REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2015-01695

BETWEEN

PETRONELLA WILKINS

CLAIMANT

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

1ST DEFENDANT

AND

THE CHAIRMAN, ALDERMAN, COUNCILLORS AND ELECTORS OF THE REGION OF MAYARO-RIO CLARO

2ND DEFENDANT

Before the Honourable Madam Justice Eleanor Donaldson-Honeywell

Appearances:

Mr. Mustapha Mushim Khan, Attorney-at-Law for the Claimant

Ms. Kezia Redhead and Ms. Narelle Ferriera, Attorneys-at-Law for the 1st Defendant

Delivered on October 5, 2016

JUDGMENT

I. Introduction

1. On 23rd May, 2011 at around 6:30 a.m. the Claimant was walking along Naparima Mayaro Road in the vicinity of the scale house and was about to cross the roadway when her left foot and sneakers got caught in a defective manhole grill which was covering that part of the road. This, she claims, caused her to fall and sustain injuries. The Claimant initially claimed against the two Defendants; however, on August 3rd 2015 Judgment in default of Appearance was entered in favour of the Claimant against the 2nd Defendant, The Chairman, Alderman, Councillors and Electors of the Region of Mayaro-Rio Claro.

2. The Claimant claims that the 1st Defendant, acting by their agents and/or servants in the Ministry of Works and Transport, was negligent in:
    a. Failing to ensure that the part of Naparima Mayaro Road to the front of the scale house was safe for all users;
    b. Failing to maintain the part of Naparima Mayaro Road to the front of the scale house;
    c. Failing to take any or any adequate or effective measures to ensure that the said manhole grill was maintained as to prevent same from being dangerous to users of the Naparima Mayaro Road;
    d. Failing to warn the public and users of that part of the Naparima Mayaro Road in front of the scale house that it was not safe and it was in a dangerous condition; and
    e. Failing to erect any warning signs or use caution tape in the vicinity of that part of the Naparima Mayaro Road in front of the scale house where the manhole grill was located.
3. The Claimant claims that it was due to this alleged negligence that she suffered injuries to her cervical spine and lumbar spine. Her claim is based on a medical report from an examination done approximately two years after the incident occurred. Her prognosis by Mr. Trevor Seepaul, Consultant in Orthopaedics, General Hospital San Fernando is as follows:
    a. Anterior osteophytes seen at C4, C5 and C6 vertebrae and C6-7 intervertebral disc space with disc desiccation changes in the entire cervical discs.

b. C4-5: there is a mild right osteophytic disc bulge causing mild right foraminal stenosis indenting the fat, possibly the site of nerve root irritation.
c. C5-6: left osteophytic disc bulge causing left foraminal stenosis bilaterally indenting the nerve root.
d. C6-7: there is diffuse osteophytic disc bulge causing mild foraminal stenosis bilaterally indenting the fat possibly the site of nerve root irritation.
e. L4-5: diffuse disc bulge causing foraminal stenosis laterally impinging the exiting L4 nerve roots on both sides.

4. Mr. Trevor Seepaul in his medical report also states that the Claimant's long history of back pain was "exaggerated" by the fall. He cites her pre-existing cardiac condition as a cause of her disability.
5. The 1st Defendant in their defence avers that the Ministry of Works and Transport neither installed nor maintained the metal grill that the Claimant claims was the cause of her accident. The 1st Defendant pleads that it is not the practice of the Ministry to use metal grills on footpaths or to cover any manholes but that the practice is to cover them with ribbed flat steel sheets or solid reinforced concrete covers.
6. The 1st Defendant's witness Navin Ramsingh, Director of Highways at the Ministry of Works and Highways confirms in his witness statement that the Ministry would not install the type of grill exhibited by the Claimant as the grill that caused her fall. He avers that the Ministry uses ribbed flat steel sheets or reinforced concrete ones.
7. The 1st Defendant further states that the Claimant contributed to her injuries by her own negligence in:
    a. Failing to pay any or sufficient attention to the surface of the footpath/metal grill;
    b. Failing to take any or sufficient steps to avoid the area of the metal grill;
    c. Failing to look where she was walking;
    d. Proceeding too fast in all the circumstances; and/or
    e. Failing to take any or any adequate precautions for her own safety.
8. The 1st Defendant denies the Claimant's medical evidence and puts her to strict proof thereof. The Claimant and the 1st Defendant both filed written submissions in this matter on 12th August, 2016.

II. Issues

9. The issues in the present case are as follows:
    a. Whether the 1st Defendant has been negligent in its duty to the Claimant,
    b. Whether the Claimant was contributorily negligent in causing her own injuries and
    c. The determination of the quantum of damages to be awarded to the Claimant if the 1st Defendant's negligence is proved.

III. Law and Analysis

Negligence of the 1st Defendant

10. To succeed in an action for negligence, the Claimant must prove:
    a. A duty to exercise care;
    b. A breach of that duty; and
    c. That damage suffered was caused by that breach.[1]
11. The Claimant argues in closing submissions that there has been no dispute that the accident did occur and that, by its own admission, the 1st Defendant was responsible for the maintenance of the road in that area. The Claimant further states that the injury she claims to have sustained was directly due to the accident. Using comparator cases, the Claimant submits that an appropriate award to be made would be $200,000.00 in general damages.
12. The 1st Defendant admits that under **S.2 & 19(1) Highways Act, Chap. 48:01** the Ministry of Works and Transport is in fact under a statutory duty to maintain the highway. They do not dispute that this covers the Naparima Mayaro Road in question. They further submit that this statutory duty of care is equivalent to the common law duty in a negligence action. Accordingly, there is no dispute that the duty of care element in the current negligence action has been established with the 1st Defendant having a duty to maintain the road in question.
13. In order to succeed in this Claim however, the other elements of negligence including breach of the duty of care would have to have been proven. In this regard, the 1st Defendant

[1] See generally, Halsbury's Laws of England, Negligence (Vol. 78 (2010)) [1]-[3]

submits that there is a common law exemption from liability for breach of the duty of care which the Highways Act also codifies. **S.150 Highways Act** provides:

> *"Nothing in this Act with respect to the duty of a highway authority to maintain highways maintainable at the public expense shall be construed as affecting any* ***exemption from liability for non-repair*** *available under the common law to a highway authority immediately before the commencement of this act".[Emphasis added]*

14. The Claimant's Attorney was entitled to file a written response to the 1st Defendant's submissions however, up to the deadline date of August 26th, 2016 no response was filed. The Claimant therefore relies on the initial submission of her Attorney which does not address the issue of the statutory exemption. Accordingly, there has been no assistance from the Claimant on this point.
15. The 1st Defendant cites **Maniram Manbodh v Victoria County Council and another**[2]**,** a High Court decision (overturned on appeal on an issue of fact), where the Court held:

> *"Section 150 of the Highways Act preserves the common law exemption from liability afforded a highway authority arising from non-repair, i.e. from non-feasance as opposed to misfeasance. Failure to repair is non-feasance. Carrying out repair work negligently is misfeasance."*

16. Several UK cases prior to 1961 buttress this point[3]. The UK has since legislated against this exemption while the position in Trinidad and Tobago remains the same. The 1st Defendant cites **Daisy Clarke v the Mayor, Aldermen and Citizens of Port of Spain**[4], a local case which applied the distinction outlined in **McClelland v Manchester Corporation [1912] 1 KB 118**:

> *"If a highway authority, therefore, leaves a road alone and it gets out of repair, there is of course no doubt that no action can be brought, although damages ensues. But this doctrine has no application to a case where a road authority has done something, made up or altered or diverted a highway, and have omitted some*

[2] HCA No S 692 of 1990 at 3

[3] Dawson & Co v Bingley Urban DC [1911] 2 K.B. 149 CA; McClelland v Manchester Corp [1912] 1 K.B. 118 KBD; Baldwin's Ltd v Halifax Corp (1916) 14 L.G.R. 787

[4] HCA 4369 of 1986

precaution which, if taken, would have made the work done safe instead of dangerous. You cannot sever what was done, omitted or left undone from was was committed or actually done, and say that because the accident was caused by omission therefore it was non-feasance. ***Once established that the local authority did something to the road, and the case is removed from the category of non-feasance.*** *If the work was imperfect and incomplete it becomes a case of misfeasance and not non-feasance, although damages was caused by an omission to do something that ought to have been done." [Emphasis added]*

17. In the present case there is no evidence whether tendered by the Claimant or by any admission of the 1st Defendant that the Ministry of Works and Transport actually placed that metal grill on the roadway. Indeed, the evidence from the sole witness for the 1st Defendant, the Director of Highways was that such a grill is not used by the Ministry. There being no evidence that the Ministry actually placed the grill on the road in the course of road works the 1st Defendant can only be guilty of non-feasance in failing to inspect and maintain the dangerous area. On the face of it therefore the 1st Defendant is exempt from liability under common law and under the Highways Act.
18. Although the exemption argument made by the 1st Defendant prima facie presents an in surmountable hurdle for the Claimant's case, I found it necessary to examine the matter further even without the assistance of submissions by the Claimant. This was necessary because the Claimant's Claim, while clearly based on non-feasance, is pleaded in a manner that focusses more on the failure to maintain the grill on the roadway than the failure to maintain the roadway itself. There are cases that have highlighted this distinction.
19. In **Auldwyn Christopher v AG**[5], a decision involving a failure by the Ministry of Works to keep a manhole securely covered, the court considered the statement of law in **Charlesworth on Negligence 5th ed., p.426** para. 690 that *"[e]ven before the Highways (Miscellaneous Provisions) Act 1961 came into force on August 3, 1964 the old common law rule that a highway authority was liable for misfeasance but not for nonfeasance* ***applied only to disrepair of the road qua road and did not extend to things on the road, such as gratings or things created on the surface***" [Emphasis Added]. Based upon this, it

[5] H.C.1671/1975

was held that the 1st Defendant was liable to the Claimant in negligence for nonfeasance in relation to the manhole that was created on the surface of the road.

20. On the liability of local authorities, **Charlesworth on Negligence 3rd ed.**, which contains the pre-1961 UK position, had this to say at para. 263:

> *"If a grid, covering the entrance to a sewer, is defective so as to injure persons passing along the highway, the sanitary authority are liable although, as highway authority, they are under no liability for non-feasance. Similarly, if a local authority, to enable them to water the streets, place a box covered with an iron flap in the footway, so that a person walking along the street slips because the flap has become worn smooth, the authority is liable."*

21. This implies that the highway authority is indeed liable for maintenance of things created upon the surface of the highway. However, the principle behind the distinction between nonfeasance and misfeasance was outlined at para. 271 as follows:

> *"If nothing at all is done, it is nonfeasance; but if the highway is interfered with, there immediately arises a duty to take reasonable care, and an omission, such as failure to fence or light a heap of stones or a hole, is misfeasance as much as a positive act, such as, causing inequalities in the road in the course of repairs."*

22. Therefore, the authority would only face liability where the objects posing a danger are placed on the surface of the highway *by the Highway Authority* as the act of creating that structure amounts to an act of misfeasance by the authority from which the duty to take reasonable care arises. This is a distinguishing feature of the present case from the case in **Auldwyn Christopher** as here the evidence of the Ministry of Transport is that it had never created the grating in question and therefore could not be responsible for its maintenance. There is no counter-evidence by the Claimant.

23. It is clear that in the UK, prior to the 1961 enactment, the exemption did not cover structures upon the road such as manholes and their covers and as such the authority would be liable for failure to maintain these covers. This applies equally to the current local position as our statute has not been amended. However, in the present case, unlike in the **Auldwyn Christopher** matter, the authority claims not to have been responsible for placing that metal grating on the roadway at all and therefore cannot be said to have been

guilty of misfeasance. The common law and statutory exemption thus dispenses with the claim of the Claimant.

24. It is noted that there are also certain factors in the Claimant's own evidence which weaken her case such as the absence of medical evidence nearer to the time of the incident and the degree of causation of the injuries by the Claimant's other health issues. It is not necessary to address these now given my findings on the exemption of the 1st Defendant from liability in Negligence.

25. There is, however, a remaining matter of concern in the way the case for the Defence was presented. It is a concern which, has not been raised by the Claimant who failed to file submissions in response. The concern is whether the pleadings of the 1st Defendant were sufficient to lay a foundation for the exemption point made its closing submissions. There was never any prior mention of this point whether at the pre-action stage or during the course of proceedings. This gives an aura of trial by ambush to the way the matter was dealt with by the 1st Defendant, a practice that is incompatible with the overriding objective of **Part 1.1** of the **Civil Proceedings Rules, 1998**, as amended ("CPR") in enabling the Court to deal justly with cases. In this regard **Part 25.1(m)** of the CPR provides that in managing cases the Court must further the overriding objective by ensuring that no party gains an unfair advantage by reason of his failure to give full disclosure of all relevant facts prior to the trial.

26. **Part 10.5 of the CPR** provides:

> *"(1) The Defendant must include in his defence a statement of all the facts on which he relies to dispute the claim against him.*
>
> *(2) Such statement must be as short as practicable.*
>
> *(3) In his defence the Defendant must say—*
>
> *(a) Which (if any) allegations in the claim form or statement of case he A dmits;*
>
> *(b) Which (if any) he denies; and*
>
> *(c) Which (if any) he neither admits nor denies, because he does not know whether they are true, but which he wishes the Claimant to prove.*

(4) Where the Defendant denies any of the allegations in the claim form or statement of case—

(a) He must state his reasons for doing so; and

(b) If he intends to prove a different version of events from that given by the Claimant, he must state his own version.

(5) If, in relation to any allegation in the claim form or statement of case the Defendant does not—

(a) Admit or deny it; or

(b) Put forward a different version of events,

he must state each of his reasons for resisting the allegation.

(6) The Defendant must identify in or annex to the defence any document which he considers to be necessary to his defence."

27. This provision places an obligation on the Defendant to state which allegations he admits, which he denies (with his reasons for so doing) and which allegations he is unable either to admit or to deny but nevertheless requires the Claimant to prove. The rule does not specifically require any propositions of law that the Defendant wishes to rely on to be included in the defence.

28. According to Saville LJ in **British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 72 BLR 26** at pages 33-34:

"The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it."

29. Further in **Three Rivers DC & Ors. v. Governor and Company of the Bank of England (No. 3) (HLE) [2003] 2AC 1** Lord Hope at paragraph 49 stated that *"a balance must be struck between the need for fair notice to be given on the one hand and excessive detail on the other"*.

30. In the present case, it is clear from the defence and the 1st Defendant's witness statement that the 1st Defendant has always maintained that it has never used the type of grill exhibited by the Claimant in its road maintenance and repairs. At the pre-action stage, the correspondence between the Claimant and the Mayaro-Rio Claro Regional Corporation and Roads Superintendent Nariva/Mayaro District reveals that initially each organisation

had denied responsibility for the area in question. However, it is apparent from the course of the cross-examination and the submissions that the Ministry of Works and Transport now accepts responsibility for the area but simply denies having placed the grill there. Accordingly, though not expressly stated prior to closing submissions, it would have been evident from the facts pleaded that the 1st Defendant relied solely on the principle of non-feasance that exempts it from liability.

31. It cannot be said that the 1st Defendant's factual case, that it had not placed the grill on the road, had not been put to the Claimant. It was specifically pleaded in their defence. The Claimant, therefore, would have had due notice and opportunity to answer the non-feasance defence. There was no evidence provided on the part of the Claimant that the 1st Defendant did use these grills in its maintenance works. The Claimant does not appear to have utilised the various proceedings provided for in the CPR to seek disclosure of such evidence from the 1st Defendant. In the absence of such evidence, the un-contradicted testimony of the 1st Defendant's witness is in my view credible on this matter as he is intimately involved in the operations of the Ministry.
32. The case for the Claimant has not been proven as it has not addressed the common law exemption for injury resulting from non-feasance as opposed to misfeasance in highway maintenance by the 1st Defendant. The issues of contributory negligence and quantum of damages do not therefore fall to be considered. The case for the Claimant is dismissed with no order as to costs.

…….

Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely

Judicial Research Counsel I