THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2011-01911

BETWEEN

Angela Mitchell
(Administratrix of the Estate of Steve Mitchell, deceased)

Claimant

AND

Leon Brown

First Defendant

Motor One Insurance Company Limited

First Co-Defendant

Nizam Hosein

Second Defendant

The Presidential Insurance Company Limited

Second Co-Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. R. Gosine for the Claimant.
Mr. S. Roopnarine for the First Defendant and First Co-Defendant.
Mr. L. Sangunette for the Second Defendant.
Mr. A. Singh for the Second Co-Defendant.

Judgment

1. By Statement of Case filed on the 23rd May 2011, the Claimant sought to recover damages for the death of her husband, Steve Mitchell ('the deceased') for the benefit of his dependants under the **Compensation for Injuries Act Chap 8:05** and for the benefit of his estate under the **Supreme Court of Judicature Act Chap 4:01**.

2. The Claimant is the wife and administratrix of the estate of the deceased.

3. At the trial, the parties agreed to the sum of $325,000.00 to be paid to the Claimant as damages, inclusive of interest, for the death of the deceased. The parties further agreed to costs in the sum of $50,000.00.

4. The parties were however unable to agree on the culpable party for the death of the deceased. Thus, the court is left to determine whether the accident giving rise to the death of the deceased was caused solely by either the First Defendant or the Second Defendant or alternatively, by both the First and Second Defendants.

The Accident

5. On the 19th June 2008, the deceased was a passenger seated in the front passenger seat of a maxi taxi, registration number HAX 9335.

6. The First Defendant was at all material times the owner and driver of motor vehicle registration number HAX 9335 ('the maxi').

7. The Second Defendant was at all material times the owner and driver of motor vehicle registration number TAZ 1517 ('the van').

8. According to the Claimant, the maxi was travelling in an easterly direction along Manahambre Road in the vicinity of Usine Pond, St. Madeline and the van in the

opposite direction. The Claimant avers that there was a large piece of wood projecting out of the tray of the van. It was this piece of wood that collided with the maxi's windshield, shattering it and causing the deceased to sustain injuries which later led to his death. The First Defendant does not contest the Claimant's version of events and adds that on seeing the oncoming danger, he blew his horn to alert the driver of the van and mashed his brakes but was unable to avoid the accident as the van continued on, colliding with the maxi.

9. The Second Defendant on the other hand averred that the maxi was heading in a **westerly** direction along Manahambre Road at a fast speed. He alleges that at the time, the piece of wood was properly secured by way of a rope with one end to the sides of the tray by the van's hood and the other end secured inside the tray. Thus, he denies that he was responsible for the accident and relies on the doctrine of *res ipsa loquitor* for the occurrence of the incident.

10. The First Defendant alleges that the accident was caused solely by the Second Defendant and in addition to the particulars pleaded by the Claimant, claims the Second Defendant was negligent in:

    a. Driving too fast;
    b. Driving in such a manner and/or in such a manner with the projecting wood that could not avoid the said collision;
    c. Failing to stop and/or slow down and/or to properly secure the said projecting wood within the area of the tray;
    d. Driving in such a cause and/or in such a manner that the projecting wood went over on the tray side of the road;
    e. Driving without due care and attention;
    f. Improperly securing the wood in the tray;
    g. Failing to warn other road users and in particular the First Defendant as the presence of the protruding piece of wood;
    h. Failing to heed and/or observe the awareness of the First Defendant.

The Evidence

11. At the trial the Claimant opted not to call any witnesses as her only issue had been quantum and this was resolved before the trial began therefore no evidence was necessary.

12. The court was also informed that the First Defendant would be calling no witnesses. Instead, Counsel indicated to the court that a Hearsay Notice was filed on the 29th January 2013 in relation to a statement made by the First Defendant to his insurers, the First Co-Defendant. No Counter Notice was filed. The court was satisfied that the statement satisfied the criteria for allowing the statement in as hearsay.

13. The statement by the First Defendant was his account of what took place when the accident occurred. The First Defendant stated that on the 19th June 2008, around 9:15 a.m. he was driving along the St Madeline Main Road proceeding to San Fernando when he observed the van approaching him in the opposite direction. He observed that the van had a piece of board material protruding from its tray across the road. The First Defendant said he sounded his horn to get the attention of the driver of the van but to no avail. The First Defendant reported that as the van approached his maxi, he applied brakes and skidded for a while. Seeing the danger of the wood the First Defendant bent his head down. The piece of wood then slammed across the windscreen, shattering it and bending the posts inwards. He stated that a passenger died as a result.

14. Witness statements were given by the Second Defendant, Wilfred Baboolal, and Boysie Baboolal on behalf of the Second Defendant's case. However, the court was informed that only the Second Defendant's evidence was being relied on at the trial.

15. The Second Defendant testified that he has been driving for over 20 years and has never been involved in any serious road traffic accidents. He stated that both he and his wife are the owners of the van.

16. According to the Second Defendant, on the 19th June 2008, at around 8:00 a.m. he took a board measuring 12 feet x 12 inches x 1 inch and secured it with forty foot half inch rope to the tray of the van. He testified that both Wilfred Baboolal and Boysie Baboolal assisted him with this. The Second Defendant gave evidence that the tray of the van was about 10 feet long and so there was a small amount of projection of wood from the tray. He further testified that the wood was placed in a longitudinal/vertical direction and placed in the centre of the tray.

17. After he dropped the Baboolals off, he turned onto the Manahambre Road and was heading towards Princes Town. The Second Defendant's evidence is that he constantly checked in the side mirrors for the wood to ensure that the board remained secure.

18. When the Second Defendant reached the area by Usine pond, he noticed a maxi approaching flashing its headlights. In cross-examination he stated that he did not understand why the maxi driver was flashing his lights but when he saw it, he slowed down and pulled to the left. The Second Defendant asserted that the maxi was being driven at a fast speed by someone he knew as "Brown". Further, he testified that he knew him to be a maxi driver for the San Fernando/Princes Town route and that he always drove at a fast speed.

19. The Second Defendant testified that the maxi was occupying more of the middle of the lanes so he pulled closer to his left. According to the Second Defendant, he heard a noise so he stopped the van and checked the rear view mirror. It was then that he noticed the wood was no longer secured to the back of the van and observed that it was partly lodged in the windscreen of the maxi. Thus, he admitted in cross examination that the sound he had heard was the sound of the wood hitting the maxi. He said that he was not aware if the maxi driver slowed his vehicle down or not before the collision.

20. In cross-examination, the Second Defendant admitted that while transporting the wood, it had somehow gotten loose and ended up protruding out of the right side of the van.

Submissions

21. Attorney for the First Defendant and First Co-Defendant contended that the First Defendant was not at fault. It was argued that when presented with an emergency situation, the First Defendant did what a reasonable and prudent driver would do in the circumstances.

22. Further, it was pointed out that the Second Defendant in his evidence not only acknowledged that the wood was protruding from the van but that there was a warning given by the First Defendant.

23. Counsel for the First Defendant and First Co-Defendant argued that the fact that the Second Defendant refused to answer whether the wood caused the accident indicated that he was not willing to tell the truth. Therefore, the Second Defendant's evidence that the First Defendant was speeding should not be believed. Further, although the Second Defendant says that the First Defendant was driving fast, "fast" was relative and there is no evidence that it was excessively fast.

24. Finally, Counsel for the First Defendant and First Co-Defendant submitted that when dealing with the duty of the First Defendant, the court ought to look at it with reference to an emergency situation. Counsel relied on the case of ***Greene v Sookdeo and others [2009] UKPC 31***. In that case, a ten tonne Nissan dump truck heading in an easterly direction collided with a maxi being driven in a westerly direction causing damage to the Appellant. The vehicles were proceeding in their respective directions along the Valencia stretch of the Sangre Grande Eastern Main Road. As the vehicles approached the point of the collision, the truck was travelling downhill, the maxi moving uphill. The road surface was wet as it was raining. The truck attempted to pass stationary vehicles and in so doing moved into the westbound lane. The taxi driver on seeing the truck "tipped" his brakes and pulled left. However, the truck picked up a skid which took it diagonally across the westbound lane and this resulted in its collision with the maxi. The trial judge found the

truck driver 75% liable while the maxi driver was ascribed 25% contributory negligence. The maxi driver appealed and the Court of Appeal allowed the appeal finding the truck driver entirely liable. The Appellant then appealed to the Privy Council as the insurers of the truck were insolvent. In upholding the findings of the Court of Appeal, Lord Brown in delivering the judgment of the Board stated at paragraph 17 that:

> *"17. The judge was wrong (at para 44) to say that in the agony of the moment the burden lay on the taxi driver "to establish that he had neither the time nor space to avoid the collision or minimise the damage". Rather, as the Court of Appeal correctly noted by reference to Clerk and Lindsell, "All that is necessary in such a circumstance is that the conduct should not have been unreasonable, taking the exigencies of the particular situation into account." All that the taxi driver could at that stage do was brake further (as Mr. Applewhite confirmed he did) and, as he said, attempt (albeit, alas, with wholly insufficient time) to steer back onto the carriageway in the hope of leaving the truck on his nearside.*
>
> *18. There was in truth no evidence here of the taxi being driven too fast or of its driver failing to keep a proper lookout. Rather the plain reality of this case is that the truck was in such a condition and being driven in such a way as to create a sudden appalling danger which no oncoming traffic could reasonably have been expected either to foresee or escape…"*

25. In the circumstances of the case therefore, counsel contended that when the First Defendant was faced with a sudden danger, what he did was not unreasonable.

26. Counsel for the Second Defendant submitted that there was clear negligence on the part of the Second Defendant but argued that the issue was whether there was contributory negligence by the First Defendant. In this regard, Counsel contended that the evidence of the First Defendant that he applied his brakes and skidded for a while indicates that he was reacting to a danger. Further, attorney for the Second Defendant linked this fact with

the fact that the First Defendant saw the wood and sounded his horn to conclude that the First Defendant must have seen the danger for sometime before and did not stop.

27. Counsel therefore suggested that the First Defendant was 25-35% contributorily negligent for the death of the deceased.

28. Counsel for the First Defendant objected to Counsel for the Second Co-Defendant relying on the particulars of negligence against the First Defendant in his closing submissions. He stated that since the Second Co-Defendant was a party only in relation to indemnity he could not be heard in arguments on liability. He relied on a passage in **MacGillivary on Insurance Law, 10th Edition** paragraph 28-27 page 835. The passage set out that insurers were entitled to defend or settle a claim, and where they are given notice of proceedings and opt not to defend the claim, they will be precluded from contesting the quantum form any bona fide settlement although the assured must still establish liability.

29. However, Counsel for the Second Co-Defendant contended that indemnity was linked to liability and thus he ought to be allowed to refer to the facts of the case against the First Defendant in defending the claim. He stated that if liability is found against the Second Defendant it was important that they, being the persons to pay, are heard on the issue. Further, attorney for the Second Co-Defendant argued that the pleadings have not been struck out and since they are party to the proceedings, they are entitled to deal with the facts and the evidence which is before the court, albeit that the evidence was not their own. Additionally it was argued that it was always the case for the Second Defendant that it was the First Defendant who was responsible for the accident.

30. On the authority sited by Counsel for the First Defendant, Counsel for the Second Co-Defendant argued that the passage related to a situation where the insurance company was not a party to proceedings. It did not say they are precluded from submitting on the liability issue when they were a party to proceedings. Further, Counsel noted that the

passage cited by Attorney for the First Defendant went on to refer to the case of **Cheltenham & Gloucester v Royal** [2001] S.L.T. 1151. In that case, the insurer had withdrawn from conducting the defence, and was not precluded by the judgment against the assured from disputing liability and the amount recoverable under the policy.

31. The court agrees with the submission of the Second Co-Defendant that the authority cited related to a situation where the insurer was not made a party to proceedings. Further, the essence of an indemnity is the finding that the insured is liable for damage. Thus, it would be unfair to hold that an insurer, which is a party to proceedings and which has opted to seek counsel separate from the insured, is not allowed to defend the claim to the fullest. In the defence of a claim it is usually the right of either party to assist the court by way of closing addresses. The Second Co-Defendant's pleaded case was that the First Defendant was liable solely for the damage to the deceased. Reference to evidence tending to support same is allowable.

32. Counsel for the Second Co-Defendant referred to the case of ***Madden v Quirk and another [1989] 1 W.L.R. 702***. In that case the First Defendant was the driver of a pick-up van and the Plaintiff was a passenger travelling in the tray. When the First Defendant decided to overtake a car, he collided with the Second Defendant who had just turned from a side street onto the road. The result was that the plaintiff was thrown from the van sustaining sever injuries. The court held that the First Defendant had to bear more responsibility for carrying the plaintiff dangerously. Knowing that the plaintiff's position in the van made him more vulnerable to serious injury if there was an accident increased his liability.

33. Attorney for the Second Co-Defendant submitted that ***Madden*** (supra) was applicable in the circumstances. He contended that the First Defendant continued to drive having seen the wood, flashed his lights and sound his horn. His duty, according to counsel, was to drive carefully and not expose passengers to unusual risk.

34. It was therefore submitted on behalf of the Second Co-Defendant that liability should be apportioned 60/30 with the First Defendant assuming 60% responsibility. Alternatively, both parties should be equally liable.

35. The case if Madden in the court's view is distinguishable from the present case. The conveyance of the passenger in Madden was conducted in an unusual manner. The fulcrum of the decision appears to have turned on its own peculiar facts. Certainly, the duty of a driver must extend to the carriage of passengers in a manner which is safe and in keeping with the usual use of the vehicle. To that end the transport of a passenger in the tray of the vehicle was clearly a breach of that duty and the driver's responsibility in that regard ought properly to have been higher than that which it would have been had the conveyance of the passenger been proper. This is a far cry from the case here. There is no evidence that the deceased was being conveyed in a manner other than that which is usual in conveying passengers in a maxi taxi. The court must be careful not to import and apply principles that are wholly inappropriate. In the circumstances the court does not accept the submissions of the Second Co-Defendant in that regard.

Law

35. A finding of negligence requires proof of (1) a duty of care to the deceased (2) breach of that duty (3) damage to the deceased attributable to the breach of the duty by the defendant(s): ***Charlesworth & Percy on Negligence Seventh Edition. Chapter 1, paragraph 1-19***. There must be a casual connection between the defendant's conduct and the damage. Further that the kind of damage to the deceased is not so unforeseeable as to be too remote: ***Clerk & Lindsell on Torts Nineteenth Edition. Chapter 8, paragraph 8-04***.

36. In these proceedings both the First and Second Defendants owed a duty to the deceased in different capacities.

37. The First Defendant owed a duty of care to all passengers of the maxi to take reasonable care for their safety during the journey. This is the driver's duty as to carriage. The driver is however not an **insurer** of the safety of the passengers: ***Charlesworth & Percy on Negligence (supra) Chapter 10, paragraph 10-55***.

38. The Second Defendant owed a duty of care to fellow road users. The duty is to take reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adjoining the road. The standard of care which road-users must exercise is that of the reasonable road-user. The reasonable driver is not entitled to assume that other road-users will exercise the appropriate degree of care, and if their conduct is within the realm of foreseeability they will be liable for injury: ***Common Law Series: The Law of Tort. Chapter 13, paragraphs 13.53***.

39. According to the ***Motor Vehicle and Road Traffic Regulations*** Part VII, Section 38(5)(2)

> *When meeting other vehicles he shall keep as close as possible to the left or near side of the road.*

40. Further, a driver ought not to carry a load in such a manner as to obstruct, endanger or interfere with traffic: see ***Motor Vehicle and Road Traffic Regulations*** Part VII, Section 38(15). Reasonable care in this context connotes the observation of traffic rules and regulations. Failure to comply with these rules and regulations is a matter to be taken into account in deciding whether there was negligence: ***Charlesworth & Percy on Negligence (supra) Chapter 10, paragraph 10-127***.

41. Contribution between tortfeasors is provided for in section 26 of the ***Supreme Court of Judicature Act Chap 4:01***. Thus, any person liable to another may claim contribution from any other person liable in respect of the same damage. The amount of the contribution recoverable from that person shall be such as may be found by the Court to

be just and equitable **having regard to the extent of that person's responsibility** for the damage.

Findings

42. The evidence of the Second Defendant was that while transporting the wood, it had **somehow** gotten loose and ended up protruding out of the right side of the van. In the court's view, this is prima facie evidence of a breach of duty by the Second Defendant. He ought not to carry a load in a manner as to endanger fellow road users. The fact of the wood becoming loose, in the absence of **any** explanation, speaks for itself. It is evidence that the wood was not secured in a way to avoid danger to road users. The death of the deceased was as a result of the breach of the duty by the Second Defendant. In relation to the submission by Attorney for the First Defendant that the Second Defendant was not telling the truth because he refused to answer whether the wood was the cause of the accident this court does agree with that submission. It was apparent to the court that the Second Defendant appeared hesitant and downright fearful of answering the question. This is understandable in the context of the issue which the court was enjoined to decide, that is the very issue of liability for the accident. It therefore was not within the purview of the Second Defendant to answer the question in the manner posed. The court also considers that his reaction is a typical human reaction in the circumstances and does not believe that his intention was to lie, as he admitted that the wood came loose.

43. However, having regard to the clear evidence in the case and the admissions that were made by the Second Defendant in cross-examination, the court finds that the Second Defendant was negligent in:

    a. Driving in such a manner and/or in such a manner with the projecting wood that could not avoid the said collision;
    b. Failing to stop and/or slow down and/or to properly secure the said projecting wood within the area of the tray;

c. Driving in such a cause and/or in such a manner that the projecting wood went over on the tray side of the road;
d. Driving without due care and attention;
e. Improperly securing the wood in the tray;
f. Failing to warn other road users and in particular the First Defendant as the presence of the protruding piece of wood;
g. Failing to heed and/or observe the awareness of the First Defendant.

44. However, the court must consider the issue of contribution to the death of the deceased by the First Defendant.

45. The evidence of the First Defendant was that (1) he observed that the van had a piece of board material protruding from its tray across the road. (2) he sounded his horn to get the attention of the driver of the van (3) as the van approached his maxi, he applied brakes.

46. The Second Defendant testified that the maxi driver was speeding, however the evidence proffered does not lend to the conclusion that he was or that he was not driving at an excessive speed. Although it may be argued that the fact that the maxi skidded indicated that the maxi was going at a considerable speed, this conclusion, in the absence of any evidence, would be speculative. In as much as the road was dry, many other circumstances could have played a part in the maxi skidding forward other than speed: see ***Charlesworth & Percy on Negligence (supra) Chapter 10, paragraph 10-154***. A sudden application of brakes, for instance, may cause the vehicle to skid without excessive speed. It is the sudden stopping in this scenario which would in itself contribute towards the skidding. The court does not believe that speed is the only factor that could be attributed to the skid and will not consider this as proof of the speed of the First Defendant without more.

47. Counsel for the Second Defendant argued that the First Defendant ought to have stopped. However, there is no evidence, and the court would not speculate that had the First Defendant stopped, the accident would not have occurred as it did. It may be that the

extent of the damage may not have been as grave; it may be that it may have been. What the evidence shows is that both drivers continued on.

48. The Second Defendant says that he saw the First Defendant flashing the lights of the maxi. The First Defendant testified that he sounded his horn. There is a disparity in the evidence of what alert was used by the First Defendant, but there appears to be no question that an alert was in fact used. The First Defendant therefore attempted to alert the Second Defendant of the protruding wood. While it was argued that the fact that the First Defendant saw the wood and alerted the Second Defendant meant that he had time to observe the danger, there is no evidence of the time frame in which this occurred. In a situation of impending danger, persons often assess situations quickly and respond with the same urgency. Thus, the fact that he responded to the situation in the manner that he did is no indication of the length of time he would have observed the oncoming danger.

49. Although a driver is required to pull to the left or near the side of the road when meeting other vehicles, there was no evidence as to the width of the road to determine whether this was at all possible.

50. In the circumstances of an emergency, what is necessary is that the conduct should not have been unreasonable, taking the exigencies of the situation into account. Even where the situation allows for time to reflect, but still presents a dilemma, the court may make allowances. Any judgment on the reasonableness of a person's reaction should take into account his limitations: ***Clerk & Lindsell on Torts (supra) Chapter 8, paragraph 8-126***.

51. The evidence does not indicate whether the First Defendant pulled to the left or near the side of the road, (regulation 38(5)(2)). At the same time there is also no evidence of the width of the road and whether this was at all possible. The court cannot say that the First Defendant could have veered left, nor can the court say that he could not have veered left. The evidence does not allow for that conclusion. What the evidence indicates is that the First Defendant slowed down, and alerted the Second Defendant of danger. In these

circumstances and on the evidence the court is of the view that the First Defendant did all that was necessary to avoid danger. The First Defendant testified that all that was left for him to do was to duck to avoid being hit himself. This indicates to the court that the oncoming danger was more immediate than Counsel for the Second Defendant would have the court believe.

52. However, the court believes that had the First Defendant been keeping a proper look out on the road, which he is obliged to do, he would have seen the protruding wood. If the evidence of the First Defendant is to be believed it would lead the court to the conclusion that the protrusion was more than just a little over the edge of the van, that is, it would have been apparent at least from a distance. A prudent driver would, if he had been keeping a proper look out, have seen the approaching van with the wood protruding substantially out of the van. So while the First Defendant slowing down or stopping at the time he **did** see the danger may not have affected the outcome, it is more probable than not that had he seen the protrusion sooner, the damage or extent of damage may have been avoided. In the circumstances of the case therefore, and considering what the First Defendant did do, the court finds that the First Defendant contributed to the damage suffered by the deceased.

53. The court therefore finds that the First Defendant was negligent in that he:

    a. Failed to keep any proper look out and therefore failed to see the Second Defendant's motor vehicle and the piece of wood in sufficient time so as to avoid the said collision.

54. Both the First and the Second Defendant therefore contributed to the damage sustained by the deceased. The court finds that in the circumstances the First Defendant was 20% liable for the damage sustained while the Second Defendant was 80% liable for the damage sustained by the deceased.

55. As a consequence the order of the court is as follows:

1. Judgment for the Claimant against the First and Second Defendants for negligence apportioned in respect of 20% contribution on the part of the First Defendant and 80% contribution on the part of the Second Defendant.

2. It is declared that the First Co-Defendant is liable to satisfy the Judgment against the First Defendant.

3. It is declared that the Second Co-Defendant is liable to satisfy the Judgment against the Second Defendant.

4. Should the Claimant recover from either Defendant an amount of damages in excess of his contribution, such Defendant shall be at liberty to enter judgment against the other Defendant for the total sum so recovered from him by the Claimant in excess of the amount of such contribution with costs of entering such judgment.

IT IS ALSO ORDERED BY CONSENT:

5. The Defendants are to pay to the Claimant in proportion set out above, damages for negligence in respect of the death of Steve Mitchell ('the deceased') for the benefit of his dependants under the **Compensation for Injuries Act Chap 8:05** and for the benefit of his estate under the **Supreme Court of Judicature Act Chap 4:01**, agreed in the sum of $325,000.00 inclusive of interest.

6. The Defendants are to pay to the Claimant the costs of the claim agreed in the sum of $50,000.00.

Dated this 27th day of January, 2014.

Ricky Rahim
Judge