REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2016-04047

Between

ANDERSON BABWAH Claimant
(now Substituted for by his mother Angela Regis)

And

NICHOLAS JONES Defendant

MOTORONE INSURANCE COMPANY LIMITED Co-Defendant

Before The Honorable Justice David C. Harris

Appearances:

Ms. Tosha Lutchman instructed by Ms. Patrice Celestine **for the Claimant**

Mr. Walede Michael Coppin instructed by Ms. Frances Haynes **for both the Defendants**

JUDGMENT

INTRODUCTION

1. The Claimant claims damages for personal injuries and loss of earnings arising out of a motor vehicle accident. The Claimant was a passenger in the Defendant's motor vehicle, occupying the back left seat when, while proceeding north along the Southern Main Road, Couva, the car skidded and spun off the road and collided with a lamp post on the opposite side.

2. The Co-Defendant is sued pursuant to s. 10A of the Motor Vehicle Insurance (Third Party Risks) Act Chapter 48:51.
3. After the filing of this action and during the case management process the claimant died from causes unrelated to the cause of action in this matter. By **court order of the 31 January 2018**, his mother Angela Regis, was substituted for the claimant.

CLAIMANT'S CASE[1]

4. Anderson Babwah, the virtual claimant, was a passenger in the Defendant's vehicle PBK 5343 on 8th June 2013, occupying the back seat on the left side of the vehicle. The car was proceeding along the Southern Main Road at about 60kmh when the driver, Nicholas Jones - the Defendant - lost control of the vehicle. It ran off the road and collided with a utility pole, all causing the said Anderson Babwah, to suffer severe injuries, loss and damage. The Claimant alleges that the Defendant's negligence caused the accident.

DEFENDANTS' CASE[2]

5. The Defendants averred that Nicholas Jones was not negligent and was not responsible for the accident and further, that the Claimant was contributory negligent for any injury or damage that may have been caused by the act or omissions of the Defendants; the Claimant was not wearing a seatbelt. Further, the Defendant, Nicholas Jones, was attempting to avoid colliding with an oncoming vehicle which had come into his lane, when the car ran off the road, hitting the utility pole.

ISSUES TO BE DETERMINED

6. Whether the First Defendant owed the Claimant a duty of care;
   Whether the First Defendant breached that duty of care; and
   Whether the breach caused injury and damage to the Claimant.
   Whether the claimant contributed to his injury and loss

THE LAW

7. A duty of care is defined as an obligation imposed upon one person for the benefit of another to take reasonable care in all the circumstances.

[1] Summarised from the Claimant's Statement of Case
[2] Summarised from the Defendant's defence

8. In ***Donoghue v Stevenson*** [1932] AC 562 @ 581 Lord Atkin stated a duty of care in terms of the *neighbour principle i.e.*:

> *Take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour…. My neighbour – persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question*."

9. Negligence is concerned with breach of that duty of care as stated by Lord Macmillan at 618 – 619 in **Donoghue v Stevenson**:

> "*The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence……The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in breach of that duty."*

10. *The general principles of the law of negligence are also set out in* ***Halbury's Laws of England***:[3]

> *"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. ……Where there is no such notional duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which it can be reasonably foreseen may cause harm to the claimant's interests in so far as they fall within the scope of the duty"*

11. When considering whether a notional duty of care applies in a particular situation, the courts will consider three questions as outlined in Halsbury's Laws of England:

[3] Negligence/Vol 78 (2018) at paras 1, 2, 4; Vol 97 (2015) at para 497

i. whether the damage is foreseeable;

ii. whether there is a relationship of proximity between the parties; and

iii. whether the imposition of a duty would be fair, just and reasonable.

THE EVIDENCE

12. The evidence in this matter is narrow. Evidence is taken from Angela Regis, the mother of the Claimant; Jason James, a back seat passenger in the car in which the Claimant and Defendant were in; Nicholas Jones, the driver of the vehicle and Rupert King, an after-the-fact investigator. Save for the investigator, they were all residents of the community of Marabella, Trinidad. The Defendant, Nicholas Jones, both, filed a witness statement and, testified for the *Claimant* in this matter even though this was a subrogated matter. He wore two hats in this matter. Counsel for the "Defendant" and Co-Defendant, Mr. Coppin, indicated to the court that he had earlier advised the Defendant of the implications of his testifying for the Claimant. On the defence's pleaded allegation that the Claimant contributed to his damage by not wearing a seatbelt; no evidence was led to this effect. Suffice it to say, the only evidence in this matter for the court's consideration is that of the witnesses for the Claimant. The Defence called no witness but relied upon the testimony of the witnesses for the Claimant.

13. At the onset, it is clear that the Defendant did owe the claimant a duty of care in the manner in which he drove controlled and maneuvered the car. Further, on the evidence, as a result of the collision the claimant suffered loss and damage.

14. Angela Regis was not a witness to the collision and plays little part in the case for the primary liability findings. In cross examination she acknowledged that she was not a witness to the accident. Nothing weighty and contradictory came out of her cross examination. Her evidence goes substantially to the nature and extent of the injury, the various services the Claimant availed himself of post-accident, and certain effects of the injury on the Claimant. There is no dispute that the Claimant suffered severe injuries arising out of the collision. The extent of certain losses are denied by the Defendant and the Claimant called upon to prove them.

15. The high water mark as it were, of the circumstances of the accident upon which the Claimant relies to establish the Defendants negligence is found in the evidence and in the evidence in chief of several witness statements as follows: **(i) Angela Regis** at para 10 where she refers to and

exhibits as "AR1", the handwritten statement of the Claimant **Anderson Babwah**, dated the '5/3/17'. This statement was the subject of a hearsay notice filed by the Claimant. Rupert King, investigator, did not give evidence. The Claimant there in his handwritten statement put into evidence by Angela Regis, stated that he was a *left rear passenger,* driven by his uncle, the Defendant, at around 3.15 am, heading north along the southern main Rd Couva. He said he was in company with his friend Jason James who was seated on the right rear, and *"…on reaching near a green door* [sic] *I just felt the car skid and spin and that's all I could remember. I suffered a broken right leg*…". The rest of the hand written statement dealt with the post collision occurrences; **(ii)** Then there was the evidence in chief of the Claimant's friend and back seat passenger, **Jason James:** after describing the seating arrangement in the car, at para 5 of his evidence in chief he went on to state: "*Nicholas was driving on the Southern Main Road Couva and we were close to Green Door Bar when I felt the vehicle spinning. I do not recall anything after that moment until I woke up in the Eric Williams Medical Sciences Complex at Mount Hope on the same day"*. **(iii)** Then there is the evidence of the named Defendant, **Nicholas Jones**. He too, amongst other things, first described the seating arrangement of all persons in the car consistent with that of Jason James and that set out in the handwritten statement of the Anderson Babwah.

16. Then at paras 6 – 9 Nicholas Jones, the named Defendant who testified for the Claimant, describes the circumstances of the collision :

    At Para 6 -

    "*As I was driving in the area of a bar which used to be called Green Door Bar where the road is slightly bent, I saw a vehicle approaching from the opposite direction quickly coming towards my vehicle and crossing from the southern lane onto my side of the road*".

    He continued: at para 7 -

    " In about 10 seconds of seeing the said motor vehicle crossing over onto my lane, I pulled my steering wheel to the left to avoid the other vehicle colliding with my vehicle. As I pulled the steering wheel of my vehicle so as to avoid colliding with the other approaching vehicle, the left front tyre of my vehicle hit the concrete pavement and the tyre burst which resulted in me losing control of my vehicle and it ran off the road and went across on the southbound lane. I saw that my car was about to hit a lamp post on

the eastern side of the road so I pulled the steering wheel but the back of the car still hit the lamp post".

At para 8 he testifies that:
" *As the car hit the lamp post*, I looked back and saw Anderson and Jason fly out of the rear windscreen and out on the eastern side of the road and hit a concrete wall and fly back onto the side of the northern lane of the road."

And continues: para 9 -
" *After the car hit the lamp post, the car spun across to the northern lane before it came to a stop*".

17. This is the evidence in support of the case for the Claimant that the Defendant was negligent in his handling of the motor vehicle. Let me reiterate, that there is no dispute that the Defendant did owe the Claimant a duty of care. Nor is there a dispute that the collision caused damage and loss of the nature claimed. The quantum is of course disputed.

18. This case is about whether that duty of care was breached by the Defendant in all the circumstances of this case, guided as the court is, by the ***Halsbury's laws of England*** learning that; "*Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which it can be reasonably foreseen may cause harm to the claimant's interests in so far as they fall within the scope of the duty"*.

19. What is the state of the evidence? No witness described the condition of the road at the time, nor the condition of the car; nor the condition of the driver(tired, intoxicated etc.), nor the speed of the vehicle; nor the manner of driving of the Defendant prior to the collision. In fact, sad to say, there is no sufficient evidence to suggest an act or omission that amounts to negligence of the Defendant. The witnesses, who were back seat passengers at the material time, were not even able to testify to contradict the version of events given by the Defendant. The Old Southern Main Road is a road constructed way back in earlier colonial period, *in the beginning of time* as we say. It is not a modern road and not a dual carriage way; but a simple two lane road, with one lane in each direction. Before the construction of the dual carriageway highway from the north to the south, it was the main artery between the north and south Trinidad. The road is not particularly

wide. These historical facts are notorious I would think and its introduction here by the court, do not change the case or facts before the court in any way.

20. The Defendant himself, who appeared as a witness for the Claimant no less, described the incident; which was that he swerved to avoid an oncoming car in his path. This is not refuted. He testified that in doing so he hit the pavement; this too is not refuted. Remember he gave evidence for the Claimant's case. He reaffirmed his evidence in chief during cross examination and added that he had more like about 3-4 seconds to react to the oncoming car in his path as opposed to the "…*about 10 seconds*…" which he had stated at para 7 of his witness statement. He said he did not have a lot of time to react. He went on to add in cross examination when suggested to him by defence counsel, that the effect of the bend in the road served to slightly obscure his view of the oncoming car. His speed he said was 60 kmh and within the speed limit. He did not testify either in chief or cross examination to driving too fast or in a manner such that the collision and ensuing damage would have been reasonably foreseen. In the end he testified expressly, that he was not responsible for the accident. This is the case for the Claimant. The careening of the car after the impact is controlled by the forces of movement, gravity, the driver and other natural factors. Those factors that can determine what a vehicle does after impact would of course include the speed of the vehicle. But none of the witnesses have testified to those factors or provided evidence(including perhaps distances traveled from point of impact to rest; extent of damage; expert evidence as what velocity a body would have to be traveling at to smash through a rear glass or windscreen etc.), upon which the court, in the context of the duty of care, can infer a rate of speed that would amount to an act of recklessness amounting to negligence.

21. The evidence of the incident other than from the named Defendant, came from Mr. Jason James and also gleaned from the handwritten statement of the Claimant which was put in as a hearsay document through Mrs. Regis. Both these accounts are bereft of pertinent detail. The upshot of them both is really an absence of recall. Neither speak directly to the Defendants more detailed account. In fact to the extent it is contended that they differ from that of the Defendant, I conclude the Defendants account fills in the detail which are absent in their account. If Mr. James account for instance, that they were driving along and all of a sudden the car spun around (inexplicably in the courts view on this account), then he woke up in hospital, amounts to a dispute as to whether a car rapidly approached them on their side of the road, and the Defendant swerved to avoid it; then this court finds in favour of the account of the Defendant as being more internally

consistent with the larger narrative and reality and more plausible. Further, the detail contained in the Defendant's version is more consistent with the occurrence of an event that actually took place and observed by a person with his faculties intact before during and after the incident being recounted.

22. Counsel for the Claimant attempted to distance the case for the Claimant from some aspects of the unrefuted evidence of Nicholas Jones. But he was her witness. Further, there was no basis for diminishing the value of these aspects of his testimony. Counsel for the Claimant then submitted that a combination of the time of the day – pre dawn; the speed of the Defendant's vehicle and the negotiating of a bend under those circumstances provide the court with sufficient evidence to found liability for negligence. This is not so. No evidence was given as to the speed to suggest it was too fast for the slight bend, or for the Defendant to control and/or maneuver his vehicle and so on or the driver was intoxicated, tired or the like. This is the state of the evidence even when the Defendant testified for the Claimant. The Claimant is calling on the court to be highly speculative in lending to the facts the interpretation of them put before the court by counsel.

23. The doctrine of *Res ipsa Loquitur* is not pleaded to assist the Claimant. In any event in the circumstances of this case it does not come to the aide of the Claimant. For such a claim to be successful, the Claimant would have to show that the accident was of such a kind as would not, in the ordinary course of things, have happened without negligence on the Defendants part[4]. Not only has the Defendant himself provided a plausible explanation for the cause of the collision, but the whole of the evidence itself, does not provide the pillars upon which the court can draw the inferences it is called upon to make. It would require speculation on the court's part, were the court to conclude from the evidence a prima facie case of negligence on the part of the Defendant. The application of this doctine for the claimant would fail if pleaded and/or sought.

24. Further still, the ever so tragic end to the collision, being the severe damage to the Claimant and his spine, does not because of the horror of it, necessarily establish negligence. So for example, non-culpable and/or inevitable accidents or *acts of god*, can result in tragic outcomes, but none of those circumstances can be said to reflect negligence.

[4] Commonwealth Caribbean Tort Law, 3rd ed Gilbert Kodilinye pp 88; see also Lloyde v West Midlands Gas Board [1971] 2 All ER 1240 per Megaw LJ at pp 1246.

CONCLUSION/DISPOSAL

25. The Claimant has not proved the Defendant's breach of his duty of care to the Claimant. In the circumstances the claim is dismissed. As a consequence, the claim against the Co- Defendant, statutorily hinged as it is on the liability of the Defendant only, falls away with the dismissal. The Co-Defendant did not defend against the substantive claim. The Co-Defendant did not contest the right of the Claimant pursuant to the Motor Vehicle Insurance (Third Party Risks) Act Chapter 48:51 (as amended), to call on the Co-defendant to indemnify the Defendant in the event the Defendant was found liable. The Co-Defendant had no interest sufficiently different to that of the Defendant intituled in the action to attract an independent costs order.

26. For the reasons provided above **IT IS HEREBY ORDERED** that:
    i. The claim against the Defendant is dismissed;
    ii. The claim against the Co-Defendant is dismissed;
    iii. Judgment for the Defendant against the Claimant with costs on the Prescribed Costs scale to be paid by the Claimant to the Defendant only or as otherwise agreed between the parties.

DAVID C HARRIS

HIGH COURT JUDGE

NOVEMBER 21, 2018