CA on appeal from Birmingham Civil Justice Centre (Mr Recorder Rogers) before Buxton LJ; Keene LJ; Thomas LJ. 3rd July 2008

Lord Justice Thomas:

1. On Bank Holiday Sunday 24 August 2003 the claimant was riding a motorcycle with his girlfriend, Miss Nash, as his pillion. He was seriously injured in a road traffic accident on A429, two miles north of Moreton-in-the-Marsh in Gloucestershire. The pillion passenger was killed. He began proceedings against the first and second defendants. The issue of liability was tried before Mr Recorder Rogers in June 2007. In a careful reserved judgment he held that the defendants had been negligent but assessed contributory negligence of the claimant as 60%. He then apportioned liability between the defendants equally.

2. Permission to appeal was sought from this court by the first defendant on two grounds. First it was said that the Recorder was wrong in finding him negligent, and secondly that the Recorder had erred in his approach to apportionment between the defendants. He was refused permission to appeal by this court on the first ground on the basis that there were ample grounds for the Recorder coming to the decision which he had. Permission was granted on the second ground. It was noted in granting permission that the Recorder had not given reasons for the apportionment of liability between the two defendants.

3. The issue on this appeal therefore is a very limited one and it is only necessary to set out the findings the Recorder made in relation to causation and negligence as opposed to examining the evidence. Dealing therefore with the circumstances of the accident, the first defendant was driving a Renault motorcar, towing a caravan along the A429 going north. The rear tyre of the car blew out and this caused the caravan and the car to snake. The first defendant decided to slow the car down gradually until he brought it to a halt. It was brought to a halt on a left-hand bend, as close as he could get it to the kerb. He turned the hazard lights on and his wife, who was accompanying him, went out and observed the passing traffic for about ten minutes. Although there was a lay-by opposite, the Recorder concluded that it would have been unsafe to pull the car and caravan into the lay-by because of the dangers that manoeuvre might have caused. However, the Recorder took the view that, as was obvious, the car and caravan constituted a serious obstruction on this winding road across the Cotswolds.

4. There was a dispute on the evidence as to whether the caravan had in it a warning triangle. The Recorder found that there was and found that it was not used. I shall return to the consequence of that finding in a moment. For about twenty minutes or so, traffic passed whilst the caravan was in position; the first defendant, during that period, attempted to change the wheel. After about twenty minutes the second defendant, who was driving a Honda Accord, approached the position of the car and the caravan travelling in the same direction as the car and caravan -- that is to say, northwards on the A429. Immediately behind him was the claimant on his motorbike with his pillion passenger. The Recorder found that the caravan would have been visible to persons travelling in the northerly direction at a point approximately 150 to 200 metres from where the car and caravan were stationary. It would of course at that point have been seen as something somewhat small, but as a driver approached it, it would have become obvious what it was and that it was stationary. That must have been so before the second defendant had reached a point of about seventy metres from the car and caravan. The Recorder found that the second defendant was travelling at about fifty-five miles an hour and only saw the car and caravan at a point close to it, less than seventy metres; possibly as little as three to three-and-a-half car lengths.

5. When the second defendant saw the car and caravan he managed, by manoeuvre, to get his car round the caravan and car and was able to avoid colliding with an oncoming Saab. However, he had to brake very hard indeed. That occurred in circumstances where the claimant was travelling very close behind the second defendant. The Recorder found he was travelling at the same speed and was tucked in behind him. He was too close and his visibility was impaired. He was probably awaiting overtaking. It is clear on the Recorder's findings that the claimant did not see the car and caravan. But when the second defendant braked heavily in the manoeuvre to avoid colliding with the car and caravan and to pass between that and the oncoming traffic, his heavy braking had the consequence that the claimant lost control of his motorbike; it tipped over and came into the path of an oncoming Saab with the resultant death of his pillion passenger and the severe injuries that the claimant suffered.

6. It was in those circumstances that the Recorder then made clear findings of negligence. Although he found that the first defendant was not negligent in positioning the car and caravan for the reasons I have given, he found that he was negligent in not putting out the warning triangle given the layout of the road, the sweeping left-hand bend, the size of the car and caravan positioned where it was as an obstruction on the road.

7. He went on to find that, if the triangle had been used, it would have made a difference and it would have had an effect on drivers coming in the same northerly direction and particularly on the second defendant and the claimant. As to the second defendant, although he also he was not exceeding the speed limit, he was negligent, in that, with appropriate care, he should have seen the caravan and been able to stop. He would not have been in the position where he had to carry out the manoeuvre which he did; that, had he been travelling at a proper speed and keeping a proper lookout, he would have had sufficient time either to stop or safely go round the caravan. His finding of negligence against the claimant was he was far too close and driving far too quickly.

8. He set out his conclusions at paragraphs 62 and 63 of his written judgment:

"I have to consider therefore what is a just and equitable apportionment of liability. Weighing all of the features of the case and the different particular pieces of negligence I have come to the sad but firm conclusion that the majority

of the blame must attach to the Claimant himself. I attribute 60% contributory blame to him, so in terms of primary liability he will succeed against the Defendants as to 40%.

The apportionment between the Defendants themselves is a matter of irrelevance to the Claimant but is crucial as between them. Although the nature of the negligent acts or omissions is very different, in the end I can not distinguish the extent of the respective responsibilities. I find them equally to blame. The effect is that of the overall 40% liability owed to the Claimant that will be divided as between Defendants equally into 20% shares."

9. Although it is clear from a passage earlier in the judgment of the Recorder that he had in mind the principles of apportionment as he had set those out, it is clear from the passage which I have cited from the judgment that he made his apportionment without giving any reasons. It is well-established that this court will not interfere with an assessment of apportionment liability between defendants made by a trial judge unless the judge was plainly wrong or took into account irrelevant matters or made an error of principle (see for example the decision of this court in ***Hannam v Mann*** [1984] RTR 252 (CA)). However, although a court will not normally therefore interfere with an apportionment unless those matters to which I have referred are made out, it is very important that the trial judge gives reasons why the apportionment was reached in the way it was. As has been made clear in many different contexts, the process of reasoning often makes clear the correct basis of decisions, and in any event parties are entitled to know the basis on which apportionment has been reached. Where reasons are not given, then this court may well be in the position, as has happened in this case, where the court must itself review the decision reached to see if there were in fact reasons that could justify the decision made or whether, because there has been no process of reasoning, the judge was in fact plainly wrong or has made some error of principle, or taken into account some irrelevant matter.

10. It is unfortunate, therefore, that in this case the Recorder failed to set out his reasons, because it has necessarily meant that the parties have incurred yet further expenditure in this case. It is necessary, therefore, first to consider whether there is a process of reasoning that could sustain the decision made by the Recorder. Obviously, that process of reasoning should have proceeded by reference to section 2 of the Civil Liability Contribution Act 1978 in accordance with the accepted principles set out in the judgment of Denning LJ in ***Davies v Swann Motor Co. (Swansea)*** [1949] 2 KB 291 and 326 (CA).

11. In accordance with those principles, I turn to consider whether there was a process of reasoning that could justify the decision that the Recorder made. It is clear from what I have set out that the basic findings of negligence could be simply expressed. The first defendant was negligent in failing to put up the warning triangle, given the layout of the road and the size of the obstruction caused by the car and the caravan. The second defendant was going too fast and did not keep a proper lookout and so noticed the obstruction too late to enable him to drive in a manner that was safe. Taking those two aspects of negligence, it is first necessary to consider whether there is a process of reasoning which can justify conclusion that the blameworthiness, or respective culpability, was the same. It has been very elegantly and succinctly argued by Mr Audland on behalf of the first defendant that if one stands back and analyses the negligence of the second defendant that has been found by the Recorder, that negligence could in fact be characterised as gross negligence. He was going too fast; he did not keep a proper lookout; and, in consequence, when he saw the caravan too late, he had to react in a manner that caused the accident. He says in contrast that one ought to look at what the first defendant did, namely position his caravan, as the Recorder found, as safely as he could. He turned on the hazard lights and his wife observed the traffic passing.

12. But, it could be said, if one had been applying a process of reasoning to justify the conclusion to which the Recorder came, that when one looked at the negligence of each of the parties one could see that, in fact, what the second defendant had done was really to drive in a manner along the roads of the Cotswolds that was at a speed that was too great without keeping a proper lookout. It was, it could be said, really one act of careless driving. If one then contrasts what the first defendant failed to do, what he failed to do was to appreciate that, having been in charge of a vehicle where obvious hazard had arisen, he failed to take the simple step of putting the triangle out so that it could be observed by those coming in the same direction as him. It seems to me that if the Recorder had taken and analysed what the two acts of negligence amounted to, and then said to himself *"Can a distinction be drawn between those two?"* in my view he would have been entitled to conclude that no distinction could properly be drawn. That is the process of reasoning that could have been open to the Recorder and it is unfortunate that he did not set it out.

13. As to the aspects of causative potency, again it has been argued by Mr Audland, if I may say so, very elegantly, that one should taken into account what actually happened on the road during the twenty or so minutes which the caravan had been there; and if one took into account that fact, it would see that a number of lorries and cars had managed to pass without an accident occurring. Therefore it must follow that the causative potency of the first defendant's negligence in bringing about the accident was very little, as so many cars had managed to negotiate the obstruction safely without the warning triangle being in place.

14. However, it is clear from the findings made by the Recorder that he took the view that, had the triangle been placed out, it might have had an effect upon the position of the second defendant and the claimant. We have no direct finding as to the position in which, if it had been put on the road, the second defendant would have seen it in time prior to seeing the caravan, but it must have been, on the Recorder's findings, at least sufficiently far that it would have made a difference. Again, it seems that if the Recorder had compared the causative potency of the actions of the first defendant in failing to put out the warning triangle, and the causative potency of what was

found to be negligent driving by the second defendant, he could have concluded that both had an equal causative potency. It is no longer right to say that merely because the negligence of the second defendant came last in point of time that that was the more potent; one has to look at all the circumstances. Looking at all the circumstances, a train of reasoning could have led the learned Recorder to the view that they were both of equal causative potency.

15. It seems to me therefore that if one looks at the train of reasoning that could have been adopted by the Recorder, there were reasons that could have been put forward by him for the conclusion he reached.

16. If that is so, then it seems to me that it is the function of this court to stand back and say: "*Was his decision one that was so wrong that this court should intervene?*" In reaching that judgment this court must bear in mind the fact that it did not have the benefit of hearing the evidence in this case and considering the matter over the period of time which the Recorder did. It is right to observe that in the particular circumstances of this case neither the claimant, because of the amnesia from which he was suffering, nor the first defendant, because of his health, nor the second defendant, because of the deliberate decision made by his lawyers, gave evidence, but nonetheless the Recorder did hear other evidence and was in a better position than this court would be to judge matters.

17. Taking that factor into account, and taking into account the train of reasoning that would have been open to the Recorder to explain the decision, I for my part can see no grounds on which this court should, despite the attractive arguments made by Mr Audland, interfere with the decision made. That is not to say that I myself might have reached a different decision had I been the trial judge; that is not the appropriate test in this court. I would merely underline that my conclusion in this case gives emphasis to the real need in cases of this kind for judges to give reasons because they thereby enable the parties to understand what has happened and this court to be able more properly to evaluate the decision made so that the court can really see whether this is a case for permission to appeal. This was a case where, if I may respectfully say so, permission to appeal was rightly granted because there were no reasons; but had reasons been given a very different view might have been taken. I for my part therefore would dismiss this appeal.

Lord Justice Buxton:

18. I agree.

Lord Justice Keene:

19. I also agree.

Order: Appeal dismissed