pinnock** [1973] 1 WLR 118, 126, the judge had erred in failing to explain how he arrived at the sums awarded to each of the claimants.

[45] And finally, as regards the respondents' notice, Mrs Myles submitted that it was open to the learned trial judge, on the pleadings as well as the evidence, to find on a balance of probabilities that Mr Alvarenga's negligence was a contributory factor in the instant case. In advancing this submission, counsel sought to distinguish **Fookes v Slaytor** [1978] 1 WLR 1298, in which it was held that contributory negligence had to be pleaded by way of defence, on the ground that in the instant case there had been an allegation of negligence against Mr Alvarenga in the defence.

[46] On grounds one and two, Mr Dujon SC for the respondents submitted that the learned trial judge's decision was fully supported by the evidence which he had heard. He pointed out that Mr Cruz had pleaded no particulars of negligence against Mr Alvarenga, but merely referred to the police report in support of his case; and that request for further information, which had been filed in an effort to tie down Mr Cruz in his defence, had produced an answer which was then contradicted by his own witness statement. Against this background, the judge clearly disbelieved Mr Cruz and his witnesses, as he was entitled to do on the evidence, which he accepted, that the left side of the motor cycle had been run into by the left side of the pickup truck. As for the position of the debris on the sketch plan, Mr Dujon pointed out that no measurements were taken by Corporal Guzman and the sketch plan did not in fact depict the midpoint of Constitution Drive.

[47] On ground three, Mr Dujon submitted that the facts of the instant case were clearly distinguishable from the facts of the cases relied upon by the appellant in support of an equal sharing of blame for the accident. It was further submitted that, despite the fact that the learned judge had taken into account some irrelevant

considerations in concluding that Mr Alvarenga had been 20% contributorily negligent, an appellate court ought only to disturb a trial judge's apportionment of blame if it comes to the clear conclusion that it is quite unreasonable and incapable of support on the evidence. In support of these submissions, we were referred to **Davies v Swan Motor Co** [1949] 1 All ER 620, **Froom v Butcher** [1975] 3 All ER 520 and **Mulligan v Holmes** 1971 RTR 179.

[48] As regards grounds four, it was submitted that the learned trial judge had considered all the relevant factors in relation to damages and had explained his reasoning with sufficient precision to allow all the parties to determine the sums assessed and the basis for the assessment.

[49] And finally, as regards the respondents' notice, Mr Dujon submitted, in reliance on **Fookes v Slaytor**, that contributory negligence not having been specifically pleaded, there ought to have been no reduction of the award of damages on this basis. In this regard, we were also referred to **Dann v Hamilton** [1939] 1 All ER 59 and **Dziennik v CTO Gesellshcaft Fur Containertransport MBH and another** [2006] EWCA Civ 1456 ('**Dziennik**').

Discussion and analysis

Grounds one and two – were the judge's findings justified by the evidence?

[50] These grounds together mount a challenge against the learned trial judge's findings of fact. At the outset of Mrs Myles' admirable submissions, she realistically accepted the limitations imposed by the well-known principles on which an appellate court acts where a trial judge's decision is based on the credibility of witnesses at trial.

[51] In **McLaren v Pow**, this court adopted Lord Thankerton's oft-cited statement of the principles in **Watt (or Thomas) v Thomas** [1947] 1 All ER 582, 587:

> "I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.
>
> It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

[52] And in **Hoy v Awe et al**, after referring to some of the relevant authorities, including **Watt v Thomas**, Carey JA said this (at para 4):

> "The principles to be derived from these cases counsel caution on the part of an appellate court in respect of findings of fact. Where the finding is based on the credibility of a witness, that is, on perception, then an appeal court ought not to interfere. Where, however, the finding is based on inferences drawn from proven facts or on the evaluation of evidence then this court is at liberty to form its own views of it."

[53] It is against this backdrop that I therefore approach the challenge to Legall J's findings of fact in this case. The first point to be made, it seems to me, is that it does not appear, from a reading of the defence, in what manner Mr Alvarenga was alleged to have been negligent in riding his motor cycle at the material time. The bare statement (at para 2) that "it was the 1st Claimant who negligently drove his motor cycle into the Defendant's vehicle" is unsupported by any particulars of negligence. Further, the defence derives no support from the police report which was attached to it. In addition

to recording the date, time and location of the accident; the fact of a "head on" collision; details relating to the vehicles involved in the accident, their drivers and the passengers; the injuries sustained by Mr Alvarenga and Ms Hernandez; and the damage to the vehicles, the report offers nothing in relation to the cause of the accident, beyond the laconic statement that "Jose Alvarenga appears to be at fault". In this regard, I entirely agree with Legall J's trenchant comment (at para 10) that, "I do not see any legal basis for a police officer, who is not an expert witness and who has not witnessed the traffic accident, but having investigated it, to state in his report his opinion as to who was at fault for the accident".

[54] So from the very outset of the case, Mr Cruz did not posit any clear answer to the very precise allegation in the statement of claim that, upon reaching the intersection of Constitution Drive and Forest Drive, he negligently "drove or attempted to drive his motor vehicle across the path of [the motor cycle]". His negative response to the question (in the request for further information) whether it had been his intention to turn left from Constitution Drive into Forest Drive took the matter no further, beyond the clear implication that no issue of a turn from Constitution Drive into Forest Drive arose on his case. This is the context within which Legall J had to assess the evidence given by the witnesses on both sides.

[55] Before turning to the evidence given on behalf of the defence, the learned trial judge dealt with two preliminary matters, viz, the police report and the location of the debris depicted by Corporal Guzman on the sketch plan. I have already referred to the judge's comment on the police report. In my view, the fact that Corporal Guzman did not see the accident, nor take any relevant measurements at the scene of the accident, might well have sufficed to dispose of any view he felt able to express as to the cause of the accident.

[56] However, Corporal Guzman did give a reason in cross-examination for his conclusion that Mr Alvarenga was at fault, which was that "he was on the wrong side of

the road", a conclusion he came to because of the "debris from off the motor cycle". Legall J's comment on this evidence was as follows (at para 11):

> "According to the sketch plan some of the debris were [sic] on the lane of the claimant and some on the lane of the defendant in the middle of Constitution Drive. But we do not know if anyone interfered with the debris prior to Cpl. Guzman's arrival at the scene, or whether traffic on the road had an effect on the location of the debris prior to the arrival of Guzman. If the debris came from the collision, it indicates that the collision occurred partly on the claimants [sic] lane and partly on the defendant's lane. The location of the debris on the sketch plan does not show clearly, in my view, which of the opposing versions of the accident is correct."

[57] Again, I entirely agree with the learned trial judge's observation that, in the absence of evidence that the debris from the motor cycle remained in the same position when its presence was noted by Corporal Guzman as it had been immediately after the accident, its value as an indicator of where the accident occurred must be limited. But, in any event, I am also inclined to agree, from a viewing of the sketch plan itself, with Mr Dujon's observation that the sketch plan does not in fact depict the midpoint of Constitution Drive at the scene of the accident and it is therefore impossible to say with any certainty on which side of that point the debris was seen by Corporal Guzman.

[58] Legall J then turned to Mr Cruz's version of how the accident happened, noting (at para 13) that the first mention of his having stopped at the intersection of Constitution Drive and Forest Drive, with a view to turning left, came in his witness statement, months after the filing of the defence and counterclaim and his contrary answer to the request for further information. The judge also reviewed the evidence of Ms Varela, and considered (at para 16) that her evidence in cross-examination that, "by colliding to the side of the motor cycle it propelled the motor cycle into the drain", might be understood to mean "that the truck collided to the side of the motor cycle, and it propelled the motor cycle into the drain". If this evidence was correct, the judge observed, "it is doubtful that the truck stopped or stationary [sic] at the time of the accident".

[59] As to Mr Griffith, whom the appellant invited us to treat as an 'independent' witness, Legall J referred to him (at para 15), as, indeed, both he and Mr Cruz had described him, as Mr Cruz's friend. I am therefore inclined to doubt whether he could truly be categorised as independent, a view which gains some force, it seems to me, from the close similarity in the actual language of his witness statement to Mr Cruz's, down to the latter's erroneous statement in his witness statement that it was he who was at the material time travelling north to south on Constitution Drive. In any event, Mr Griffith's evidence in cross-examination that the "front wheel of the motor cycle hit the left hand corner of the truck" and that his expectation was that, after the collision, he "would expect to see damage of the motor bike, either the front wheel, fender or handle", is belied by Mr Alvarenga's unchallenged evidence of the actual damage to the motor cycle, which was to its left side. And, as the learned judge pointed out (at para 17), one of the photographs tendered in evidence "showed damage around the middle of the motor cycle". Mr Griffith's evidence on this point is also at variance with Ms Varela's evidence, to which I referred in the previous paragraph, that "the truck collided to the side of the motor cycle…"

[60] It is against this background that the learned judge identified the "main question" as being "whether the defendant intended to turn left into Forest Drive, and was in the process of turning left when the accident occurred". In answer to this question, the judge expressly stated that he disbelieved Mr Cruz's version of how the accident happened and it seems to me that, by that same token, he must perforce have equally disbelieved the evidence given in support of it by Mr Griffith and Ms Varela. His conclusion (at para 21) therefore followed naturally from his assessment of the evidence:

> "I am satisfied, on a balance of probabilities, that the defendant failed to discharge his duty to exercise reasonable care when driving on the road to prevent injury to the claimants because the said defendant while driving his truck intended to turn and was in the process of turning into Forest Drive when the collision occurred involving the claimant's motor cycle, and caused injuries to the claimants and damage to the motor cycle."

[61] The evidence given by Mr Alvarenga and Ms Hernandez provided a clear and credible narrative of how the accident happened. Their account was not only entirely in keeping with their pleaded case, but was also consonant with the physical evidence of the damage to both vehicles. In what was essentially a contest of credibility between them, on the one hand, and Mr Cruz and his witnesses, on the other, I find it impossible to say, in the light of the learned judge's careful analysis of the evidence, that he misdirected himself in any way or failed to take proper advantage of the opportunity he had had to see and hear the witnesses. In the result, grounds one and two must accordingly fail.

Ground three – the judge's finding of contributory negligence

[62] **Baker v Market Harborough**, upon which Mrs Myles relied on this ground, was, by any measure, an unusual case. On the evidence in that case, there was a collision between two motor vehicles, which were proceeding in opposite directions, in the centre of a straight road during the hours of darkness. Both drivers were killed and there was no evidence to enable the court to distinguish between them in terms of culpability. Sellers J, whose judgment at first instance was upheld on appeal, said this (reproduced at pages 1475 – 6):

> "It seems to me that, on these meagre facts, on a straight road, two vehicles descending hills in opposite directions and meeting at the bottom, the inference is that they were both to blame because, in the absence of any other evidence that anything befell either vehicle or driver, it would appear that they were both committing almost the same negligent acts, failing to keep a proper lookout, failing to drive their respective vehicles on the correct side of the road so that they would each pass the other in safety. It seems to me that they were both hugging the centre of the road and failing to give way to the other. In those circumstances, I would hold, and I do hold, that the responsibility for this accident lies with the drivers of both vehicles equally, they both having, by proper inference, committed the same negligent acts of driving."

[63] From the very brief report of **Shiner v Webster** (taken from Bingham and Berryman's Motor Claims Cases, 11th edn, para [5.16]) with which the court was

provided by Mrs Myles, it appears that the situation in that case was very similar. Neither of the two cyclists involved in a collision was able to give evidence at the trial, one having been killed as a result of the collision and the other having suffered severe concussion and being unable to recall anything of the accident. The trial judge took the view that there was not enough evidence to show whose negligence caused the accident, but the appeal was allowed on the basis that, there being some evidence of negligence on the part of both cyclists, both should be held equally to blame.

[64] Both those cases are in my view plainly distinguishable, particularly in the light of Legall J's clear finding, supported, as I have already concluded, by the evidence, that the cause of the collision in the instant case was that "the defendant intended to turn his truck left into Forest Drive and was in the process of doing so when the collision occurred". Further, the judge went on to find, as Mr Dujon reminded us, that, at the time of the collision, Mr Alvarenga "was on his side of the road albeit in the middle of his lane". This was therefore a case in which there was evidence, which the court accepted, of whose negligence caused the collision and there is accordingly no basis, in my view, to approach the question of liability, in default, as it were, of evidence, on the basis of an equal apportionment of blame.

[65] The question nevertheless remains whether Legall J ought to have assigned a degree of contributory negligence greater than 20% to Mr Alvarenga. In approaching this question, the learned judge considered (at para 24) that, in order to establish contributory negligence in a claimant, "it is essential for [the defendant] to establish that the injury to the claimant was partly caused by his omission to take that degree of care which the circumstances of the case required". Applying that test, as has been seen, the judge found that Mr Alvarenga was guilty of 20% contributory negligence, on the basis that "he was not a licensed driver, with only four months of experience as a driver, and that he drove his motor cycle at speed at night around the middle of his lane on Constitution Drive, rather than on the right side of his said lane".

[66] As Lord Denning MR observed in **Froom v Butcher** (at page 524), the relevant question in considering whether contributory negligence has been made out "…is not what was the cause of the accident … [it] is rather what was the cause of the damage". The question in the instant case is therefore whether Legall J was correct in his determination that, on the basis of the factors identified by him, the damage suffered by Mr Alvarenga was due to his contributory negligence to the extent of 20%. Of the factors identified by the learned trial judge as contributory to the damage caused to Mr Alvarenga and Ms Hernandez, Mr Dujon was only prepared to concede the relevance of speed. In this, I am inclined to agree with him, as it is difficult to see how either Mr Alvarenga's status as an unlicensed driver or the fact that he was riding in the middle of the lane could have been contributory factors to the damage suffered by him, in the face of a vehicle which, on the judge's findings, turned left across the oncoming traffic, at a time when it was manifestly unsafe to do so.

[67] In all these circumstances, I am therefore unable to say that the judge's apportionment of blame no greater than 20% to Mr Alvarenga for the damage suffered by him is so wholly erroneous as to justify interference by this court.

Ground four – the judge's award of general damages

[68] On this ground, Mrs Myles relied on a dictum of Sachs LJ in **George v Pinnock** (at page 126), which was an appeal from an award of general damages:

> "It is thus as well to say that, whatever may have been the differing judicial views up to a few years ago and, indeed, up to 1970, as to whether a judge should simply award a global sum, or whether he should state in his judgment what are the main components of that figure, the modern practice, since *Jefford v. Gee* [1970] 2 Q.B. 130 (decided on March 4, 1970), is to adopt the second course. It is true that that adoption has to a considerable extent come into being because of the differing rates of interest applicable to differing heads of damage under the *Jefford v. Gee* decision. On the other hand, it is also in part due to the general adoption of that considerable body of judicial opinion which held that plaintiff and defendant alike are entitled to know what is the sum assessed for each relevant head of damage and thus to be able on appeal to challenge any

> error in the assessments. In my judgment, this court should be slow to emasculate that right of litigants."

[69] On this basis, Mrs Myles complained that, not only were the global sums awarded for damages to both Mr Alvarenga and Ms Hernandez excessive, but that Legall J had failed to explain how he arrived at those global sums and thereby deprived Mr Cruz of the ability to challenge any error in his assessment.

[70] Legall J approached the matter of general damages on the basis suggested by Wooding CJ in the well-known case of **Cornilliac v St. Louis** (1965) 7 WIR 491, which is by a consideration of (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting disability; (iii) the pain and suffering that had to be endured; (iv) the loss of amenities suffered; and (v) the extent to which consequentially the injured persons' pecuniary prospects have been materially affected.

[71] The learned trial judge also preferred Wooding CJ's method of arriving at a total figure under all heads as damages for pain and suffering and loss of amenities, rather than making separate awards under each head and then aggregating the total. This is how Wooding CJ put it in **Cornilliac v St. Louis** (at page 494), in a passage which Legall J quoted in part:

> "…it is not the practice to quantify the damages separately under each head or, at any rate, to disclose the build - up of the global award. But I do think it is important for making a right assessment that the several heads of damage should be kept firmly in mind and that there should be a conscious, even if undisclosed, quantification under each of them so as thereby to arrive at an appropriate final figure. I must not, however, be understood to mean that at the last count there should be a simple addition of a number of money sums. Any such arithmetical exercise would ignore the realities that are so often encountered. Frequently, the unit factors overlap so that the aggregate of the several amounts which might be allowable in respect of each would be an over-assessment of the total damage taking them all together. In the present case, for instance, the nature and extent of the injuries inflicted cannot be dissociated from the physical disabilities which are their permanent result, nor are they unrelated to the pain and suffering which have had to be endured. So,

> too, the physical disabilities which have become permanent are inextricably bound up with the loss both of amenities and of pecuniary prospects."

[72] Legall J also referred to **Fletcher v Auto Car and Transporters Ltd** [1968] 1 All ER 726, 733-4, in which Lord Denning MR said that -

> "…I think the judge was wrong to take each of the items separately and then just add them up at the end. The items are not separate heads of compensation. They are only aids to arriving at a fair and reasonable compensation…There is, to my mind, a considerable risk of error in just adding up the items. It is the risk of overlapping."

[73] Legall J then went on to consider in some detail the evidence under each head, as well as comparable previous awards in other jurisdictions, before arriving at a global figure for each claimant. In the light of the authorities referred to by him, I cannot fault the learned judge in his approach. There is no issue in this case of the differing rates of interest applicable to differing heads of damage referred to by Sachs LJ in **George v Pinnock** and, given Legall J's detailed analysis of the medical evidence in this case, I do not think that there can be any question of an emasculation of the right of Mr Cruz to challenge the awards made by the judge. In the absence of any substantial challenge to the actual quantum of damages which he arrived at in respect of each of the respondents, it seems to me that there is no basis upon which this court can interfere with his assessment.

The respondents' notice – should contributory negligence have been pleaded?

[74] The court was told by Mr Dujon, who appeared at the trial, that there was no discussion of contributory negligence during counsel's addresses and that the issue made its first appearance in Legall's written judgment. It is certainly clear that there was no reference to it in Mr Cruz's defence and counterclaim, although Mrs Myles does ask us to say that the averment in the defence that "it was the 1st Claimant who negligently

drove his motor cycle into the defendant's vehicle" was in the circumstances a sufficient pleading of contributory negligence.

[75] In **Fookes v Slaytor**, the plaintiff brought an action for damages arising out of the alleged negligence of the driver and owners of an articulated lorry. After the owners delivered a defence alleging that the driver was not acting as their servant or agent at the material time, the action was discontinued against them. However, the driver did not deliver a defence, despite being ordered to do so by a certain time and, when the matter came on for trial, he did not appear and was not represented. After the plaintiff had given evidence of the accident, the judge found that the driver had been negligent, but that the plaintiff's own negligence had contributed to the accident. The judge accordingly reduced the plaintiff's damages by one third.

[76] On the plaintiff's appeal to the Court of Appeal, Sir David Cairns, after a careful review of the authorities, came to the conclusion that contributory negligence had to be specifically pleaded by way of defence to a plaintiff's claim of negligence and that, in the absence of any pleading to that effect, the trial judge had erred in law by reducing the plaintiff's damages on the ground of contributory negligence.

[77] In coming to this conclusion, the court was influenced by the Scottish decision of **Taylor v Simon Carves Ltd**, 1958 S.L.T. (Sh. Ct.) 23, in which the Sheriff Substitute (William Garrett Q.C.) held that, for contributory negligence to arise, it must be "in issue between the parties". Sir David Cairns' comment (at pages 1297-8) on what the contrary view would entail was as follows:

> "The opposite view would mean that a plaintiff in any case where contributory negligence might possibly arise, even though it was not pleaded, would have to come to court armed with evidence that might be available to him to rebut any allegation of contributory negligence raised at the trial. It is true that in the ordinary case it would not be likely to involve anything beyond the evidence he would be giving to establish negligence on the part of the defendant, but circumstances are reasonably conceivable in which it might be."

[78] A similar point emerges from the **Dziennik** case, in which the unreasonableness of the claimant's belief in the existence of a certain state of facts was not pleaded as a particular of contributory negligence, although there was, by a late amendment, a general pleading of contributory negligence. Hallett LJ's comment, on what she had initially regarded as "a technical point of pleading", was as follows (at para 39):

> "It is common ground that the first defendant did not plead, as a particular of contributory negligence, or at all, that the claimant's belief…was unreasonable. They could have done so but they did not. The reasonableness of the claimant's belief was not, therefore, a live issue on the question of contributory negligence, at any stage during the trial."

[79] And, concurring with Hallett LJ, Sir Igor Judge P (as he then was) said this (at paras 51 – 52):

> "51. I shall add a few words by way of emphasis. The decision on contributory negligence is not based on a mere pleading point, nor can it be dismissed as an unmeritorious problem arising from a legal technicality. A much more important principle is involved.
>
> 52. As a matter of simple justice, and like any litigant in civil proceedings, the claimant was entitled to know of any misconduct, including negligence, alleged against him and to be provided with a proper opportunity to enable him to deal directly with and answer the allegation. In the result, as Hallett LJ's analysis demonstrates the basis on which the claimant was held partly responsible for his injuries was one of which he had no notice, and which, as the analysis shows, neither he, nor his counsel, could reasonably have anticipated. That is not trivial or technical. It is fundamental to the fairness of civil proceedings."

[80] These cases demonstrate, it seems to me, that the requirement that contributory negligence be specifically pleaded is more than a technical rule of pleading. It is in fact an essential part of the process of ensuring fairness to all parties in civil proceedings. In the instant case, in which it is common ground that Mr Cruz did not, in terms, plead contributory negligence in his defence, his position is not improved, in my view, by the bald statement in the defence that Mr Alvarenga was negligent. A proper pleading of contributory negligence would require that, in a case such as this, particulars be given

sufficient to enable Mr Alvarenga to deal with the specific contributory factor being alleged against him, whether it be that he was riding at an excessive speed, that he was unlicensed or that he was riding in the middle, instead of close the outer edge, of the right hand lane of Constitution Drive.

[81] For these reasons, the respondents' notice has, in my view, been made good and, on the state of the pleadings in this case, a finding of contributory negligence was not open to the learned trial judge.

Disposal of the appeal

[82] I would therefore propose that the court make the following orders:

(a) The appeal is dismissed.

(b) The judgment of Legall J given on 15 December 2010 is varied, by deleting at paragraph (1) thereof the sum of $43,493.50 payable to the first respondent as damages and substituting therefore the sum of $55,000.00.

(c) Costs of the appeal to be the respondents to be agreed or taxed.

[83] Since writing the above, I have seen the form of the order for costs proposed by the learned President (at para [1]) and I am in full agreement with it.

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MORRISON JA

AWICH JA

[84] I concur in the reasons and orders proposed by my learned brother Morrison JA. I have nothing to add.

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AWICH JA