THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2010 – 00132

BETWEEN

AUSTIN BOUSIGARD **CLAIMANT**

AND

THE AIRPORTS AUTHORITY OF TRINIDAD AND TOBAGO **DEFENDANT**

BEFORE THE HONOURABLE MR JUSTICE R. BOODOOSINGH

APPEARANCES:

MR YASEEN AHMED AND MISS TARA LUTCHMAN FOR THE CLAIMANT

MR ROBIN OTWAY FOR THE DEFENDANT

DATE: 19 February 2013

JUDGMENT

On 6 July 2008 the claimant, a resident of the United States, was an arriving passenger at Piarco International Airport. He was then a month shy of being 60 years old. About 1 to 2 am on that day, the claimant had cleared the Customs area and was proceeding to make a complaint about a suitcase. He slipped on a wet surface and fell. He sustained personal injuries.

He alleged negligence on the part of the defendant in that they:

(1) failed to keep the floor dry
(2) failed to take steps to prevent persons from slipping on the floor
(3) failed to leave warning signs on the floor in the vicinity of the wet region
(4) failed to warn the public of the slippery and dangerous condition of the floor
(5) failed to maintain the floor area in a safe, clean condition
(6) exposed the claimant to risk or damage or injury which the defendant knew or ought to know.

The claimant also relied on res ipsa loquitur.

He said he had a pre-existing back condition and he sustained several injuries as set out at paragraph 7 of his re-amended statement of case. He said he had trouble performing his work as a driver of a fuel tanker and was dismissed. He later got work as a suitcase tagger but lost that job because of his inability to lift suitcases.

He also claimed several items of special damage set out at paragraph 11 of his statement of case.

The defendant is incorporated by an Act of Parliament essentially to manage the airport and air services in Trinidad and Tobago. The defence alleged that the reporting of the incident one day late prejudiced their ability to properly investigate the incident. In an Incident Report Form dated 16 July 2008, the claimant had alleged that the area of the floor where he fell was being mopped and was wet.

The defendant set out in its Defence that it had in place a 24 hour spot mopping system for spillage, as well as wet floor caution signs and appropriate warnings of areas being mopped. The defendant says the claimant was negligent himself if he fell. The defendant challenged the medical evidence that the injuries the claimant had were all caused by the fall and took issue with his claims.

The issues for determination were:

1. Did the claimant fall?

2. Was he negligent?

3. Was the defendant responsible?

4. Was the defendant negligent?

5. If so, to what extent? Was there any contribution?

6. What is the appropriate measure and quantum of damages?

The first issue to be decided was whether the claimant fell as he alleged. On this matter he says he did. No evidence was called by the defendant that he did not. He was tested in cross examination on this. I accepted his evidence on a balance of probabilities that he slipped and fell on a wet floor.

The second issue is, was he negligent? There was no evidence to suggest negligence on his part. His evidence is that he was walking along when he slipped on a wet floor.

The third issue is, was the Airports Authority liable?

It was submitted by the defendant that in the absence of proof of misfeasance by the claimant the defendant is not liable to the claimant, the defendant being a statutory authority whose functions are spelled out at section 12(1) of the **Airports Authority of Trinidad and Tobago Act, Chap.49:02**. The cases cited by the defendant apply to a situation where it is being alleged that a statutory duty applies. They will not, however, affect ordinary common law duties such as

liability for negligence or the duty of an occupier in relation to visitors. The claim was framed in negligence against the defendant in the management of the facilities. The claim was not based on the duties imposed by statute under the Airports Authority Act. This, in my view, is a subtle but important distinction. In **X (minors) v Bedfordshire County Council [1995] 3 All ER 353 at 362**, a case involving a hospital authority, Lord Jauncey concurring with the judgment of Lord Browne-Wilkinson said:

> "The owners of a National Health Service hospital owe precisely the same duty of care to their patients as do the owners of a private hospital and they owe it because of the common law of negligence and not because they happen to be operating under statutory provisions".

At paragraph 17.4 of the **Common Law Series: The Law of Tort, Second Edition, (LexisNexis Library)** the learned authors stated as follows at paragraph 17.4:

> "There is no general cloak of immunity for public bodies, and so a public authority that acts ultra vires is liable in tort if a cause of action is established, just as a private individual would be. In Mersey Docks and Harbour Board Trustees v Gibbs, a ship was damaged when it collided with a mud bank at the entrance to the defendants' dock. The defendants were held liable for the damage in negligence, and appealed to the House of Lords on the ground that they were a public body entrusted by Parliament with the task of maintaining the docks. The House held that the defendants' status did not absolve them from their common law duty to exercise reasonable care. According to Blackburn J, who delivered the opinion of the learned judges advising their Lordships:
>
> *The proper rule of construction of such statutes is that, in the absence of something to*

> *shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things."*

Further, at paragraph 17.6 it is stated:

> "One of the most problematic issues in the field of public authority negligence is the precise ambit of the special liability rules governing such claims. The first point to be made is that if the act or omission complained of is such that a private individual or body would be liable, then the fact that the defendant happens to be a public authority is irrelevant, and the ordinary negligence rules apply..."

Having found that the defendants are liable in negligence I now turn to consider the defendant's evidence. The defendant's witness, Claude D' Oliviera, Manager, Airports Operations at the relevant time, set out the operations when dealing with wet floors. He noted they had a contract with Century 21 Janitorial Services and Company Limited to provide janitorial services including cleaning and mopping of floors in the Airport terminal. He sets out in detail what is the process for dealing with spills and for mopping in general. This appears on the whole to be both a reasonable process and a careful one.

I accepted his evidence that this was the process agreed with Century 21. What Mr D' Oliviera couldn't say, however, is if this system was in fact in place on the night in question. It may

generally be the case, but evidence was needed from someone present to say what had happened in the night about 1 to 2 am in the area where the claimant fell.

I also do not accept, as contended by Mr Otway, that the defendant was overly prejudiced by the fact that the report was made the next day. At that time they could have conducted the necessary enquiries of persons who were present, or who ought to have been present, and about what took place. There was no reason in principle why evidence could not have been put forward from the Century 21 representatives on what their employees had done or were doing at the point in time of the incident. Without such evidence I was left only with the evidence of the claimant on this issue. I do not think that the hiring of Century 21 as a contractor necessarily absolved the defendant from this claim. The defendant was ultimately responsible.

In terms of how the incident occurred, the Incident Report Form of the defendant noted that the claimant had reported that he slipped and fell on some water and that at the time, some mopping operations were taking place but there were no signs to suggest this.

Notwithstanding their contract with Century 21, the defendant would still have been under an obligation to supervise the carrying out of the contract to ensure it was being done in the requisite manner. Further, Century 21's involvement was not set out in the Defence filed. They

could not therefore seek to shift the blame to Century 21 in light of the case they had set out in their Defence.

The defendant, based on the pleadings and evidence set out here, would ultimately be responsible for any negligence arising from failing to warn about wet floors or taking reasonable remedial measures. Perhaps if the case had been pleaded differently by the defendant, this may have resulted in the case being decided on a different footing. The pleaded Defence was that they had a system in place, not that another party was responsible as an independent contractor.

The next issue is, was there contribution by the claimant? From the version and the cross examination of the claimant, there does not appear to be contribution on his part. There was no evidence that he was not looking where he was going, or that he was distracted, or that he was talking to someone else, or that he was not alert and paying attention. Based on the evidence, I found no contribution on his part.

The fifth issue is, what is the defendant liable for? Did the claimant prove that the injuries he sustained resulted from the fall and which ones.

The day following the incident, he went to a doctor, Dr Vidya Gyan, who found him to be suffering from "acute sciatia" following a fall on his back on 6 July 2008. He was given anti-inflammatory and analgesics and was to have an x-ray done of his lower back. In the days and weeks following, he went for various physiotherapy sessions. He had also been examined by Dr Rasheed Adams two days after the incident and he was found to have had shooting pain from the lower back to both legs. The doctor noted there was a metallic pin in L3-L5 and another injury at L2-S1.

Dr Adam's report of 15 December 2008, noted he continues to have a sticking pain type sensation in the lower back. It was noted he had lumbar fusion from a 2003 injury. He was advised that low back exercises, baserol (a painkiller) and vitamins would all help. An assessment of his disability was to be done one year after the injury. None was done as the claimant did not return to him.

Dr Santana's report dated 1 June 2011 noted the claimant continued to complain of numbness down both legs, right more than left and pins and needles under the right foot.

I have looked carefully at the medical evidence including the reports which were put forward. These included reports from the United States, for which hearsay notices were served. I considered these reports in light of the fact that no cross examination was possible and the

weight I could attach to them had to be tempered by the other written and oral evidence given. In particular, I considered Dr Santana's evidence in cross examination. The claimant had an injury in 2003 at work and surgery related to it. Dr Santana did not know that the claimant had prior spinal surgery. Having been told of this in cross examination, he gave evidence that the likelihood of pain from the previous condition was high and there was a long recovery time.

This report, in any event, was approximately 3 years after the accident. For the claimant to rely on this medical evidence as establishing a connection between the 2008 Airport fall and his condition in 2011, there would have been need for detailed explanation of what aspects of the claimant's condition was connected to the fall and how. This was not done. There would also have had to be shown, on a balance of probabilities, that it was not connected to the 2003 accident, which in itself was serious, nor was it attributable to some other cause. In any event, merely because statements are made by medical practitioners, without the basis for so finding, even where no contrary evidence is advanced, does not mean that the court would or must necessarily accept it.

What was to be noted, further, was that some of the conditions noted in the X-ray reports were degenerative and that the "arterioscherotic changes" were not related to the accident.

The reports and the evidence as a whole did not point on a balance of probabilities to what resulted from the 2003 injury or the 2008 injury.

What would, therefore, be most relevant is what the medical evidence showed in relation to the claimant immediately after the 2008 injury and in the few months following.

Based on the evidence I do not find that the claimant established that his inability to return to work was related to the injuries he sustained in 2008. He gave evidence in any event of returning to work after his vacation which had ended in mid November 2008. After this happened he went on sick leave at different points until he was terminated. He gave evidence that in December 2008 he was advised by a Dr Ludwig in the United States that he had a "fractured spinal column pinch nerve". There is no evidence that connects this to the 2008 incident or the 2003 accident or whether it was related to either at all.

In this regard it is to be noted in particular that at paragraph 20 of the claimant's witness statement he said that as a result of the accident he sustained the following injuries:

> "Shooting pains from lower back to both legs.
>
> Tenderness to right para spinal area and midline scar
>
> Worsened lower back strains / pain
>
> Pain to both legs and lower back
>
> Acute sciatia (sic)
>
> Spasms in walking

Tenderness to L3-L5 region of lumbar spine”

The main injury claimed from this list can be considered sciatica. The other injuries are essentially injuries related to pain to various parts and occasional spasms felt when walking.

The additional reports from the United States sought to be put in by hearsay notices do not refer to the claimant’s fall of 2008. These in any event are generally radiological reports. There is no report from a surgeon. Dr Santana in cross examination gave evidence that a surgeon can connect the cause to the injury. A radiologist report cannot do so. The reports cannot connect what was seen to the 2008 fall.

Dr Santana’s examination of the claimant on 29 April 2011 showed “numbness down both legs, right more than left” and ‘pins and needles under the right foot”. Importantly, Dr Santana was not told of the claimant’s previous 2003 surgery or accident. His evidence does not connect these continuing injuries to the 2008 fall.

I am unable on the evidence to find that the claimant’s condition after Dr Ludwig’s diagnosis of December 2008 was related to the 2008 fall. Thus the special damages claims relating to treatment after December 2008 are not proved.

Mr Ahmed on behalf of the claimant submitted that the egg shell skull principle would apply in the sense that the defendant must take the claimant as he was, being a man who had a previous injury. While the soundness of this principle is accepted, it cannot afford the claimant carte blanche to say that whatever treatment he received after the 2008 fall should be laid at the doorstep of the defendant. The issue squarely was whether any of the injuries not identified shortly after the fall could be said to have resulted from the 2008 fall as opposed to whether they may have occurred in any event given the 2003 fall or for some other cause unrelated to the 2008 fall, such as age, weight or some other injury. It is on this basis that the claimant has failed in my respectful view to establish the necessary links to the 2008 fall.

Given what the evidence established, I considered the following authorities to be of particular assistance when considering the appropriate award for the claimant's injuries:

HCA 1972 of 2007 Peters v Ramjohn per Best J. on 29/9/10

CA 21 of 1993 / S 883 of 1998 Sookhoo v PTSC, Court of Appeal, 20/2/98

HCA 2092 of 2002 Charles v Attorney General per Rajkumar J on 26/5/08

CV 3944 of 2008 Dipnarine v Attorney General on 24/2/2002

HCA 6039 of 1988 Pemberton v Hilo Food Stores on 25/4/95

In this present case, the injuries which can be attributed based on the evidence led here were somewhat less serious than those in the Pemberton and Dipnarine cases.

I also did not accept the claimant's evidence of his active lifestyle before the incident. His 2003 injury would reasonably have curbed many of the activities he spoke about such as playing baseball, wind ball cricket and soccer. I found this aspect of his claim to be exaggerated.

I have considered, in particular, that the claimant would have been in considerable pain for a long period, that he had discomfort for some time, there was a diagnosis of sciatica, he would have had some loss of amenities and there probably was some ongoing disability, but not such as prevented him from undertaking other types of work. The claimant was also already near age 60 at the time of the fall so his work life for strenuous activity was probably drawing to an end. Thus, given all these circumstances, a reasonable award for general damages would be the sum of $140,000.00

Based on the injuries I have found as proved, the following have been proved as being Special Damages arising from the 2008 fall:

Dr Gyan visit on 7 July 2008	250.
X-ray on 9 July 2008	225.

Dr Gyan visit on 23 July 2008	250.
Physiotherapy on 12 August 2008	55.
Physiotherapy on 15 September 2008	55.
Dr Gyan visit on 22 October 2008	250.
Dr Adam's visit on 27 October 2008	500.
Transportation in Trinidad for medical treatment	800.
Total	$2385.

The claimant had surgery done in 2011 which he says was related to his 2008 fall. The cause of this surgery being related to the 2008 accident has not on a balance of probabilities been proved. There were several surgeries done together which were separately billed for. The claimant bore the burden to prove that these were necessitated by the 2008 fall. Expert medical evidence was needed for this. Merely serving hearsay notices with particulars of the surgery were not sufficient. The claimant's duty remained to provide, through an expert witness, the facts together with the necessary scientific criteria on which the conclusion was made linking the need for surgery to the cause of that surgery: see **Errol Edmund and Others v A.S.P. Morris, unreported, Magisterial Appeal No. 5 of 1973 per Hyatali CJ.** I therefore decline to make any award in respect of the sum of $120, 414.75 US due for these surgeries.

In any event the defendant had given a mitigation notice by letter dated 12 October 2010 as required by the Privy Council case of **Lansiquot v Geest PLC**, PC Appeal 27 of 2001, delivered 7 October 2002 per Lord Bingham. The claimant went ahead with the United States surgery. It has been accepted in this case (see paragraphs 54 to 56 of the claimant's witness statement) that the same kind of surgery can be performed here at a cost of about $220,000. Thus even if I was wrong on the connection of the need for surgery to the 2008 fall, I would have awarded damages for the lower sum of $220,000. It would have been unreasonable in all the circumstances for the claimant not to have sought to mitigate his loss. He, of course, could have decided to go ahead with the more expensive foreign surgery. However, the defendant would not have been liable for the higher figure.

In conclusion then, there is judgment for the claimant against the defendant. The defendant must pay the claimant general damages in the sum of $140,000.00 and special damages in the sum of $2,385.00. Interest on both general and special damages to run at the rate of 6 % from the date of the appearance by the defendant to the date of judgment. Costs are to be paid by the defendant to the claimant on the prescribed scale based on an award of $142,385.00 in the sum of $30,357.75.

Ronnie Boodoosingh

Judge