

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2012-02049

BETWEEN

IAN HOYTE Claimant

AND

TOYOTA TRINIDAD AND TOBAGO LIMITED
Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JONES

Appearances:

Mr. O. Charles S.C., and Ms. S. Khan instructed by Ms. S. Lakhan for the Claimant.

Mr. K. Bengochea instructed by Ms. K. Persad for the Defendant.

JUDGMENT

1. The Defendant, Toyota Trinidad and Tobago Limited, (“Toyota”) is a motor vehicle dealer engaged in the business of selling new and pre-owned motor vehicles. On the 12th of May 2008 the Claimant, Ian Hoyte (“Hoyte”) purchased a pre-owned motor vehicle (“the Vehicle”) from Toyota for \$160,000.00. At the time of the sale the Vehicle was nine years old and had a mileage of 120,000 km. Prior to the purchase Hoyte inspected the Vehicle and identified certain repairs that he wanted done. Toyota agreed to perform these repairs on the Vehicle prior to its delivery.

2. The vehicle was delivered on 23rd May at 4:15p.m. After inspecting the vehicle Hoyte

took delivery of it. The next day at around 8.15 a.m. while driving along the Beetham Highway Hoyte heard a rumbling sound followed by an explosion from the underneath and to the rear of the vehicle. The vehicle then violently pulled towards the median of the Highway and overturned several times. The airbags failed to activate. As a result of the accident Hoyte suffered injury and the Vehicle was damaged.

3. By this action Hoyte alleges that Toyota has breached the terms of the contract between them and its duty under the Sale of Goods Act and seeks declarations in that regard and damages. In particular Hoyte contends that Toyota orally represented to him that it would rectify any and all defects in the Vehicle to a satisfactory quality and to a standard that was acceptable to be roadworthy and safe before delivery of the said Vehicle. He contends that, among other things, Toyota failed to ensure that the Vehicle was of merchantable or satisfactory quality; failed to carry out proper repairs to the Vehicle; failed to check the quality of the tyres to ensure that they were in a standard and quality reasonable and acceptable for road use and failed to ensure that the airbags, the Vehicle's primary safety mechanism, was functional and operating.

4. Although Hoyte's claim is in contract he also pleads reliance on the maxim of *res ipsa loquitur*. Insofar as the maxim, if applicable, affects the burden of proof it is perhaps appropriate to deal with this plea here. In my opinion the maxim does not apply. While the maxim allows a Claimant to establish a *prima facie* case in circumstances where (a) it is not possible to prove the cause of the accident and (b) on the evidence as it stands it is more likely than not that the cause of the accident was the fault of the Defendant it is one applicable to a claim in negligence. It

describes a state of the evidence from which it is possible to draw an inference of negligence.¹
The case as presented by Hoyte is framed in contract and not negligence.

5. Toyota on the other hand denies that the Vehicle was not in a satisfactory working condition and avers that the Vehicle was sold in a second-hand and “as is” condition and was in those circumstances up to the requisite standards of reasonable roadworthiness. It avers that prior to its sale and delivery Hoyte inspected, drove the Vehicle and signed an acceptance of the Vehicle in its condition. Toyota avers that in those circumstances if there were any defects to the tyres these defects were not visible and in the circumstances there was no implied condition as to their merchantable quality. With respect to the failure of the airbags to activate Toyota avers that given the description of the accident the deployment of the airbag would not have been triggered. Toyota further contends that if Hoyte suffered any damage as a result of the accident it was due to the manner in which the Vehicle was being driven at the time.

6. The issues for my determination are as follows:

1. What were the terms or conditions, implied or expressed, of the contract for sale?
2. Was Toyota in breach of any of these terms and if so
3. What damages flow from the breach?

7. Much of the evidence in dispute in this case relates to the conversations between Hoyte and Petit-Walker. Indeed, it is these conversations that form the basis of Hoyte’s case with respect to the express terms of the contract for sale. This is not one of the cases in which

¹ Charlesworth and Percy on Negligence 10th Ed. Paragraphs 5-77 to 5-79.

credibility can be resolved simply by the acceptance of the evidence of one witness and the rejection of another. The case ultimately revolves around these witnesses' recollection of their conversations. In circumstances such as this cross-examination becomes even more important. To my mind the fact that the evidence of Mrs. Hoyte supports the evidence of her husband, while of some assistance, does not necessarily turn the table in favour of Hoyte for the simple reason that she is clearly not an independent witness.

8. My conclusions with respect to the evidence are to some extent affected by the failure by both sides to put essential elements of their case to opposing witnesses. As a general rule a party who fails to cross examine a witness upon any matter tacitly accepts the truth of the witness' evidence in chief on that matter and will not thereafter be entitled to challenge or contradict it by other evidence or invite the tribunal of fact to disbelieve the witness in that regard.² That said the rule is not absolute and a failure to cross examine will not always amount to acceptance by the opposing party of the witness' testimony³ nor will it bind a tribunal of fact. It is however one of the matters which a tribunal of fact will consider when making findings of fact and when determining what weight to put on particular evidence.

9. While the rule itself goes to fairness its consideration may also involve the question of why that particular allegation was not put to a witness, for example, was it as a result of the inexperience of Counsel or a recent fabrication by a witness. The answer to such questions relate directly to the weight to be put on the evidence. Where there is little or no independent or contemporaneous documentary evidence and the case on both sides is based mainly on whose

² Halsburys Laws of England, volume 28 5th Ed, paragraph 567.

³ Phipson on Evidence 17th Ed para 12-35.

oral evidence I believe, as in this case, the failure to put to the opposing witness the essential elements of the case assumes even greater proportions.

10. Evidence on the terms of the contract was given by Hoyte and his Wife on the one hand and Petit-Walker and the salesman, Kamborn Browne (“Browne”) on the other. The evidence of the other witnesses is with respect to the other issues for my determination. Since a determination of those other issues are essentially dependent on my determination of the terms of the contract I propose to deal with the terms of the contract for sale first. This may, unfortunately, involve a fragmented examination of the evidence, in particular that of Hoyte and his wife and Petit-Walker, but it seems to be a more convenient approach to the evidence in these circumstances.

What were the terms or conditions of sale?

11. The Sale of Goods Act Chap 82:30 (“the Act”) sets out the conditions to be implied with respect to the sale of goods. With respect to the quality or fitness for any particular purpose of goods supplied under a contract for sale the Act provides that there is no implied condition or warranty with respect to those goods except where the seller sells goods in the course of a business. Where, as in this case, the seller sells goods in the course of business, there is an implied condition that the goods supplied under the contract are of merchantable quality. This condition does not however apply with respect to (a) defects specifically drawn to the buyer’s attention before the contract is made; or (b) if the buyer examines the goods before the contract

is made with respect to defects which that examination ought to reveal⁴. In this regard it is not in dispute that Hoyte examined the Vehicle prior to its purchase. As a result there is no implied condition as to merchantable quality with respect to the defects which ought to have been revealed by his examination.

12. In addition to the conditions implied by the Act Hoyte relies on certain representations which he says were made by Toyota's employees at the time of sale. At the end of the day therefore I have to determine what were these representations and their effect. According to Hoyte these representations were with respect to certain repairs agreed to be done by Toyota prior to the delivery of the Vehicle and to the condition of the Vehicle.

13. At the time of the purchase and delivery of the Vehicle Hoyte attended Toyota's compound accompanied by his wife. Negotiations on behalf of Toyota were conducted by Petit-Walker. After Hoyte's inspection he identified and Petit-Walker agreed to do certain repairs. There is some dispute whether Toyota agreed to repair four bolt holes in the Vehicle. There is however no dispute that there was an agreement that Toyota repair the lights in the instrument panel and the rear power windows. Petit-Walker actually says the light in the instrument panel but I am satisfied that nothing turns on this difference.

14. According to Hoyte he did not go to purchase a pre-owned vehicle but was told about the Vehicle when he went to look at new vehicles. He was shown the Vehicle and told by an employee of Toyota that it was in good working condition and in an acceptable standard of roadworthiness. He does not however give the name of this employee. He says that when he

⁴ Section 16 Sale of Goods Act Ch 82:30

viewed the vehicle it was not in a satisfactory working condition and he observed the following defects: the lights in the instrument panel and the rear power windows were non-functional and there were four open and unsecured boltholes in the cabin section of the Vehicle.

15. He says he pointed out these material defects which were visible to him on the Vehicle to Petit-Walker. According to him Petit-Walker assured him that Toyota would rectify all defects in the Vehicle to a satisfactory standard that was acceptable to be roadworthy and safe before delivery. He says that at no point in time did any of Toyota's employees indicate to him that the Vehicle was being sold "as is". He says that based on the assurances given he believed the Vehicle would have been in a good working condition when he received it and purchased the Vehicle.

16. During the period May 12th -23rd he made several periodic checks by way of telephone calls to Petit- Walker and Browne. On each occasion he was assured that the repairs were being carried out. He says that on those occasions Petit- Walker also informed him that there would be no problems with the Vehicle upon delivery and it would be in a good working condition and in a proper state of repair. On the 21st May he received a call from Browne who informed him that the Vehicle would be ready for delivery on the 23rd May.

17. According to him he only took delivery of the Vehicle on the 23rd of May "based on the Defendant's undertaking to complete the remaining repairs and after the Defendant assured me that all the necessary tests and repairs had been effected and the motor vehicle was in a good and satisfactory quality". He says that he "was further assured by the Defendant that the motor

vehicle was brought up to a standard of safety and roadworthiness.” In this regard he annexes a copy of the delivery receipt.

18. With respect to this particular bit of evidence, given its context; the slight differences between it and the words identified as used by Toyota’s representatives in the Statement of Case; and the failure of Hoyte to identify who, on behalf of Toyota, made these specific statements. I am satisfied that this evidence represents Hoyte’s state of mind at the time of delivery based on conclusions arrived at by him as a result of his earlier conversations with the unnamed employee and Petit- Walker and his interpretation of the contents of the delivery receipt.

19. The delivery receipt referred to is a standard form delivery receipt which provides for the insertion of the details of the particular vehicle delivered and a checklist of certain items. With respect to the details inserted the receipt contains details as to the Vehicle, the fact that it was a trade in and identifies various items which were in the Vehicle at the time of delivery. Of relevance is the fact that although provision is made for a check for the box dealing with “explain warranty booklet” that item is not ticked off. The delivery receipt also provides for the insertion of certain signatures by Toyota’s representatives and the Customer.

20. One of the signatures required by the delivery receipt is the signature of Toyota’s Service Manager under the words:

“ Quality Inspection

This delivery receipt is your assurance of a quality Pre-Delivery inspection on your vehicle. Our trained service professionals have verified that all systems and controls are operating as designed.”

There is no signature in the space designated for the signature of the Service Manager on the delivery receipt. Also required by the delivery receipt is the signature of the Customer under the words:

“Customer Acknowledgement

I have inspected my new Toyota and acknowledge that all Pre-Delivery and Delivery Receipt items have been reviewed with me by the dealership representative.”

There is a signature in the space provided for the Customer’s signature. I am satisfied that the signature on the document is Hoyte’s.

21. According to Hoyte after the accident he and his wife visited Toyota’s premises on 26th May, spoke to Petit-Walker and informed of her of the accident. He says she replied that she herself had concerns over the delivery of the Vehicle and its suitability. She advised him to obtain an investigator’s report and bring it back to her and told him that Toyota would reimburse him. According to Hoyte it was Petit-Walker who recommended that he retain the particular firm of investigators and adjusters to do the job.

22. Under cross-examination Hoyte accepts that prior to the purchase he examined the Vehicle very closely; sat in it and tried it out but he denies that he took the Vehicle for a test

drive. He says he never asked to do so. He also accepts that there was never any discussion of any warranty with respect to the Vehicle.

23. Of note is the fact that there was never any suggestion made to him in cross-examination that he did not have the conversations with Petit-Walker as alleged. In particular it was never put to Hoyte that Petit-Walker did not (a) assure him that Toyota would rectify all defects in the motor vehicle into a satisfactory standard that was acceptable to be road worthy and safe before the delivery of the Vehicle; (b) inform him that there would be no problems with the Vehicle upon delivery and it would be in a good working condition and in a proper state of repair; (c) when informed of the accident tell him that she herself had concerns over the delivery of the Vehicle and its suitability (d) advise him to obtain an investigator's report and bring it back to her and that Toyota would reimburse him or (e) recommend that he retain the particular firm of adjusters to do the job.

24. Except that Avril Hoyte confirms the evidence given by her husband and claims under cross-examination that although her husband inspected the Vehicle prior to the purchase he did not pay any particular attention to the tyres, nothing much turns on the evidence of this witness. It was put to her in cross-examination however that the Petit-Walker did not state that (a) the Vehicle was roadworthy and safe and in a satisfactory condition on 12th May or (b) the necessary tests and repairs had been effected and that the Vehicle was in a good or satisfactory quality on 23rd May when her husband took delivery or (c) she had concerns over the delivery of the Vehicle and its suitability.

25. According to the evidence of both Petit-Walker and Browne prior to agreeing to purchase the Vehicle both Hoyte and his wife went on a test drive of it accompanied by Browne. Petit-Walker's evidence is that she gave the keys to the car to Browne and the three of them went to test drive the Vehicle. Brown confirms this evidence. He says that during the test drive the Vehicle appeared to work properly and all systems appeared to be in order. According to him nothing occurred during that test drive to indicate to him that the Vehicle was not safe or was not roadworthy and Hoyte expressed no reservations in this regard. Under cross-examination Browne insisted that the Vehicle left the compound on the test drive. He accepts that there would be a record of all vehicles leaving the Toyota compound. No record was either produced or disclosed by Toyota.

26. According to Petit -Walker it was after Hoyte returned from the test drive that he and his wife agreed to purchase the vehicle for the sum of \$160,000. She says that the price not only included the purchase price of the vehicle but also the repairs to the light in the instrument panel and the rear windows and a full diagnostic check to the vehicle. She makes no reference to the 4 bolt holes but she does accept under cross-examination that there were four areas on the back window to be covered. According to her Hoyte and his wife requested that the Vehicle be repainted and in response she advised them that the Vehicle was being sold in its second-hand condition or "as is". She says that meant that apart from the repairs and the diagnostic check agreed to be done no additional repairs or adjustments to the Vehicle would be made by Toyota.

27. No evidence is given by Petit-Walker in her witness statement of any conversation with Hoyte on the 26th May. Under cross-examination however while admitting a conversation

with Hoyte after the 23rd in which he made certain complaints she denies that during that conversation (a) he made any complaints to her about the Vehicle; (b) she told him that she had concerns over the delivery of the Vehicle and its suitability; (c) she advised him to obtain an investigators report and bring the results back to her; (d) she directed him to go to the specific adjusters or (e) she told him that Toyota would reimburse him.

28. There is a dispute of fact with respect to the test drive. While it seems to me to be a bit foolhardy to purchase a vehicle, let alone a second-hand vehicle, without test driving it both Hoyte and his wife admit that this is what was done. Browne in his evidence says the Vehicle was taken on a test drive out of the compound. He admits under cross-examination that had the Vehicle left the compound there would have been a record of same. He however gives no valid reason for Toyota's failure to disclose or produce such a record of the car.

29. The existence of this dispute was clear from the pleadings. In the circumstances it would seem to me that the only reasonable inference to be drawn from Toyota's failure to produce the relevant record is that the record, if produced, would have supported Hoyte's evidence. In the absence of this contemporaneous record therefore I accept the evidence of Hoyte and his wife with respect to the failure to take the car on a test drive. I am satisfied that both the exterior and the interior of the Vehicle were examined by Hoyte prior to its purchase. In the course of this examination the engine was turned on and the non- functioning of the lights of the instrument panel and the power windows observed. There was however no examination of the engine nor was the Vehicle taken on a test drive.

30. With respect to the reservations as to the suitability of the Vehicle which Hoyte alleges was expressed by Petit-Walker after the accident this evidence goes mainly to the credibility of Petit-Walker and to a lesser extent to the condition of the vehicle when delivered. No reference is made to this conversation by Petit- Walker in her evidence in chief. She suggests that this was not important because it did not deal with the sale of the Vehicle. I do not accept this excuse. It is clear that this was identified in the pleadings as a dispute of fact. This coupled by the witness' inconsistency in cross-examination on the question of whether Hoyte made any complaints to her on the 23rd leads me to the conclusion that she is not speaking the truth with respect to this conversation.

31. That said it is clear that while Hoyte pleads an offer to reimburse by a representative of Toyota no reference was made to this admission in the pre- action protocol letter, the contents of which were tendered into evidence by Hoyte by way of a hearsay notice. According to the letter:“ Ms. Walker informed my client that she herself had concerns over the delivery of the vehicle and its suitability. She further advised my client to commence an investigation through his insurers for my client to be compensated for the accident. She also informed that the vehicle was written off and my client should provide an investigator's report and the matter would proceed therefrom.”

32. It would seem to me that if there was in fact a statement made by Petit-Walker as to reimbursing Hoyte this would have been stated in the letter. Indeed this would have been one of the main planks of the pre-action protocol letter. In my opinion the contents of the letter provide a more accurate representation of the conversation between Petit-Walker and Hoyte.

33. I accept the evidence of Hoyte and his wife that Petit-Walker told them that she had concerns about the delivery of the Vehicle and its suitability and advised them to obtain an investigator's report from adjusters. I have no reason to doubt that she may have even recommended the adjusters. I do not accept however the evidence of Hoyte and his wife that Petit Walker advised them that once they obtained a report from the adjuster Toyota would refund their money. It seems to me more likely that Petit-Walker revealed her concerns about the transaction and merely advised them of the course of action to be adopted by them to make a claim on Toyota.

34. With respect to the repairs agreed to be done by Toyota I accept Hoyte's evidence that Toyota agreed to repair the light to the Vehicle, repair the power windows and cover four bolt holes. I am also satisfied that Toyota warranted that the repairs would be performed before delivery and to a satisfactory standard.

35. With respect to representations by Toyota as to the condition of the Vehicle at issue is whether Hoyte was advised by (a) an unnamed employee that the Vehicle was in good working condition and in an acceptable standard of roadworthiness; (b) Petit-Walker that Toyota would rectify all defects in the motor vehicle into a satisfactory standard that was acceptable to be road worthy and safe before the delivery of the said motor vehicle; and (c) Petit-Walker that he would have no problems with the vehicle upon delivery and it would be in a good working condition and in a proper state of repair. Or whether Hoyte was told by Petit-Walker that except for the repairs agreed to be done the vehicle was being sold "as is".

36. With respect to the conversations between Petit-Walker and Hoyte it was never suggested to Hoyte in cross-examination that his evidence with respect to the conversations between himself and Petit-Walker was not true. On the other hand the fact that these questions were subsequently posed to Hoyte's wife suggests to me no more sinister reason than that Counsel forgot.

37. At the end of the day it seems to me that the conversations between the parties must be examined in the context of what was being sold. This was a nine year old second-hand "trade-in" from another branch with a mileage of 120,000 km. It seems to me to be somewhat incredulous that with specific reference to the sale of such a vehicle Petit-Walker would assure Hoyte that Toyota would rectify all defects. In the context of the conversation I am satisfied that this discussion was with respect to the specific defects identified by Hoyte prior to purchase. With respect to the representations as to the state of repair I am of the opinion that this was with particular reference to the repairs agreed to be done.

38. I am satisfied that Hoyte was given the express assurance by Toyota's representatives that the Vehicle was roadworthy and in good working condition. With respect to the roadworthiness and working condition of the Vehicle this was against the background of it being a second-hand or pre-owned vehicle as described. I am satisfied that in these circumstances it matters not whether Hoyte was told that the vehicle was being sold "as is" or not. The vehicle was sold in the condition that it was at the time subject to the agreement by Toyota to do the specific repairs to a satisfactory standard. It is in respect of this condition that the assurances were made by Toyota.

39. With respect to the conditions implied by the Sale of Goods Act, on the evidence, it is clear that there was an examination of the Vehicle by Hoyte prior to the purchase. In these circumstances section 16 (2) (b) applies with respect to those to defects which Hoyte's actual examination ought to have revealed. With respect to defects not ascertainable on the examination there is an implied condition of merchantable quality.

40. To this end, the Act provides that goods are of merchantable quality within the meaning of the section if they are fit for the purpose for which goods of that kind are commonly bought as is reasonable to expect having regard to any description applied to them, the price if relevant and all the other relevant circumstances⁵. The repairs agreed to be done apart I am satisfied that the guarantee made by Toyota that the Vehicle be roadworthy is no more stringent than the conditions of sale implied by section 16 of the Act. In this regard I agree with the dicta of Lord Denning when in dealing with the question of whether a second-hand car is reasonably fit for the purpose in *Bartlett v Sidney Marcus Ltd* he says: "A second-hand car is reasonably fit for the purpose if it is in a roadworthy condition fit to be driven along the road in safety, even though not as perfect as a new car."⁶

41. In my opinion therefore with respect to the defects which were apparent on Hoyte's examination and agreed to be addressed by Toyota there was a guarantee that those repairs would be done prior to delivery and be to a satisfactory standard. In the context of the specific repairs I am satisfied that this required the lights and the power windows to be working and the bolt holes closed. With respect to defects which Hoyte's examination ought to have revealed

⁵ Section 16(2)(b)

⁶ [1965] 1 WLR 1017

there was no implied condition as to merchantable quality. With respect to any other defects which would not have been apparent upon Hoyte's examination there was an implied condition that the Vehicle would have been of merchantable quality. Further I am satisfied that the express guarantees made by Toyota as to the condition of the Vehicle were no more than the requirement of merchantable quality provided by the Act. In this regard however I am satisfied that the express guarantees made by Toyota were not limited to those defects not revealed or revealable on Hoyte's examination.

Was Toyota in breach of any of these terms?

42. In this regard there are two questions to be answered (i) did Toyota complete the repairs as agreed? (ii) was the vehicle of merchantable quality in accordance with the standard required by the Act?

43. The first question for my determination here is whether the repairs were done and in particular, given the case as presented, whether the light(s) on the instrument panel was functioning at the time of delivery. The evidence of Hoyte in this regard was that the repairs agreed to be done were in fact not done. Under cross-examination he admits that the windows were fixed. What was not fixed was the light to the instrument panel and the four bolt holes.

44. According to Hoyte he was contacted by Browne on the 21st May who told him that the Vehicle would be ready for collection on the 23rd. He gives evidence attending Toyota's compound at 11:00 a.m. and at 2:00p.m. and of seeing work on the Vehicle being done up to 2:00p.m. on the day of delivery. According to him at 2:00 p.m. when he came for delivery he

was informed by Petit-Walker that they required another 45 minutes as the employees were in the process of changing a rubber on the steering. He eventually received delivery of the Vehicle at around 4:15 p.m.

45. At that time he says he inspected the Vehicle with another of Toyota's employees, a Mr. Shah, and observed that the lights in the instrument panel and the four bolt-holes had not been repaired and that the car had no fuel. He says in the presence of Mr. Shah he complained to Petit-Walker that the Vehicle had not been properly repaired in accordance with the agreement and arrangements were then made by Petit-Walker for him to return the Vehicle on the 29th of May for those repairs to be completed at Toyota's cost. In those circumstances he took delivery of the Vehicle. According to Hoyte he was introduced to Mr. Shah by Petit-Walker as another sales person who would hand over the vehicle to him.

46. According to Petit-Walker it was Hoyte who by way of a telephone call made on the 23rd May requested that the Vehicle be delivered to him on that day. No assistance is given by Browne in this regard. He gives no evidence of this in his witness statement and he was not cross examined on it. Petit-Walker gives no evidence of a Mr. Shah. Indeed under cross-examination she denies that there was a Mr. Shah employed by Toyota at the time. None of Toyota's other witnesses were cross-examined on the existence of this Mr. Shah. According to Petit-Walker it was Toyota's fleet supervisor, Jean La Foucard, who assisted with the delivery.

47. Petit-Walker gives no evidence in chief of any complaint by Hoyte with respect to the repairs or of making an appointment for the Vehicle to be returned for this purpose. Indeed in her

witness statement except by reference to the diagnostic or quality checklist exhibited Petit-Walker gives no evidence of whether the repairs were in fact done. Of note is the fact that Hoyte's allegations as to what occurred on delivery was never put to the witness. Neither was it suggested that these repairs were not in fact done or that the Vehicle was to be returned to Toyota to complete the repairs.

48. According to the witness, Jean la Foucade, however he was the person who assisted with the delivery of the Vehicle to Hoyte. He says that he checked off the relevant parts of the delivery receipt. According to him since the Vehicle was a "trade in" certain items would not have been provided or explained and consequently would not have to be checked on the delivery receipt. He says that one such item was the warranty booklet. According to him after the Vehicle was inspected by both Hoyte and him, Hoyte signed the "customer acknowledgement" certifying that he had inspected the Vehicle and acknowledged receipt of all pre-delivery and delivery receipt items. He said that at the time of delivery Hoyte made no complaint to him. According to him there was no express warranty on the tyres provided for the Vehicle. Except that his statement with respect to there being no express warranty on the tyres was not challenged nothing turns on his cross-examination. Of note is the fact that it was never suggested to him that he was not the person who handed over the Vehicle to Hoyte.

49. The evidence of Patrick Sheppard was that he was at the time a service coordinator. He says that he and Gary Juteram inspected the Vehicle. At the time of his inspection he noted that there had been compliance with all the items checked off on the quality checklist. This, he said, included checking the tyre pressure to ensure that it was the appropriate pressure for the

Vehicle. According to him, if something were visually wrong with the tyres he would have noted it. He says he also ensured that the airbags were functioning properly by observing the warning light on the dashboard which would have indicated if there was any problem with the airbags. He says at the time of inspection there was no warning light to indicate any issues or problems with the airbags. Thereafter he countersigned the quality checklist thereby certifying that the Vehicle was in a fit condition to be driven. According to him from his perusal of Toyota's records and his experience working on the Vehicle he does not know of any warranty provided on the tyres for the Vehicle. Under cross-examination he states that he made his observation as to the absence of a warning light the first day when the Vehicle came into the shop.

50. The quality or diagnostic checklist consists of a printed list of checks to be made to the Vehicle and requires the maker to tick a box certifying which of these checks were done. None of the work identified to be done by this checklist relates to either quality or condition of the tyres or the functioning of the airbags. In fact the checklist requires checks to both the interior/exterior to the Vehicle and checks under the bonnet with respect to relatively minor servicing items like the placement of the radiator fuel and oil caps, oil levels, drive belt adjustment and fluid levels. According to the document however all the work performed corresponded with the customer's request.

51. According to Gary Juteram he performed the diagnostic test on the Vehicle. He did this using an "intelligence tester" which according to him is an external device which when plugged in synchronises with the internal computer of the Vehicle and identifies any problems in the power train, chassis or body of the vehicle. He says after performing the diagnostic test he

concluded that all electrical systems were in working order. He replaced the battery and the shifter bushings, noticed that the steering column and u-joints were worn, but did not replace them since there were no parts in stock. According to him, this replacement was not critical because, although worn, it was still in working order and does not affect the overall road worthiness or safety of the Vehicle.

52. He says he ensured that the airbags in the Vehicle were functioning properly by observing the warning light on the dashboard. According to him there were no warning lights on the dashboard to indicate any issues or problems with the airbags at the time of inspection. He also checked the tyre pressure. He says that the Vehicle left the servicing department with the normal tyre pressure for such a Vehicle. According to him if something was wrong with tyres he would have reported it to the service adviser. He had no reason to make such a report. According to him there were no issues with the handling of the Vehicle and it could have been driven comfortably and reliably.

53. Under cross-examination, however, prior to his examining the relevant parts of the repair order the witness states that no balance test was done on the Vehicle. From an examination of the repair order however he concludes that that a wheel alignment and balance was done but not by him. He says that if there was request to check the condition of the tyres it would have been his responsibility to do so. He did not do so in this case because there was no defect report in this regard. He confirms that when the Vehicle came to him and when it left him the lights of the dashboard were working. With respect to the airbags he says by noting the “SRS” on the steering pad he was satisfied that the main airbag located directly behind the steering pad was on

the Vehicle. He could however not assist with respect to whether this type of Vehicle was outfitted with other airbags and, if so, whether those were in fact in the Vehicle at the time.

54. The problem with the evidence of the technicians is that there is no evidence as to exactly when their inspection with respect to the warning light was done. Nor do the documents provided assist. On the other hand it was never put to these witnesses that the specific repairs were not done or that on the date of delivery the lights to the instrument panel were not working. According to Juteram however when the Vehicle came to him and when it left he ensured that the lights on the dashboard were working. The evidence of Hoyte is that work was being done to the Vehicle up to at least 2:00 p.m. on the 23rd. In these circumstances I am satisfied that the work and inspection done by Juteram was done immediately prior to the delivery of the Vehicle.

55. With respect to the dispute as to the repairs there are two other factors of relevance to my determination as to who is speaking the truth. The first is that the pleadings reveal a major inconsistency on the part of Hoyte on this issue.

56. In his Statement of Case Hoyte avers that he took possession of the Vehicle only after he was assured by Toyota that all the necessary tests and repairs had been effected and that the Vehicle was in “a good and satisfactory quality”. By this plea I understand that he is saying here that the repairs had been completed but that he was relying on Toyota’s representations that they had been completed to a satisfactory quality. In his reply however, in response to Toyota’s plea that he inspected the Vehicle after the repairs and diagnostic tests had been carried out by it and accepted the keys, Hoyte alleges that the repairs were not done; that he made complaint in

the presence of Mr. Shah and that an appointment was made for the repairs to be done at a later date. Under cross-examination however he accepts that the only outstanding repairs to be done were to the bolt holes, they were not covered, and the light to the dashboard which was not coming on.

57. The second point of concern is more fundamental: why would Hoyte take delivery of the Vehicle if the repairs, particularly the repairs to the light in the instrument panel, were not done. This is the very reason he did not accept delivery of the Vehicle at the time of sale. I do not accept Hoyte's evidence in this regard. I am satisfied that at the time of delivery the repairs had been completed and as a result Hoyte accepted delivery of the Vehicle.

58. I accept the evidence of Toyota's technicians and find that prior to the delivery of the Vehicle the checks and observations identified by them were in fact done. In particular, I am satisfied that at the time of delivery of the Vehicle there was nothing visibly wrong with the tyres.

59. The question of whether the Vehicle was of merchantable quality is a question of fact for my determination. In the particular circumstances of this case of relevance here is the close proximity in time of the accident to the delivery of the Vehicle and Hoyte's evidence as to the cause of the accident. The case as presented by Hoyte it is that the accident occurred as a result of a defective tyre and that the injury to him was made more severe because the airbags failed to deploy.

60. The evidence of Hoyte is that after taking delivery of the Vehicle he drove it home and secured it in his garage. The next time he used the Vehicle was the following day when at around 8:15 a.m. the accident occurred. Thereafter Hoyte says he took steps to secure the Vehicle first at the Besson Street Police Station until 26th May and then at an auto shop. While at the Besson Street Police Station Hoyte says the vehicle was examined by Gregory De Four, a motor vehicle inspector 1 from the office of the Transport Commissioner. According to Hoyte he was advised by De Four to take the left rear tyre of the vehicle to the Trinidad and Tobago Bureau of Standards for analysis. This he did on 27th May. On that date he filled out a customer complaint form requesting an examination of the tyre by the Trinidad and Tobago Bureau of Standards (“TTBS”) and left the tyre with them for examination. He subsequently employed Kenneth Murray from Cariclaim Investigators and Adjusters Limited to investigate the said Vehicle. He received reports from both the TTBS and the Adjusters.

61. With respect to the cause of the accident Hoyte relies on the expert evidence of Ronald Boodoosingh, the head of the Construction Goods Unit attached to the Trinidad and Tobago Bureau of Standards (“TTBS”). There has been no acceptance of the expertise of this witness by Toyota. At the end of the day however I am satisfied that the objections made with respect to this witness go to the weight to be placed on the evidence rather than its admissibility.

62. The evidence of this witness can be divided into three areas: his expertise; his observations; and his conclusions. With respect to his expertise he says that he has been employed with TTBS for approximately 13 years. He says that he is at present the head of the Construction Goods Unit attached TTBS. He holds a Bachelor of Science in Chemistry and has

nine years experience in inspecting new and used tyres. He says he also receives annual in-house training from TTBS. No details however are given of this training.

63. In 2008 he was the head of the Automotive Unit attached to TTBS, a position which he held for five years and was in charge of a staff of 20 employees. His duties at that time included the inspection of new and used motor vehicle tyres. He says that his department examined approximately 3000 to 3600 tyres daily. These tyres he says were occasionally examined with the assistance of international manuals which are used as a guide when inspecting tyres and arriving at conclusions for defective tyres.

64. He says that following Hoyte's complaint to the TTBS he was detailed to review the tyre and prepare a report. He says he personally examined the tyre and made notes as to his findings after consulting two international manuals for the possible causes of tyre defects. From his report tendered into evidence he details his observations in this manner: "The separation seen shows belt separation where the entire thread or Crown area completely separated from the casing and accompanying belt area." From these observations he opines, presumably with the assistance of the manuals, that "There are many possible causes for this occurring, most of which are accumulative i.e. consistently running tire at low inflation pressures; constant tire abuse; excessive heat; constant excessive speed and consistently overloading tire. Also this can occur if the tyre was previously damaged or if the tyre was run flat."

65. He comes to the conclusion that the tyre showed no indication being run flat nor was any repair performed on it previously. He does not however give any basis for arriving at this

conclusion. Presumably however it is possible for him to ascertain from a visual inspection whether the tyre had been damaged previously. The information that would lead to a conclusion as to whether or not a tyre was run flat, in my opinion, is not so obvious. He says that although no evidence of the height of the thread could be seen judging from the height of the other three tyres and the fact that the owner initially watched all tyres prior to receiving the vehicle the previous evening, one can assume that it was good. I assume that the word “good” here refers to the height of the thread. He gives no assistance as the conclusions to be drawn from the height of the thread however.

66. He concludes that the tyre was abused and not properly inspected prior to delivering the vehicle to its new owner. He says that he also found that it was possible that the tyre may have had some sort of impact damage which was overlooked by the dealership in question and noted in his witness statement that the separation seen in the tyre does not occur immediately or overnight but is as a result of accumulated causes.

67. Under cross-examination the witness confirms that belt separation is not caused by wear and tear but occurs by the manner in which the Vehicle was used. He says that it cannot be caused by impact damage or mileage or the age of the tyre. According to him belt separation can occur in both old and new tyres. Impact damage will in his opinion just accelerate the rate in which belt separation can happen.

68. The evidence of this witness as to his observations has not been challenged and I accept that on an examination of the tyre he saw “separation where the entire thread or Crown

area completely separated from the casing and accompanying belt area.” There is however some problem with accepting the conclusions arrived at by this witness. For example he fails to give details of the literature used in arriving at his conclusions.

69. There are however more fundamental difficulties. In his report he states that most of the causes of belt separation are accumulative and identifies them. He does not however state those causes which are not. In his witness statement however he states categorically that the separation seen by him in the tyre was as a result of accumulated causes without stating how he arrived at this conclusion or how he distinguished this case from the other more rare cases when the causes are not cumulative. Even if I accept his evidence as to the causes of belt separation he provides no basis for his elimination of certain of the causes.

70. With respect to the height of the thread of the tyre he concludes that the height was good. He comes to this conclusion by the fact that Hoyte initially watched all the tyres prior to receiving the vehicle and from a comparison with the other three tyres. The difficulty here is that even if we can assume that in giving him instructions Hoyte confirmed that he examined the tyres there is no evidence that he was provided with the other tyres which he used for comparison. According to Hoyte’s evidence, which is confirmed by the consumer complaint form, only one tyre was brought in for examination.

71. Further, with respect to his conclusions there seems to be some inconsistency as to whether the cause of the belt separation was visible on inspection. On the one hand he confirms that the tyre was inspected by Hoyte, but under on the other hand, he concludes that the tyre was

not properly inspected prior to delivery. He places the blame for this failure to inspect squarely on the shoulders of Toyota. No reason is given for this choice. Further, he states that it is possible that the tyre was subject to some sort of impact damage which was overlooked by Toyota. Again he gives no basis for accepting this as a possible cause out of all the other possible causes identified by him.

72. Of perhaps even greater concern is what is revealed by the Consumer Complaint Form tendered into evidence. According to Hoyte he filled out this form. Boodoosingh says that he received the Consumer complaint form and annexes a copy to his witness statement. His report is in fact inserted to the back of this form. To the front of the form however under the heading 'brief description of complaint' there is a statement which basically, accords with Hoyte's evidence in this matter. As well there is the following statement made in relation to the tyre:

“It was inspected by Mr Ronald Boodoosingh (Head Tyre Inspection) TTBS and the following was observed Thread Separation (2) tyre four years old (2004) (3) stored tyre (4) Belt leaving Belt.”

73. While I am sure that there is a good explanation and non-sinister reason for the insertion of this information on the Consumer Complaint Form of more concern to me is the fact that the information inserted suggests that Boodoosingh came to two additional conclusions that were not revealed in his report or in his evidence: that the tyre was four years old and that it had been stored. To my mind, if he did come to these additional conclusions as the form suggests then, it was incumbent on the witness, as an impartial expert to refer to these conclusions and

then exclude the possibility that either of them was the cause of the failure of the tyre. Unfortunately he has failed to do so.

74. While I accept this witness' evidence as to what he observed I do not accept the conclusions arrived at by him as to the cause of the damage to the tyre. He provides no details of the literature used. He provides no rational basis for his ultimate conclusions. His ultimate conclusion is in my view inconsistent with earlier conclusions drawn by him. Further the fact that he refers to an examination of all four tyres contrary to the undisputed evidence and some doubt has been placed on his accuracy of his report by the statement to the front of the Consumer Complaint Form. In these circumstances I do not accept the conclusions arrived at by him as to the cause of the failure of the tyre.

75. The evidence of Hoyte's other expert witness, Kenneth Murray, does not assist since he comes to no independent conclusion as to the cause of the accident but merely refers to Boodoosingh's report. At the end of the day, I have no evidence that the cause of the accident was tyre failure. Neither has there been any evidence presented with respect to the cause of the failure of the airbag to deploy. Toyota submits that, while it is not in dispute that the airbag did not deploy Hoyte must show, by way of expert evidence that the failure of the airbag to deploy is as a result of a defect in the car. Although there is no expert evidence in this regard Hoyte has placed before me by way of an unagreed document a document which is referred to as the Defendant's pre-check manual for airbags.

76. While this document is not an agreed document and not the subject of a hearsay notice in the circumstances strictly speaking the truth of the contents is not in evidence. I note that the document in part states that:

“In a collision, the airbag sensor detects the degree of the impact and when the degree exceeds the specified value of the center airbag sensor assembly (airbag sensor assembly) the initiator in the inflator is ignited.”

“ SRS front airbags are not designed to inflate if the vehicle is involved in a side or rear collision, if it is if it rolls over or if it is involved in low speed frontal collision.”

“SRS front airbags may deploy if a serious impact occurs to the underside of the vehicle.”

77. While I am satisfied that this does not represent evidence before me it does suggest to me that the evidence with respect to the deployment of the airbags is the province of an expert. In the circumstances I am satisfied that there is no evidence before me attributing the cause of the failure of the airbags to deploy to either a defect in the Vehicle not identifiable by an examination or the failure of the warning light.

78. At the end of the day therefore I am asked to assess whether the Vehicle was of merchantable quality on the basis of the evidence of Hoyte as to how the accident occurred; the proximity of the accident to the date of delivery and the fact of a damaged tyre. With respect to the tyre, given my rejection of the evidence of Boodoosingh, I have no way of knowing whether the damage to the tyre was the cause of or as a result of the accident. Accordingly I have no

information as to the cause of the accident. On the other hand it is not in dispute that this was a 9 year pre-owned Vehicle with a mileage of 120,000 km which was subject to certain conditions as to merchantable quality. In this regard I am cognisant of the dicta of Lord Denning in *Bartlett v Sidney Marcus Ltd* when he says:

“A buyer should realise that when he buys a second-hand car effects may appear sooner or later; and, in the absence of an express warranty, he has no redress. Even when he buys from a dealer the most ran⁷ that he can require is that it should be reasonably fit for the purpose when driven along the road.”⁸

79. In that case the purchaser drove the car for more than four weeks before putting it into the garage to have its clutch repaired. The clutch required more work than the purchaser had anticipated. It was determined, however, but that did not mean that at the time of sale it was not fit for use as a car. In the instant case Hoyte had the benefit of the Vehicle for less than 24 hours after delivery. During which period he drove the vehicle twice, one of those journeys being to his home from Toyota’s compound. It was on the second journey that the accident occurred.

80. I am satisfied that with respect to the conditions implied under the Sale of Goods Act there was a requirement that insofar as there were defects in the Vehicle which could not have been revealed by the examination conducted by Hoyte, Toyota was required to provide a vehicle which was of merchantable quality. In this regard therefore there was no examination of the engine by Hoyte nor did he test drive the Vehicle. On the evidence it is clear that at the time of

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⁸ Page 1017 B

his examination of the Vehicle there was no visual indication of any damage to the tyres. The evidence of Sheppard confirms this. It is clear therefore that in accordance with the Act Toyota was required to provide a Vehicle which was of merchantable quality with respect to both the engine and defects to the tyres not obvious on a visual examination.

81. I satisfied that with respect to the express representations made by Toyota it was required to provide a vehicle that was roadworthy, regardless of Hoyte's examination. I am satisfied that in both cases the requirement of merchantable quality required that the Vehicle be fit for the purpose for which Vehicles are commonly bought, that is to be driven along the road, as is reasonable to expect, having regard to the fact that the Vehicle was nine years old, pre-owned with a mileage of 120,000 km and purchased for \$160,000.

82. There has been no challenge to Hoyte's evidence as to how the accident occurred. He says that he was driving at approximately 60 kilometers per hour when without warning he heard rumbling sound followed by an explosion from beneath and to the rear of the Vehicle. The Vehicle immediately malfunctioned and pulled violently in an uncontrollable manner to the right, slammed into the median of the Highway and overturned several times. It would seem to me therefore that, given all the pre-delivery checks made by Toyota with respect to this Vehicle and given the fact that the Vehicle was driven for less than 24 hours before it literally self-destructed the inescapable inference to be drawn is that the Vehicle was not of merchantable quality. It was not reasonably fit for the purpose of being driven along the road. In this regard it seems to me that although the maxim Res Ipsa Loquitur does not strictly apply taking a common sense approach these facts speak for themselves.

Damages

83. Section 54 of the Act preserves the right of the purchaser to recover interest or special damages or money paid where the consideration for it has failed in the case of a breach of the contract of the sale of goods. I am satisfied that given the fact that the subject of the sale was a Vehicle purchased for the purpose of Hoyte driving it from one place to the other it was in the reasonable contemplation of the parties that Toyota's breach of its contractual undertakings was not unlikely to cause physical injury to Hoyte. In these circumstances I am satisfied that Hoyte is entitled to recover damages for any physical injury suffered as a result of Toyota's failure to provide a vehicle of merchantable quality.

84. The evidence as to the damage suffered by Hoyte was given by the adjuster Kenneth Murray. He gave evidence as to the damage suffered by the motor vehicle. According to him the adjusters were retained to survey the damage to the car and provide a report on their observations. He says that he observed collision damage to both broadsides and the top of the car. From this he concludes that this was the result of a roll over. After identifying the items which have resulted in damage beyond repair and what he says was severe structural damage he concludes that it was uneconomical to repair the car due to the extensive damage and that in the circumstances it was a constructive total loss.

85. There was no challenge to the witness' expertise or his conclusions. His cross-examination was limited to his use of the words "roll over". In this regard he confirms that the words used indicate that the vehicle went over on both its sides. This is consistent with the unchallenged evidence of Hoyte and his wife.

86. The only evidence with respect to Hoyte's claim for personal injuries was his evidence as to the effect of the accident on him. He says immediately after the accident he was taken to the Port-of-Spain General Hospital. He does not say how long he remained in the hospital, but it is clear that he was discharged on the same day. It is clear from his evidence as to what he did on that day and on the days immediately following that he was not incapacitated as a result of his injuries. He says however that after the accident he felt pain on his body and sought treatment from Dr Avinash Deonarine at Medical Associates Hospital Ltd. on the 26th of May. He says he paid the sum of \$900 to the Hospital and subsequently received a medical report dated 14th October 2008. That is the extent of his evidence with respect to his personal injuries.

87. There is no evidence by the medical doctor. By his statement of case however Hoyte pleads his injuries and annexes a copies of a medical reports dated the 14th October 2008. By its defence Toyota denies the relevant paragraph, and states: "if any damage was caused to the Claimant, it was as a result of the manner in which the Claimant and/ or driver of the said motor vehicle handled the vehicle at the material time and/or denies that any accident or injury occurred as a result of any breach of contract and puts the Claimant to strict proof thereof of these injuries."

88. It is now settled law in this jurisdiction that a failure in the defence to comply with Part 10.5 of the CPR entitles the Court to treat the Claimant's allegation in this regard as undisputed⁹. Similarly, where a Claimant has attached to his statement of case a report from a medical practitioner on his personal injuries a failure by a Defendant to comply with part 10.8 of the Court is entitled to treat the contents of this report as undisputed.

⁹ MI5 Investigations Ltd v Centurian Protective Agency Ltd. Civ App No 244 of 2008.

89. Part 10.8 requires a Defendant to state whether he agrees with the medical report and where he disputes any part of it give his reasons for doing so. It is clear from the defence filed that with respect to the claim for personal injuries and the medical report annexed Toyota has failed to comply with the requirements of part 10.5 and part 10.8. In the circumstances the contents of these medical reports are undisputed. I am satisfied therefore that as a result of the accident Hoyte suffered the following injuries: Abrasions to the right forearm and stiffness with consequent pain on using the right upper limb.

90. There have been no submissions on either side with respect to damages. By his statement of case Hoyte seeks special damages in the sum of \$160,000 being the cost of the replacement of the vehicle; wrecking fees in the sum of \$1700 and loss of use at a rate of \$200 per day for sixty days. He also seeks a repayment of the cost of obtaining reports on the investigations survey of damage to the vehicle in the sum of \$832.15 and the return of his medical expenses in the sum of \$1000, which sum includes the cost of medication at \$100.00.

91. On the evidence presented Hoyte is entitled to return of the monies paid to Toyota for the Vehicle. Insofar as he seeks the return of the wrecking fees; monies paid for the investigators report and the cost of the consultation and medical report of the medical doctor he has proved this expenditure and is entitled to these sums. There is no evidence with respect to his claim for loss of use or of the sum of \$100 spent on medication these sums are therefore not recoverable.

92. With respect to his personal injuries I am satisfied that these are relatively minor. There is has been no evidence led with respect to any resulting physical disability; loss of

amenities or earning capacity. With respect to his pain and suffering he merely states that he experienced some pain on his body after the accident. In the circumstances bearing in mind awards in comparable cases I am satisfied that an award of \$5,000.00 is reasonable for Hoyte's personal injuries.

93. In its defence Toyota alleges that as a result of Hoyte's quantification of his claim at \$175,000.00 in a previous action on the same facts Hoyte is now estopped from quantifying this claim at a value higher than \$175,000.00. There have been no submissions in this regard by Toyota and I can only assume that this is not being pursued. In any event it cannot be that by this plea Toyota is suggesting that this alleged estoppel binds me with respect to the award of damages in this case. In any event I am satisfied that the damages due to Hoyte exclusive of interest amount to not more than the \$175,000.00. In the circumstances Hoyte is entitled to a declaration that Toyota has breached the expressed and implied terms of the contract with him over the sale of the Vehicle. There will be judgment for Hoyte in the sum of \$163,432.15 representing his special damages and the sum of \$5,000.00 representing general damages with respect to his injuries.

Dated this 2nd day of July, 2013.

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Judith Jones
Judge