THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2015-01061

ANN MARIE JONES JACOB

Claimant

AND

PRICESMART CLUBS (TT) LTD

Defendant

Before the Honourable Madame Justice Margaret Y Mohammed

Date of Delivery 25 June 2021

APPEARANCES

Mr Anil V Maraj instructed by Mr Adrian D Ramoutar Attorneys at law for the Claimant.

Mr Stephen Singh instructed by Mr Kendell S Alexander Attorneys at law for the Defendant.

JUDGMENT

Introduction

1. The Claimant was employed by the Defendant as a Cake Decorator which owned, managed, controlled and administered PriceSmart Movie Towne. She suffered injuries on the job while moving a wheeled trolley shelf display ("the trolley") on 13 April 2011. The injuries which the Claimant claimed she sustained were: a rotator cuff injury to her right shoulder, more particularly described as a well-defined linear high signal area in the anterior superior labrum consistent with a superior antero-posterior labral tear; nerve compression at the C5/C6 level; 20% permanent partial disability; and

restriction of motion, loss of flexibility in her right hand and diminished strength in her right hand and arm. She claimed that her injuries were due to the Defendant's negligence and/or breach of its statutory duty to ensure that it provided a safe and secure work environment to her, as she was an employee at the material time and the servant and/or agent of the Defendant had insisted that she move the trolley which had a defective wheel. In this action she has sought to recover damages against the Defendant.

2. The Defendant has denied liability on the basis that: the trolley was not defective; the Claimant was not compelled to move the trolley but instead volunteered to do so; by volunteering to move the trolley, any damage suffered by the Claimant was caused by her own negligence; the only injury suffered by the Claimant was to her right shoulder which was due to her own negligence.

The Claimant's Case

3. The Claimant asserted that on 13 April 2011, she acted upon the instructions and insistence of the Defendant's supervisor and moved the trolley which had defective wheels. In the course of moving the trolley she sustained injuries and experienced severe pain in her right shoulder, neck and hand.

4. The Defendant paid for all the Claimant's medical expenses up until 31 August 2014 and on 5 September 2014 it terminated the Claimant's employment with immediate effect. The Claimant contended that she still undergoes physiotherapy, inclusive of acupuncture once a week to alleviate pain caused by the injuries. She is presently a weekly patient of the Outpatient Clinic of the Port of Spain General Hospital, where it was recommended that she undergo surgery on her neck due to nerve compression at her C5 and C6 vertebrae. The Claimant still suffers from the effects of the injuries which are restriction of motion, loss of flexibility in her right hand, diminished strength in her right hand and arm. She asserted that despite three operations and different treatments she has experienced only minimal relief of the pain caused by her injuries.

5. The Claimant pleaded that as a result of her injury she has suffered loss of past and future earnings. In relation to her loss of past earnings she stated that prior to the injury she earned the monthly sum of $4,763.20. However, by letter dated 5 September 2014, the Defendant terminated her employment with immediate effect on the grounds of being "retired medically unfit".

6. She stated further that due to her injury she suffered a loss of future earnings, as she has a permanent disability of 20% and has been deemed medically unfit to work. At the time of the injury, the Claimant was 41 years old and would have retired in the year 2029 at the age of 60. Therefore, she claimed for the wages she would have received from the Defendant up until her retirement in 2029, which based on the Defendant's Collective Agreement[1], would have been subject to an annual wage adjustment of 5% per annum from 2 April 2015 to 30 November 2015 and thereafter increased for each successive two (2) year period from 1 December 2015 by adding 25% to the increase until she reached the retirement age of 60.

7. The Claimant also pleaded that she has suffered loss of future medical expenses, which can only be quantified after she has received a C5/C6 Cervical Arthroplasy surgery and would include the cost of surgeries, clinical observations, medication and physical/water therapy. She stated that the said surgery was recommended by Dr Ranette David of the Department of Surgery at the Port of Spain General in the medical report dated 12 October 2015.[2]

The Defence

8. The Defendant asserted that its supervisor, Mr Donny Boiselle ("Mr Boisselle") did not instruct the Claimant or any other employee to move the trolley from the sales floor on 13 April 2011. It stated that Mr Boiselle had entered the bakery on the said date and requested that the trolley that had been left on the Defendant's sales floor be removed and the Claimant on her own volition volunteered to move the trolley. The

[1] Exhibit AJJ 3
[2] Exhibit AJJ 4

Defendant also pleaded that the wheels of the trolley were not defective, as the Claimant was able to remove the trolley from the sales floor. Further, two of the Defendants supervisors, Ms Vonessa Alexander ("Ms Alexander") and Mr Boiselle, as well one of its employees Mr Devon Wilson inspected the trolley after it had been reported as defective and they confirmed that the wheels were not defective and the trolley was fully functional.

9. The Defendant denied that: (i) it had failed to ensure, as far as reasonably practical the safety, health and welfare of its employees, particularly the Claimant; (ii) it had failed to provide the Claimant with a fully functional trolley; (iii) it had negligently or otherwise or at all provided the Claimant with a defective trolley; (iv) there was any foreseeable or other risk of injury associated with moving the trolley; (v) it had a duty to warn the Claimant about the weight of the trolley; (vi) it had failed to instruct the Claimant on the proper way to move the trolley; (vii) it had failed to provide any or any adequate means to move the trolley; and (viii) it had failed to provide a safe system of work for its employees and as a result had exposed the Claimant to a foreseeable risk.

10. The Defendant also contended that the Claimant's injuries were caused in whole or in part by her. It asserted that prior to the alleged incident, the Claimant had worked in the Bakery Department of the Defendant for approximately one (1) year and five (5) months and during that period she would have been frequently exposed to that type of trolley and ought to have been fully aware of its weight. It also asserted that the Claimant having deemed the trolley as being heavy, should have recognized that it may have been unsafe to move it on her own and requested assistance. However, she did not request assistance in moving the trolley and by failing or refusing to do so she had acted negligently and without care. Further, the trolley was on wheels and the only adequate method of moving it was by pushing it and the Claimant by continuing to move the trolley as she did, had impliedly consented to running the risk of potential injury.

11. With respect to the damages claimed by the Claimant, the Defendant called upon the Claimant to prove her loss. It admitted that the Claimant was terminated on the basis that she was declared medically unfit to work and upon her termination the Claimant was paid by way of a cheque dated 2 September 2014 the sums of $16,575.94 as her Retirement Gratuity and $666.48 for her unused Casual Leave, which amounted to $17,004.32 after the relevant statutory deductions were made.[3] The Defendant also paid the Claimant the sum of $20,682.05[4] as compensation in accordance with the Workmen's Compensation Act and her medical expenses which amounted to $464,483.84[5].

The Issues

12. The issues which I will address in this judgment are:

    (a) Did the Defendant breach its duty of care to provide a safe place of work for the Claimant on 13 April 2011?
    (b) Did the Claimant contribute to her injury?
    (c) Has the Claimant proven that the Defendant is liable for her injuries?
    (d) If the Defendant is liable, what is the quantum of damages owed to the Claimant by the Defendant?

The Witnesses

13. At the trial the Claimant gave evidence and the Defendant called Mr Boisselle and Ms Alexander. Dr Marlon Mencia also gave evidence as a joint expert witness.

[3] Exhibit B
[4] Exhibit C
[5] Exhibit D

Did the Defendant breach its duty of care to provide a safe place of work for the Claimant on 13 April 2011?

14. The Claimant contended that the Defendant breached its common law and statutory duty of care to provide a safe place of work for the Claimant, by providing a defective trolley on 13 April 2011 which caused the Claimant to sustain injuries.

15. It was argued on behalf of the Defendant that it did all that was reasonably required to ensure that the Claimant was not exposed to any foreseeable risk to her health and safety, and it had provided a safe place of work for the Claimant.

16. The **Halsbury's Laws of England**[6]**,** described the common law duty which an employer owes to each of its employees as a duty to take reasonable care for his health and safety in all the circumstances of the case, so as not to expose him to an unnecessary risk. The duty is often expressed as a duty to provide a safe plant and premises, a safe system of work, safe and suitable equipment and safe fellow-employees; but the duty is nonetheless one overall duty. The duty is a personal duty and is non-delegable. All the circumstances relevant to the particular employee must be taken into consideration, including any particular susceptibilities he may have.

17. The authors of **Munkman on Employer's Liability**[7] described the duty of the employee where there is an allegation that the employer has breached this duty as follows:

> "The principles of causation may be summarized that, where a claimant can establish that the injury or damage was foreseeable, it is still necessary for the claimant, on whom the burden of proof lies, to establish that the wrongful act of the defendant was the cause of it, or at least materially contributed to it. The correct test is a matter of law and varies depending on the circumstances of the case.

[6] Volume 52 (2014), paragraph 376
[7] 15th edition, para 3.03

18. At paragraph 3:04 the authors continued:

> "Even where the claimant can establish that the injury or damage he sustained was within the bounds of foreseeability, it is still necessary for him to establish that the wrongful act of the defendant was the sole or substantial cause of it, or at least that the wrong materially contributed to it. Indeed in many actions for personal injuries... the starting point in any causation is the but for test; that is, it must be shown that had the defendant not committed the breach of duty concerned, the injury would not have happened."

19. **Munkman on Employer's Liability**[8] sets out that the employer does not undertake that there will be no risk, merely that such risks as there are will be reduced so far as reasonable. To the extent that this leaves an employee at risk, he will accept the inherent risks that cannot be avoided by the exercise of such reasonable care and skill on the part of his employers.

20. The employer's statutory duty is set out at section 6(1) and (2) of the **Occupational Safety and Health Act**[9] ("OSH Act") which states that:

> (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the safety, health and welfare at work of all his employees.
>
> (2) Without prejudice to the generality of an employer's duty under subsection (1), the matters to which that duty extends include in particular—
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> (a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;
>
> (b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use,

[8] 16th Edition at paragraph 4.62
[9] Chapter 88:08

handling, storage and transport of equipment, machinery, articles and substances;

(c) the provision of adequate and suitable protective clothing or devices of an approved standard to employees who in the course of employment are likely to be exposed to the risk of head, eye, ear, hand or foot injury, injury from air contaminant or any other bodily injury and the provision of adequate instructions in the use of such protective clothing or devices;

(d) the provisions of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the safety and health at work of his employees;

(e) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;

(f) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards amenities and arrangements for their welfare at work; and

(g) compliance with sections 7, 12, 37, 46, 75 and 76, Parts III and IX and such other duties that may be imposed on him by this Act.

21. The employer's statutory duty is not isolated as under section 10 of the OSH Act, employees have a concurrent duty to ensure their own safety and the safety of their co-workers while at work. Section 10 states that:

(1) It shall be the duty of every employee while at work—

(a) to take reasonable care for the safety and health of himself and of other persons who may be affected by his acts or omissions at work;

(b) as regards any duty or requirement imposed on his employer to co-operate with him so far as necessary to ensure that that duty or requirement is performed or complied with;

(c) to report to his employer, any contravention under this Act or any Regulations made thereunder, the existence of which he knows;

(d) to use correctly the personal protection clothing or devices provided for his use;

(e) to exercise the discretion under section 15 in a responsible manner; and

(f) to ensure that he is not under the influence of an intoxicant to the extent that he is in such a state as to endanger his own safety, health or welfare at work or that of any other person.

22. In assessing whether the Defendant provided a safe place of work for the Claimant, it is necessary to resolve two disputes of facts which arose from the pleadings, namely: (a) whether the Claimant was trained in moving the trolley and (b) whether the trolley was defective.

23. In order for the Court to satisfy itself on which version of the events is more probable in light of the evidence, it is obliged to check the impression of the evidence of the witnesses against the: (1) contemporaneous documents; (2) the pleaded case; and (3) the inherent probability or improbability of the rival contentions, (**Horace Reid v Dowling Charles and Percival Bain**[10] cited by Rajnauth–Lee J (as she then was) in **Mc Claren v Daniel Dickey**[11]). The Court must also examine the credibility of the witnesses

[10] Privy Council Appeal No. 36 of 1897
[11] CV 2006-01661

based on the guidance of the Court of Appeal judgment in **The Attorney General of Trinidad and Tobago v Anino Garcia**[12], where it stated that in determining the credibility of the evidence of a witness, any deviation by a party from his pleaded case immediately calls his credibility into question.

Training for moving the trolley

24. The Claimant pleaded that the Defendant breached its statutory and common law duty by failing to give her any adequate instructions on moving the trolley. The Claimant's evidence was that she was never given any training by the Defendant about how to move the trolley. The Claimant described the trolley as being made of steel, approximately 6 to 7 feet in height, 8 to 9 feet in width and 1 to 2 feet long with approximately 6 wheels and several horizontal shelves which were used to display bakery items. The dimensions of the trolley were not disputed by the Defendant.

25. The Defendant denied that it failed to give the Claimant instructions in relation to moving the trolley and put the Claimant to strict proof. It averred that the trolley is on wheels and is operated by pushing which is the only adequate method for moving it.

26. Mr Boisselle stated in his witness statement that at the time of the incident he was the Produce Supervisor and his responsibilities included: (i) ordering local and foreign fresh produce items; (ii) managing the produce department; (iii) scheduling the staff roster; (iv) ensuring that the produce department made sales; (v) controlling the loss of perishable products; (vi) ensuring that all items in stock are displayed for sale; and (vii) controlling the inventory of produce and deli items.

27. Mr Boisselle stated that there were two (2) trolleys/bakery racks on either side of the bakery display case. He stated that he was familiar with the trolleys and that he had also moved them which did not require much effort to move as they glided easily on their wheels.

[12] Civ. App. No. 86 of 2011 at paragraph 31

28. Mr Boisselle testified in cross-examination that the trolley is easier to move when it is empty, as it requires some effort to get it moving when it is full. He also testified that although he was not present when the trolley was being moved to ensure that the proper technique was being used, the Defendant had shown its staff the proper technique to be used when moving items. However, he admitted that he had excluded this evidence from his witness statement. In his cross-examination, Mr Boisselle stated that in order to move the trolley an employee would have to hold the trolley with his/her arms and push and pull it, but once done properly there was no risk of injury. He also testified in cross-examination that the Defendant offered all its employees a general safety training course on how to prevent injury to themselves and other staff members. This training was held on a quarterly basis and included training on how to use all the Defendant's equipment and proper lifting procedures.

29. Ms Alexander stated in her witness statement that at the time of the incident she was the supervisor for the bakery where the Claimant worked. Her duties included: (i) inspecting the Defendant's equipment to ensure that it is clean and in working order; (ii) ensuring that the necessary staff members were in attendance and performing their respective functions; (iii) checking the production plan for the day and assigning tasks to the respective team members; (iv) ensuring that all items available in the bakery were on display for sale; (v) controlling the inventory of stocks and re-ordering stocks, where necessary; (vii) covering any short staffing issues; and (viii) compiling reports on employee attendance.

30. Ms Alexander testified in cross-examination that the trolley had four (4) wheels. She explained that two (2) at the front were rotating, while the two (2) at the back were straight. However, she could not recall if those wheels had a locking mechanism. She indicated that the trolley stayed stationary unless it was moved by someone and maintained that the only way to move the trolley was by pushing or pulling it, otherwise it would remain stationary. She denied the suggestion that force had to be applied to the trolley in order to get it to move. In relation to the manufacturer of the trolley, Ms Alexander stated that she could not recall the name of the manufacturer and that she had never seen the user's manual for the said trolleys.

31. Ms Alexander accepted in cross-examination that she had not indicated in her witness statement if any staff had been trained in using any of the Defendant's equipment.

32. In my opinion, the Claimant having established that she was not trained or informed on how to move the trolley, the onus was on the Defendant to demonstrate that it had provided a safe system of work by educating its staff on the proper techniques to be used when they were handling the trolley.

33. In my opinion, due to the dimensions of the trolley one of the duties of the Defendant in providing a safe sytem of work for the Claimant was to provide training on the proper techniques to be used to move the trolley.

34. However, the Defendant failed to do so as there was no evidence from the Defendant's witnesses with respect to the details of any training programmes which were conducted with respect to the moving of the trolley when it was either full or empty. There was also no evidence of who and how often these training courses were conducted. Further, there were also no contemporaneous documents produced by the Defendant's witnesses to show that such training took place. In my opinion, if the Defendant had conducted such training programmes on a quarterly basis as asserted by Mr Boisselle, at the very least the Defendant would have had records of such programmes. In light of the failure by the Defendant to produce any evidence that the Claimant was trained on the appropriate techniques to be used to move the trolley, it is more probable that the Claimant was not so trained. In my opinion, the task of pushing or pulling the trolley of the size described by the Claimant was not mundane. It was reasonably foreseeable that a person may be injured in moving the trolley and to reduce such risk of injury some basic training on the techniques to be employed were required. However, there was no cogent evidence that the Defendant undertook the training of any such techniques with the Claimant.

Defective trolley

35. According to the Claimant, the trolley had defective wheels which did not move and numerous complaints were made to the safety officer and management about the trolley by other members of staff in her presence and hearing. She also testified that after the incident the trolley was cut to about half its height and the wheels were replaced.

36. However, in cross-examination, the Claimant's evidence on the condition of the trolley at the time she moved it was undermined. The Claimant admitted in cross-examination that: when she went to straighten the trolley she did not examine it or its wheels and she was uncertain if it had two (2) or four (4) wheels; she could not recall who made the complaints about the defect in the trolley and when they were made; and she did not return to work after the incident and therefore she could not attest to the trolley being cut in half.

37. According to Mr Boisselle, he saw the trolley was out of its lane. He went into the bakery and indicated that the store was to be opened and that the trolley needed to be moved from the lane. Later in the day, after the incident he was informed that the Claimant had sustained injuries while attempting to move the trolley and that she had said that the trolley was defective. Mr Boisselle testified that he then examined the trolley and found that nothing was wrong with it or its wheels.

38. Mr Boisselle testified further in cross-examination that due to the length of time that had passed since the incident, he could not recall the date on which he had examined the trolley. He was also unable to recall if he had inspected the trolley prior to the incident. However, he maintained that he had conducted a visual and physical inspection of the trolley after the incident and he did not find anything was wrong with it. He also ensured that it was working properly. However, he admitted that he had not been specifically trained to inspect trolleys. Mr Boisselle stated that he could not recall the company which manufactured the trolley at the time of the incident as the trolleys were changed often.

39. Ms Alexander admitted that she was not at work when the incident occurred. However, she stated that when she arrived at work she was informed about the incident and that the Claimant had stated that the trolley was defective. Ms Alexander also stated that she was familiar with the trolley as she has moved it. She explained that the trolley consisted of two bakery racks with one on either side of the bakery display case. She stated that she examined the trolley in question and she did not see anything wrong with it or the wheels.

40. In cross-examination, Ms Alexander maintained that at the time of the incident she was responsible for inspecting the equipment and ensuring that they were clean and in working order. She stated that she did not create records of her regular inspection of the equipment, but if there was a problem with one she would record it. Ms Alexander agreed that she had not given any evidence in her witness statement on the nature of her inspection of the equipment or how frequently the said inspections took place.

41. Ms Alexander also stated that at the time, she was not responsible for the maintenance of the trolleys. She explained that when she stated that she had inspected the equipment to ensure that it was in working order, she meant that as a supervisor she walked through the department and ensured that everything was working and if it was not then she would relay that information to the maintenance personnel, who would then correct it. She agreed that she had not mentioned in her witness statement that there was a system in place for the periodic maintenance of equipment which included the trolley.

42. The onus was on the Claimant to first establish that there was a defect with the wheels of the trolley, which she asserted caused her injuries, before the burden was shifted to the Defendant. In my opinion, the Claimant's admissions in cross-examination undermined the credibility of her evidence that the wheels of the trolley were defective, as the Claimant admitted that she did not examine it before she attempted to move it and she was not even able to recall how many wheels the trolley had.

43. Indeed, I have attached no weight to the Claimant's evidence that there were complaints about the defects in the trolley as she did not identify who made those complaints, when they were made and the nature of those complaints, in particular if they concerned the wheels of the trolley.

44. Further, the Claimant did not call any witness to corroborate her evidence on these alleged complaints. In **Wisniewski v Central Manchester Health Authority**[13] Brooke LJ set out the applicable principle for when an adverse inference can be drawn. Brooke LJ held:

> (a) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
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> (b) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
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> (c) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (d) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

45. This principle was adopted by Rajnauth-Lee J(as she then was) in **Ian Sieunarine v Doc's Engineering Works (1999) Ltd**[14]. In my opinion, it is reasonable to make the adverse inference that the reason the Claimant did not call any witness to corroborate

[13] [1998] Lloyd's Rep. Med. 223
[14] HCA No. 2387 of 2000

this aspect of her evidence was because there was no person who had made such complaints.

46. For these reasons I was not satisfied that the Claimant established that the wheels of the trolley were defective so as to shift the burden to the Defendant to prove otherwise.

47. In any event, the Defendant established from the evidence of Mr Boisselle and Ms Alexander that they both checked the trolley on the same day of the incident and they did not observe any defect with the wheels. In my opinion, this did not appear to be a technical exercise as both Mr Boisselle and Ms Alexander stated that they were familiar with the trolley based on the nature of their respective jobs and the length of time they were employed with the Defendant. In assessing the credibility of their evidence I have noted that both Mr Boisselle and Ms Alexander are employees of the Defendant and it may appear that they have an interest to serve. However, I also took into account that they were the servants and/or agents of the Defendant involved in the incident.

48. Further, the Defendant was also able to establish from the evidence of Ms Alexander that there was a system in place for the supervision and checking of the equipment including the trolley and periodic maintenance to ensure that the equipment was working properly.

49. While I have found that the Defendant did not train the Claimant in the appropriate techniques to be used when moving the trolley, it is of no moment, as the Claimant's case was not that the lack of training caused her injuries but rather the defective wheels of the trolley. In my opinion, the Claimant having failed to prove on a balance of probabilities that the wheels of the trolley were defective she also failed to prove that her injuries were caused when she attempted to move it. It follows that the Defendant is not liable for the loss she has claimed. However, for completeness on the issue of liability, I will examine the next issue.

Did the Claimant contribute to her injury?

50. The Defendant pleaded that the Claimant was not compelled to move the trolley but had volunteered to do so, as such, she accepted the risk to move the trolley without assistance and ought to have addressed her mind to the weight of it and any risk it may have posed to her health and safety.

51. The Defendant contended that any loss or damages suffered by the Claimant was on account of her own negligence and that the apparent risk to her safety and/or health, which the weight of the trolley posed, if she chose to move the trolley alone was foreseeable. The Defendant pleaded that the Claimant was negligent for the following reasons:

    (a) For attempting to move the trolley on her own when she knew or ought to have known from her work experience that it may have been unsafe to do so without assistance;
    (b) She continued to move the trolley after feeling and assessing the weight of it; and
    (c) She failed and/or refused to and/or neglected to ask for assistance in moving the trolley.

52. Lord Denning articulated the principle of contributory negligence in **Jones v Livox Quarries Ltd**[15] as follows:

> A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

[15] [1952] 2 QB 608

53. Paragraphs 76 to 80 of **Halsbury's Laws of England**[16] set out a more detailed analysis on the principles which govern contributory negligence. They state:

> "76. In order to establish contributory negligence the defendant has to prove that the claimant's negligence was a cause of the harm which he has suffered in consequence of the defendant's negligence. The question is not who had the last opportunity of avoiding the mischief but whose act caused the harm. The question must be dealt with broadly and upon common sense principles. Where a clear line can be drawn, the subsequent negligence is the only one to be considered; however, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the person secondly negligent might invoke the prior negligence as being part of the cause of the damage so as to make it a case of apportionment. The test is whether in the ordinary plain common sense the claimant contributed to the damage.
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> 77. The existence of contributory negligence does not depend on any duty owed by the claimant to the defendant and all that is necessary to establish a plea of contributory negligence is for the defendant to prove that the claimant did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury.
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> 78. The standard of care in contributory negligence is what is reasonable in the circumstances, and this usually corresponds to the standard of care in negligence. The standard of care depends upon foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought

[16] Volume 78 (2018)

reasonably to have foreseen that, if he did not act as a reasonably prudent person, he might hurt himself. A claimant must take into account the possibility of others being careless. As with negligence, the standard of care is objective in that the claimant is assumed to be of normal intelligence and skill in the circumstances...

79. In a very large number of claims arising out of road accidents, issues of contributory negligence arise. Although the question is essentially whether the claimant has taken reasonable care for his own safety in the circumstances, certain principles have emerged. It may be contributory negligence for … a passenger to take a lift with a driver knowing him to be drunk and incapable of driving with due care.

80. Knowledge by the claimant of an existing danger or of the defendant's negligence may be an important element in determining whether or not he has been guilty of contributory negligence. The question is not whether the claimant realised the danger but whether the facts which he knew would have caused a reasonable person in his position to realise the danger. It is a question of fact in each case whether the knowledge of the claimant in the particular circumstances made it so unreasonable for him to do what he did as to constitute contributory negligence…"[Emphasis added]

54. The Claimant's evidence in chief was that she was aware that the trolley had defective wheels which did not move and that numerous complaints had been made to the safety officer and management about the trolley by other members of staff in her presence and hearing. Even if I had found that the Defendant was liable for the Claimant's injury, which I have not, based on the Claimant's evidence she was well aware that (a) the wheels of the trolley were defective; (b) the wheels did not move; and (c) numerous complaints had been made about the trolley to both the safety officer and management.

55. Therefore, based on the Claimant's own evidence, she was fully aware that the trolley was defective before she moved it. The Claimant had the option to pass on the instructions from Mr Boisselle to the relevant persons to move it. She did not exercise this option. In my opinion, in making the decision to move the trolley the Claimant ought to have exercised reasonable care for her own safety as she had knowledge of the risk she was accepting by taking such action. However, there was no evidence from the Claimant that based on her knowledge she had done any assessment of the risks which she was accepting. In my opinion, by failing to do any such assessment, she did not act as a reasonable and prudent person by proceeding in the manner in which she did. For these reasons, even if the Claimant had succeeded in proving that the Defendant was negligent, the Defendant has succeeded in making out its case that the Claimant contributed to her injuries.

The defence of volenti non fit injuria

56. It was argued on behalf of the Claimant that because of the employer/employee relationship, the Defendant could not rely or succeed on a defence of volenti non fit injuria as the courts protected workmen from misuse of this doctrine by employers. Counsel for the Claimant submitted that the courts have held that a workman who exposes himself to some risk or danger at work, cannot have freely consented to run the risk of injury because the workman faces the dilemma of losing his employment.

57. On the other hand, Counsel for the Defendant submitted that a defence of volenti non fit injuria can succeed if the Defendant can show that the Claimant was aware of the risk and/danger and acted in manner that can be seen as being expressly or implicitly an assumption of that risk, without regard for her own safety.

58. Guidance for the defence of volenti non fit injuria is set out in the English case of **Morris v Murray and anor**[17]**.** In that case, the plaintiff spent an entire afternoon drinking with a friend, a pilot, who owned a small airplane. The two men after drinking

[17] [1991] 2 QB 6

decided to go on an airplane ride. The plaintiff drove them to the airfield and helped to refuel the plane. The plane crashed shortly after takeoff, leaving the pilot dead and the plaintiff seriously injured. The plaintiff sued the estate of the pilot for personal injuries as a consequence of negligence. The Court of Appeal held that as the plaintiff willingly went on the trip with full knowledge that the pilot was too drunk to carry out the usual duty of care owed, he fully accepted the risk and freed the pilot from any liability for negligence.

59. Lord Justice Fox determined that there were three (3) factors to consider when applying the principle of volenti non fit injuria to negligence. Those factors were: (a) the extent of the risk; (b) the plaintiff's knowledge of the risk; and (c) the inferred acceptance of the risk by the plaintiff. Lord Justice Fox also observed that a plaintiff cannot be said to have been "willing" if there was no reason for them to anticipate the negligent act, or was compelled to partake in it.

60. I accept that Mr Boisselle admitted in cross-examination that he made a general request to the bakery staff to move the trolley and it had not been directed to any specific person, but if they had chosen to ignore the request it would have been classified as insubordination. However, there was no evidence from the Claimant that she was compelled in any way to move the trolley by Mr Boisselle or any agent and/or servant of the Defendant, so as to shift the burden to the Defendant to prove that the Claimant was not coerced into moving it.

61. Based on the Claimant's evidence she was aware of complaints that the trolley was defective. The Claimant therefore knew of the risk and accepted the risk when she elected to move the trolley, rather than informing those who were responsible for moving the said trolley.

62. Having found that the Defendant is not liable for the Claimant's injuries, it is not necessary for me to address the issues of: (a) whether the Claimant has proven that the Defendant is liable for her injuries; and (b) if the Defendant is liable, what is the quantum of damages owed to the Claimant by the Defendant.

Order

63. The Claimant's action is dismissed.

64. The Claimant to pay the Defendant's costs on the prescribed basis pursuant to Rule 67.5(2) (b) Civil Proceedings Rule 1998 as Amended ("CPR"). The Court will hear the parties on on 6 July 2021 at 10:30 am virtual hearing on whether rule 67.5(2) (b) (i) or (ii) CPR is to be applied in calculating the quantum.

/S/ Margaret Y. Mohammed

Judge