THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

San Fernando

Claim No. CV 2017-03440

Between

George Elliot

Claimant

And

Chaitram Ramrattan

Tyre Sales and Services Limited

First Defendant

Chaitram Ramrattan

(Joined Pursuant to Part 19 of the Civil Proceedings Rules 1998 as amended)

Second Defendant

Before the Honourable Mme. Justice Donaldson-Honeywell

Delivered on: November 25, 2019

Appearances:

Mr. Ted Roopnarine, Attorney at Law for the Claimant

Mr. Nizam Mohammed and Ms. Genevieve Thompson, Attorneys at Law for the Defendant

Oral Judgement

A. Background

1. This is essentially a negligence claim, though partly based on alleged breaches of implied terms of the employment contract. The pleaded claim is the substance of the case that had to be proven by the Claimant and I started by looking at the pre-action letter, at paragraph 4, where the claim was first set out as follows and I quote:

> "You are at fault (addressed, of course, to the employer) as you have a common law duty to provide our client with a safe system of work."

2. This, in effect, is reflected in the Statement of Case eventually filed and amended. The amended Statement of Case at paragraph 2 bases the Claim on an implied term of the contract of employment and/or that the employer's duty was to take reasonable precautions for safety of the Claimant while he was engaged upon his work, not to expose him to an injury risk of which the employer ought to have known and to provide a safe system of work. Of course, the particulars are set out at paragraph 5 of the Statement of Case.

3. In light of the foregoing, Employer's Liability was the primary basis for the claim. Additionally, in the amended Statement of Case, the Claimant added details of the incident leading to his injury, which implicitly introduced the issue of alleged Vicarious Liability. At paragraphs 3.1 and 3.2, the Claimant pleads that he was acting on instructions from another of the Defendant's employees to (and I quote) 'hold a two feet long piece of metal pipe'. That employee was a steel bender by the name of Premlal Dookie. The Claimant says that he followed his instructions and in so doing, was injured while bending a piece of steel.

4. The case cited by Counsel for the Claimant at the last hearing date was one I found to be quite useful. It was **Cleston Maynard vs Wayne Jeffers, Andy Liburd and others, Claim No. NEVHCV2004-0131**, an Eastern Caribbean case from St Christopher and Nevis. The case usefully summarises the law on negligence generally at paragraph 33. Vicarious Liability and Employers' Liability are addressed at paragraph 70 and 71 and paragraphs 74 and 79 are also relevant.

5. Generally for negligence, certain elements must be proven on a balance of probabilities by the Claimant. The first is the existence of a duty of care. Here the second Defendant, Mr Chaitram Ramrattan ["the Defendant"], admits that, as an employer, he had such a duty, a duty of care with regard to the Claimant in his role as a cleaner. The duty of care admitted is in his capacity as an employer.

6. The Defendant also admitted, under cross-examination, that if one of his employees did something wrong and injured another, he would be liable and hence Vicarious Liability would apply. Of course, he didn't use those words. But I must say at the outset that I found he was very forthright and convincing in admitting that if such a thing happened, he would be liable.

7. So the next aspect, with regard to negligence generally, would be breach of the duty of care. And here again I found the case cited by the Claimant, the **Cleston v Maynard** case, provides useful clarification that, in considering breach of the duty of care, the 'reasonable man' standard is applied. I took note of and found very applicable the quotation from paragraph 74 of the case that "*negligence is the omission to do something a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do.*" The Court in **Cleston v Maynard** was citing **Clerk & Lindsell** on **Torts 18th Ed**. But I really underscore the part that, in deciding whether or not there has been a breach of duty, they are looking at what the reasonable man would ordinarily do to regulate the conduct of human affairs.

8. It is as to this aspect of the alleged negligence that the Defendant primarily bases his denial of liability. He says there was no breach. He says, in denial of Employer's Liability, that he had a safe system of work in place and exposed the Claimant to no risk. If the Claimant was injured, it was due to his own negligence. This is what the Defendant is saying.

9. As to Vicarious Liability, no admission is made by the Defendant that his employee, Dookie, was negligent and caused injury. As we recall, it is not in dispute that it is Mr. Dookie who is supposed to have asked the Claimant to help him out and the Claimant agreed to help him out in the steel shed.

10. So again, I'm dealing with the perspective of the Defendant. In any event, from his testimony, it is clear from the Defendant's perspective, that it was not reasonable to expect him to regulate the day to day interactions of workers, 'lending each other a hand' on a construction site. And in this way, I will be using our local parlance in terms of 'lending a hand', as we call it on a construction site. So the position of the Defendant was that that was not his duty, his duty did not extend to this aspect of the general way that people behave on a construction site, one worker speaking to another, helping each other and so on. I think most of the witnesses for the Defence spoke about that in the context of that not being within the scope of their duty of care.

11. A third essential factor for negligence to be proven is the causal connection between the Defendant's alleged careless conduct and the injury. As it relates to this factor the Defendant also denies liability. This aspect of the Defence is based on the challenge to the Claimant's case that there was more than a slight injury. Implicitly, the Defendant is saying any severe injury was not caused by the incident on the job. The Claimant was required to prove on a balance of probabilities the full extent of causation.

12. And finally, of course for a negligence claim, you also need to establish foreseeability of the type of injury. However, that wasn't so much a factor that was submitted on by counsel on both sides in this case. So I'm getting now to my findings, having set out some of the background of the principles involved and so on.

B. <u>Findings</u>

13. It is my finding that the Claimant has not discharged his burden of proof in proving breach of duty of care or causation on either the Employer's Liability or Vicarious Liability allegations. This is so partly because some aspects of the case were not made out at all in the pleadings and/or evidence of the Claimant; but overall and more so because the Claimant's case was discredited due to inconsistencies, contradictions and lack of logical explanations.

14. In this regard, I'm thankful for submissions of counsel of the Claimant. He started his submissions by arguing that, in assessing the evidence, it would be unsafe to rely solely on the case cited for the counsel for the Defendant. That is **1047 of 1983 Ramsamooj Chattergoon v Selwyn Agard**, which was cited at paragraph 34 of **CV2016-00913 Keston Clark v Darren Gonzales & Rakesh Roopnarine** as follows:

> *"Counsel for the Defendants in submitting that the Claimant's entire case should be dismissed as lacking credibility based on these inconsistencies, cited **S-1047 of 1983 Ramsamooj Chattergoon v Selwyn Agard**. In that case, which involved a motor vehicle accident, Mr. Justice Persad Maharaj, summarised the law on contradictory statements. At page 30 of the judgment he said;*
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> *"I have perused the learning in HCA 612 of 1979, ...At page 22 of the judgment the learned Judge adopted a passage from the judgment of Telfer Georges J.A in the case of Texaco Trinidad Inc v Oilfield Workers Trade Union Civil Appeal (unreported) #42/1969 which read as follows;*

> *"**A witness who makes contradictory statements on oath on an issue which is the kernel of the case ought not to be believed** unless he is able to give a satisfactory explanation for having done this..."*

"The principle is also neatly and aptly set out in R v Harris 20 Cr App R 144:

> *"**when a person says one thing at one time, or swears or says something to the contrary at another, his evidence must be rejected in its entirety because the person has destroyed his creditability** unless he offers some proper and satisfactory explanation for his inconsistency. [Emphasis added]"*

15. Counsel for the Claimant, Mr. Roopnarine, argued that the doctrine or maxim of *falsus in uno, falsus in omnibus*, (apparently being applied by Justice Persad Maraj in the **Chattergoon** case) has been rejected in many common law jurisdictions such as India.

16. He cited a 2018 article **by Dr. Rita Pawan Bansal, in IJLMH Volume 1 Issue 2/ISSN2581-5369** entitled **"The Doctrine of FALSUS IN UNO, FALSUS IN OMNIBUS & Its Applicability in India"** in support of his argument. Notably however, the thrust of the article is that while the maxim does not have status as a mandatory rule, the subject matter of it, that is, inconsistent evidence on one thing and its impact on credibility generally, can be taken into account in assessing the weight of evidence. In reading the article, I found that, in essence, they were saying that the Court can take into account these inconsistencies.

17. Counsel for the Claimant, in contending that the case of **Chattergoon** should not be relied on, suggested that the approach to follow is not to be bound by the above mentioned maxim but to approach the evidence in the way explained in **ABC v West Heath 2000 Ltd & Anor [2015] EWHC 2687 (QB)** at paragraph 64 and also **Wetton v Ahmed [2011] EWCA Civ** at page 61 and paragraph 11. I'm thankful to counsel Mr. Roopnarine for the Claimant

for the useful authorities from India and the United Kingdom respectively. As I mentioned, consideration of these references serves to enhance our jurisprudence.

18. However, in my assessment of the evidence, I did find binding guidance in the **Horace Reed v Dowling Charles & Percival Bain PC No. 36 of 1987** Judgment by the Privy Council. The guidance at **Privy Council Appeal No. 36 of 1987 at page 6** was referred to by Madam Justice Rajnauth-Lee as she then was, in **CV2006-01661 McLaren v Dickey & ors** at paragraph 12 as follows:

> *"Where there is an acute conflict of evidence, the Judicial Committee of the Privy Council has laid down the following principles in the case of Horace Reid v Dowling Charles and Percival Bain Privy Council App. No. 36 of 1987. At page 6, Lord Ackner delivering the judgment of the Board examined the approach of the trial judge:*
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> *'Mr. James Guthrie, in his able submissions on behalf of Mr. Reid, emphasized to their Lordships that where there is an acute conflict of evidence between neighbours, particularly in rights of way disputes, the impression which their evidence makes upon the trial judge is of the greatest importance. This is certainly true. However, in such a situation, where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanour of witnesses, it is important for him to check that impression against contemporary documents, where they exist, against the pleaded case and against the inherent probability or improbability of the rival contentions, in the light in particular of facts and matters which are common ground or unchallenged, or disputed only as an afterthought or otherwise in a very unsatisfactory manner. Unless this approach is adopted, there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seen and heard the witnesses.'"*

19. Judicial Research Counsel would have shared with attorneys during the break that I had intended to rely on this case.

20. Further, I also hold that I am entitled to consider, as suggested in the **Chattergoon** case, the contradictory statements of witnesses in weighing the evidence. I don't think the authority from India says that I ought not to consider it, so I have considered that.

21. My observation on the Claimant's evidence throughout this hearing has been that there was great inconsistency. The contradictory nature of his evidence and that of his witnesses was highlighted in my notes, my handwritten notes, where I highlighted some contradictions. These contradictions noted included for example,

    - Concerns about the receipt books – who wrote them, the Claimant saying he made them up and so on. This contradicted his case as pleaded as it was purported that the receipts were from taxi drivers. The Claimant's wife gave a different account, saying under cross-examination that it was not the Claimant's handwriting on the receipts.
    - The question about who was holding the machine and who was holding the piece of steel. The Claimant contradicted himself about that under cross-examination.
    - It was not in dispute that the Defendant made some payments to the Claimant after the day of the incidents. The Claimant was inconsistent as to the amount of the payment that he received, as under cross-examination he repeatedly denied what was in his own witness statement at paragraph 27, saying that it is "a lie".
    - The date of the incident – there is a lot of inconsistent evidence on the Claimant's case about the date. That it was the 19th of February, is clear from his evidence as given under cross-examination before the court. However from the hospital record, it is apparent that they are saying that

the incident took place on 20th of February, at least that is the date that the hospital has recorded as when the incident took place. So the Claimant must have told them that. This is based on the case for the Claimant

- The extent of the disability- the Claimant saying he is unable to do any gardening, household duties and so on but the wife is saying he can manage most personal household matters and he still has the garden in the back yard and he has been doing gardening.

22. I considered all of that, however the contradictions are more fully set out in the written skeleton submissions of Counsel for the Defendant. All of those contradictions set out by the Defendant were weighing heavily on my mind as affecting the credibility of the Claimant in the evidence that was presented. I won't go through it all now, but it was highlighted in the skeleton submission from pages 5 to 9.

23. Everything was highlighted including what was said by the Claimant's first witness, Doctor Gentle. It is clear that Dr. Gentle believed that the Claimant worked at Tanteak as a steel bender and was injured there. Where could he have got that information that bears no relation to the allegations against the Defendant in this case, other than from the Claimant? There were many other inconsistencies detailed in the Defendant's skeleton argument.

24. I will now indicate my findings more specifically with regard to Employer's Liability based on my review of the evidence and my view that the Claimant's side of the case was not credible.

Employer's Liability

25. The Claimant failed to prove the pleaded facts on a balance of probabilities. Instead, the Defendant has proven his version of events on a balance of probabilities. Firstly, the aspect

of whether the employer took no reasonable precautions – the Defendant's case is that he hired an experienced construction consultant to administer the project, including the health and safety aspects of it and the provision of safety gear. There was a foreman who gave the Claimant safety equipment for his job as a cleaner. That is pleaded at 5b to d of the Defence.

26. Notably, this aspect of the precautions taken is corroborated by Defence witnesses, of whom there were three, corroborating each other. So that added to the strength of that side of the case. Their case, again in the witness statements as well as the pleadings, is that the machinery used was not defective. This is un-contradicted. I haven't noted any evidence in writing or oral by the Claimant to say that the machine was defective.

27. The Defence witnesses all say that safety gear was provided for the job of cleaner, which is gloves. Well that is contradicted, as the Claimant says he didn't receive any gloves. But then again, I have to weigh that against my view of his credibility as a witness.

28. The Defendant says the other workmen hired were very experienced and that includes the steel bender Mr. Dookie who spoke about his experience, I believe it was over twenty years or so. The method used for the coil making in progress when the Claimant was hurt was the standard method used for over twenty years. There is no evidence of any other injuries over the years. Both of these aspects of the Defendant's case are un-contradicted i.e. that the steel bender was very experienced and that there was no evidence of any other method to be used or any other injuries having occurred as a result of the use of this method.

29. Notably, although the employer spoke about hiring these persons, the foreman and the consultant, he did not delegate his duty of care. He went to the site daily, and kept tabs on things. That is at paragraph 23 in his witness statement, which is un-contradicted. I haven't heard any evidence from the Claimant to contradict that that was done. So I found

that the Defendant fully covered the aspect of taking the precautions to protect the Claimant on the job.

30. A second aspect of alleged Employer's Liability is whether the Claimant was engaged upon his work when injured. The Claimant admitted, under cross-examination, the Defendant's assertion that he was a cleaner and not a labourer as he had pleaded. So here again there is inconsistency. The Claimant had pleaded that he was a labourer but under cross-examination and in his witness statement, he admitted that he was a cleaner.

31. In any event, the Claimant admits he was not a steel bender. All the Defendant's witnesses admit that Mr. Dookie had no role in giving the Claimant orders. He simply made a request as the Claimant came to rest in his steel bending shed. Thus the Claimant was not engaged upon his work, he was lending a hand. And again I'm using that local term, he was lending a hand.

32. I look back again at that general principle as cited in the case relied on by the Claimant, that is the **Cleston** case at paragraph 74, about the duty of care and the need to look at what a reasonable man would do, guided by the considerations which ordinarily regulate the conduct of human affairs. And here I'm looking at the average construction site in Trinidad and Tobago and how the workers would interact conversing with each other and offering to lend a hand to help co-workers in tasks not assigned. This was not the case of the Claimant being engaged upon his work to the extent that it would fall within the employer's duty of care.

33. A third aspect to be proven was that the Defendant exposed the Claimant to risk. That was another aspect that had to be proven and Mr. Deonarine, the foreman, at paragraph 29 of his witness statement, says both aspects of the tasks, that is turning the wheel or holding the steel were menial low to non-skill tasks. Under cross-examination, he did say turning the handle carries more risk. But this has to be looked at in the context where he said both

are menial low to non-skill. So even if one had more risk, it still fell within the category of menial low to non-skill.

34. Mr. Dookie the steel bender, under cross-examination, said there was no risk. In his witness statement at paragraph 26, though, he said he explained to the Claimant the risks. Mr Dookie, as was the case with the other witnesses, said no skill is required. So I looked at paragraph 26 in that context, in looking at whether the Claimant was really exposed to risks as he said, in the context of this menial low to non-skill task. Further, even if there were any risks, Dookie fully explained how the task of holding the pipe was to be done. No skill required.

35. Mr. Ramlochan, the Construction Consultant/Supervisor said at paragraph 17 of his witness statement and under cross-examination that it was a simple task that any unskilled person can do and master in no time.

36. Overall, my finding is that the Defendant established on a balance of probabilities that there was no real risk. I found the Claimant's contention with regard to risk, to be one with an inherent lack of logic. This was so as the explanation of the task gleaned from the testimony of witnesses from both sides was agreed. From that explanation as well as the evidence presented by the Defendant in a video, it was clear as stated by the witnesses for the Defence, that this was a very simple task with no risk. That is my finding. When I say no risk, I mean it was a low-skill and menial task which could easily be explained to the Claimant so that he could manage it without risk.

37. A fourth aspect that had to be established is that the Claimant sustained serious injury on that day as result of the Defendant's failures. The Defendant's witnesses are consistent and corroborate each other that the Claimant on that day refused to go to the Health Centre. He acted as though it was a slight injury on that day. Only on the next day, he returned to the job site with a plaster on and said he was going to the Health Centre.

38. The Claimant's evidence with regard to causation weighed on my mind in terms of credibility because it was highly suspect. The Claimant's wife spoke of a prior injury at Tanteak. The Claimant told his witness, Dr. Gentle, that he was injured at Tanteak as a steel bender. He treated the occurrence referred to in this case as a slight injury on the day it happened and went for treatment a day later. So those things made it not possible for me to find that, on a balance of probabilities, he could be believed with regard to causation.

39. In any event, the Claimant, under cross-examination, admitted that the injury was not Dookie's fault. It is not in dispute that Dookie was the person he was helping but, under cross-examination, he said it was not Dookie's fault. He did not plead how gloves would have helped or what else about the coil-making was unsafe. His sole complaint was that he should not have been asked to help. But it was clear to my mind, from the evidence, that he knew he was under no duty at the time to assist the steel bender, as his job was that of the cleaner. I will now address Vicarious Liability.

Vicarious liability

40. The Claimant failed to prove on a balance of probabilities that Dookie was acting within the scope of his employment to ask the Claimant for help. Here again as the Claimant was a cleaner, such an interaction of lending a hand was not within the scope of duty of care to be covered by Vicarious Liability.

41. I looked at whether or not Dookie was negligent in a number of respects,
    a. in asking the Claimant for help,
    b. in the instructions he gave, and
    c. in the role he played in the steel bending and coil-making process.

42. So firstly, was Mr.Dookie negligent in asking the Claimant for help? I found as a fact that he was not. The Claimant was resting close to lunch time after his cleaning work was

completed and he agreed to help Mr. Dookie. They were casual friends for many years. I noted in the witness statement of Mr. Dookie that he had known the Claimant for many years as a casual friend. No skill was required and the Claimant had made coils before on the site. So therefore, I did not find that it was negligent of Mr. Dookie to ask him for help.

43. Secondly, were the instructions he gave negligent? I find as a fact on the evidence presented by Mr. Dookie that he did demonstrate the process, it was simple. He warned the Claimant not to move his hand too quickly. The video evidence presented in court shows or corroborates that it was simple.

44. Thirdly, was there negligence in the role Dookie played in the coil making process? Was he negligent in the way that he was turning the wheel or conducting himself while the Claimant was injured? Dookie presented the evidence that he had thirty years of experience in coil-making. The video evidence of the process, shows that it was a simple task. No less risky method was put forward by the Claimant.

45. I accept, as truthful, the evidence of Mr. Dookie that he saw the Claimant wearing gloves, the Claimant acted without due diligence and care with regard to the way that he did not hold onto the pipe carefully. The Claimant acted without due diligence. He was offered to be taken to the Health Centre, some five hundred yards away after the occurrence. This response of care and concern shown after the occurrence is consistent with the professional approach taken by the Defendant's employee Mr. Dookie. The Claimant was offered to be taken to the Health Centre, five hundred yards away. And finally, most importantly, the Claimant confirms that Mr. Dookie did not cause the accident.

46. So, again, in addition to Employer's Liability not having been established on a balance of probabilities, I found that Vicarious Liability was also not established.

47. In closing, I comment further on the case of **Cleston v Maynard**, relied on by Counsel for the Claimant, in his closing submissions. It was relied on in opposition to a possible *volenti no fit injuria* argument that Counsel felt may have been made by the Defendant.

48. It turned out not to be relevant because I did not hear Counsel, Mr. Mohammed, make that argument in submissions. It wasn't in the pleadings and, in any event, such a pleading would have involved an admission of risk. And that was not the basis of the Defendant's case. I found that, as it turned out, reliance on that case as a response to a possible argument of *volenti no fit injuria* was not relevant as that argument was never made and was not pleaded.

49. So all in all, my decision is that the Claimant has not established the case on a balance of probabilities.

C. <u>Order</u>

50. It is hereby ordered as follows:

    i. The Claim is dismissed.
    ii. The Claimant is ordered to pay the costs of the Defendant on the prescribed basis in the amount of $14,000.00.

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Eleanor Joye Donaldson-Honeywell
Judge

Assisted by Christie Borely JRCI