

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2015-01128

BETWEEN

JASON BALBOSA

Claimant

AND

TELECOMMUNICATIONS SERVICES OF TRINIDAD AND TOBAGO LIMITED

Defendant

Before the Honourable Mr. Justice Frank Seepersad

1. Mr. M. George and Ms. D. Allan for the Claimant
2. Mr. K. Mc Quilkin and Ms. Balkaran for the Defendant

Date of Delivery: September 19, 2017

DECISION

1. Before the Court is the Claimant's claim for the following:
 - a. General damages for personal injuries, consequential loss and expenses during the course of employment occasioned by the Defendant's defective vehicle registration number TBP 1736 which the Defendant approved and certified as fit for purpose; and caused by the negligence and/or breach of the Defendant Employer's duty;
 - b. Future Economic Loss;
 - c. Loss of amenities;
 - d. Loss of opportunity;
 - e. Damages for negligence and/or personal injuries and/or breach of statutory duty under the Occupational Safety and Health Act Chap. 88:08;
 - f. Damages for negligence and/or personal injuries and/or breach of statutory duty under the Workmen's Compensation Act Chap.88:05;
 - g. Damages for negligence and/or personal injuries and/or breach of contract under the Junior Staff Collective Agreement 2003-2007 between the Defendant and the Communication Workers' Union;
 - h. Compensation;
 - i. Aggravated and/or exemplary damages;
 - j. Interest thereon pursuant to s.25 of the Supreme Court of Judicature Act;
 - k. Costs and;
 - l. Such further and/or other relief as the Court may see fit.

Summary of the Claimant's case

2. The Claimant was a Driver of a motor vehicle bearing registration number TBP 1736 on the 14th August 2013, when he collided with a median in the far right lane.
3. At the material time he was employed by the Defendant as a Senior Lines & Instruments Technician. When the accident occurred, the Claimant was driving a vehicle that belonged to the Defendant.
4. The Claimant's case is that the collision occurred as a result of a defect which existed in the said vehicle, which defect had been repeatedly reported to the employer, but was ultimately not remedied. For the purposes of this action the relevant complaint was in relation to motor vehicle registration number TBP 1736.
5. The Claimant claimed to have previously complained about motor vehicle registration number TBP 1736 as well as other vehicles which formed part of the Defendant's fleet. The defects outlined by him included a lack of power, exhaust leaks, gears not engaging, slipping of clutch operation, defective braking systems and engine knocking.
6. The Defendant denied liability and alleged that the accident which occurred was as a result of the Claimant's negligent management of the vehicle.
7. At paragraph 20 of his Amended Statement of Case, the Claimant advanced the particulars of the Defendant's failure in providing him with safe conditions of work. He alleged that the Defendant was negligent as follows:
 - a. Failing to take any or any reasonable to see that the Claimant would be reasonably safe in using motor vehicle registration number TBP 1736;
 - b. Failing to take any or any reasonable care to prevent injury or damage to the Claimant from unusual dangers of using motor vehicle registration number TBP 1736 of which they knew or ought to have known;
 - c. Causing or permitting the said motor vehicle registration number TBP 1736 to be

and/or to become and/or to remain in a defective and dangerous condition and a danger and a trap to persons lawfully using it;

- d. Failing to take any or any reasonable measures to render the said motor vehicle registration number TBP 1736 safe to use when they knew or ought to have known that it was in a defective and dangerous condition was liable to cause injury;
- e. Failing to provide an accurate evaluation or assessment or certification for the condition or fitness for purpose of motor vehicle registration number TBP 1736;
- f. Failing to take any or any adequate measures whether by way of periodic or other examination, inspection, test or otherwise to ensure that the said motor vehicle registration number TBP 1736 was in a reasonably safe condition and was not defective or dangerous and in a condition in which it was likely to cause injury;
- g. Failing to give the Claimant any, or any adequate warning of dangerous condition of the said motor vehicle number TBP 1736;
- h. Failing to provide an adequately safe and functional motor vehicle thereby a safe system of work with adequate safety equipment;
- i. Failing to provide and maintain a safe means of access to and egress from or adequately safe access, transfer and exit route to the aforesaid Work Centres that are safe and without risks to health, and adequate as regards amenities and arrangement for the Claimant's welfare at work;
- j. Failing to provide any or an adequate suitable and safe motor vehicle fleet for the Claimant's use during the course of his employment despite the Claimant having made several complaints of same;
- k. Failing to properly maintain and ensure that the said motor vehicle registration number TBP 1736 was in full working condition;
- l. Failing to service, maintain and/or assess the said motor vehicle registration

number TBP 1736 or the Defendant's motor vehicle fleet on a reasonably regular basis given the particular circumstances of this matter;

- m. Failing to provide and to maintain plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;
- n. Failing to properly train and/or brief and/or inform its agents and/or servants, who manage and/or fix or repair its defective motor vehicles so that they may be fit for purpose and, on the risks, danger and/or probability of danger to end users should these duties not be executed effectively;
- o. Failing to have any or any trained/experienced supervising and/or fleet personnel to certify a motor vehicle's fitness for purpose and to assess and ensure that the Defendant's motor vehicle fleet were free from risks or injury to employees and other end users;
- p. Failing to take reasonable or adequate care to ensure that the Claimant would be reasonably safe in the performance of his duties as an employee;
- q. Failing to regard and/or foresee the risk that injury to an employee may occur because of inattention or misjudgement to wrongly certify a defective motor vehicle as fit for purpose;
- r. Failing to provide medical practitioners with Claimant's medical reports so that further medical assessment might be rendered thus exacerbating the Claimant's injury;
- s. Failing to ensure and/or keep safe Claimant's personnel/personal file and reports and/or records containing information relative to the Claimant's motor vehicle accident, his medical file and Driver's Defect Reports for motor vehicle registration numbers TBK 5141, TBK 5139 and TBP 1736 for the period December 12, 2011 to July 22, 2013.

THE EVIDENCE

The Claimant

8. The Claimant at paragraphs 17-29 of his witness statement outlined the circumstances that unfolded which led to the accident on the 14th August, 2013.
9. In his witness statement the Claimant said that as he descended the flyover at Grand Bazaar, he was diverted by a Police Officer to enter the right lane between Grand Bazaar and the Caroni Bridge. At that time, he felt that the brakes were not working properly so he called Mr. Greenidge and told him that he felt it was unsafe to drive.
10. Notwithstanding his reservation, he went on to state at paragraph 24 of his witness statement that he proceeded to comply with the directive given to him to take the vehicle to the Henry Street Work Centre. The Claimant then spoke of a second set of road works in the vicinity between Caroni and the Guayamere River. In his Reply however only one set of road works, in the vicinity between Grand Bazaar and the Caroni Bridge, was mentioned.
11. In his witness statement he also said that he saw a flashing arrow ahead which signalled the traffic to move from the right “fast” lane to the left lane. He stated that as he attempted to change lanes, the brakes did not hold and as he passed the police post he still could not pull over to the left due to the presence of other vehicles on that lane. The brakes were still not functioning properly so he applied hand brakes and pulled to the right shoulder and eventually collided with the steel median.
12. The Claimant exhibited a prior statement with respect to the accident to his witness statement which was marked “JB9”. The Court noted that several averments which were made in the witness statement were not included in the exhibited statement. In the Court’s view, the exhibited statement was a summary of the incident which occurred. The information as to the presence of police officers and road works cannot be viewed as critical information and the exclusion of same in the previous statement did not excite suspicion in the Court’s mind nor was the Court inclined to hold that the Claimant was an untruthful or unreliable witness.

13. The version of the events as outlined in the exhibited statement was not necessarily inconsistent with the version as outlined in the witness statement. The witness statement was however far more detailed. At the end of the day, the gist of the Claimant's case was that the brakes of the vehicle failed and that this led him to pull to the right and onto the shoulder. The exhibited statement also did not contain any averment to effect that the Claimant told Mr. Greenidge that he thought it was unsafe to drive or that he wanted to find a safe spot and pull aside.
14. It was pointed out that in the said statement the Claimant stated that as he continued driving he had to apply brakes and shortly afterward, in the vicinity of the Ministry of Works, the brakes did not hold as vehicles ahead of him were reducing their speed and so he pulled the vehicle to the right and collided with the said median.
15. The Court did not form the view that there were material inconsistencies between the witness statement and the exhibited statement nor did the Court conclude that it was unsafe to rely on the Claimant's evidence. Having seen and heard the Claimant, the Court was impressed by him and felt that he was a credible and convincing witness who engendered in the Court the unshakable feeling that he was a witness of truth. The Court also noted that he made no contradictory statements on oath on any critical issue so as to raise the suspicion of the Court. The Court accepted the version of events as outlined by the Claimant and found that same appeared to be plausible and that the decision to pull to the right was reasonable, given the circumstances.
16. The Defendant also submitted that the Claimant's evidence as outlined in the Witness Statement contradicted what was recorded in the Accident Report which was exhibited as "JB7" to his witness statement.

The Accident Report

17. The report contained the following statement:

"Dr. Maccon said that Mr. Balbosa cannot remember anything and he was transferred to Mt. Hope".

18. The Claimant was examined shortly after the accident on the 14th August, 2014. The Court placed no reliance on this report and noted that according to the Claimant's evidence he momentarily lost consciousness when the accident occurred and the information contained in the report was premised upon the statement allegedly made by 'Dr. Maccon' who was not called as a witness. Given the fact that the Claimant was examined shortly after the accident, it is possible that the shock and trauma of the accident could have affected his recall. Such an inference is equal in weight to the inference, that he genuinely had no recollection of the accident. Given that both inferences are of equal weight, the first inference being the one that is more favourable to the Claimant, it is the inference which the Court is minded to draw.
19. The differences between the witness statement and the exhibited statement were minor. They did not touch upon fundamental issues and did not impact on the Claimant's credibility. Accordingly the Court on a balance of probabilities accepted the Claimant's version of the events.

Mr. Ernest Peters

20. This witness accepted that he could not verify whether repairs to TBP 1736 were undertaken or whether Premier Motors actually tested or verified that the braking system was working properly on the 14th or 15th August, 2013. He accepted that there was no system in place to verify if work was done to any vehicle sent for repair.
21. Before the Court was a report from Premier Motors which was annexed as "EP1" to this witness's witness statement. In this report there was an expressed opinion that the brakes of TBP 1736 were functional. However, there was no evidence as to the manner in which the brakes were checked and the person who prepared the report one Mr. Duncan, did not testify.
22. There was also no evidence before the Court regarding Mr. Duncan's qualifications and therefore the Court could not hold that he was an expert. The Court noted that on the face of the said report there was no endorsement that the company was required to test the braking system as there was no tick next to the category 'Braking System'. The document also had the endorsement 'checked by' but no clarity was given as to whether it was 'checked in by'

or 'checked out by'. There was no information as to the processes that were adopted, or of any brake testing or examination and no indication as to how the braking system was checked so as to support the endorsement that the brakes were in good working order after the accident. In addition, the report was not stamped nor did it have a "Work Order Number" assigned to it.

23. The Manager of Premium Motors by the Court's direction came to testify in respect of the work done. However, he provided no receipts or documentation relative to examination or certification that the brakes 'were in good working order' on the 15th August, 2013. The Manager indicated that 'Mr. Duncan' was an employee but was no longer working for the company and no information as to Mr. Duncan's qualifications was given.

24. The report from Premium Motors annexed as 'EP1' also reflected an endorsement "Foot Brakes and Hand Brakes is working good" but there was also a check by the box "Fault detected". This anomaly was not explained. No evidence was adduced as to how the vehicle was taken to Premium Motors the day after the accident. Given that the vehicle had to be wrecked from the accident site and a crane had to be used to stabilise the vehicle, the Court had difficulty in understanding how the inspection and examination by Premium Motors was undertaken. The Court also noted that the Manager of Premium Motors provided no evidence or any record that the vehicle was actually examined by his company nor was any invoice or supporting records provided. In the circumstances, the Court disregarded this report in its entirety and dismissed the Defendant's contention that the report established that the vehicle had brakes which were in a good working condition.

The Law on Negligence

28. In order for the Claimant to succeed in a claim of negligence against the Defendant, the Claimant must prove that the Defendant owed him a duty of care and prove causation on a balance of probabilities. He must establish a degree of causal connection between his damage and the Defendant's conduct.

29. Alderson B in **Blyth v. Birmingham Waterworks Co (1856) 11 Exch 81** described the term

‘negligence’ as “*the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable/man would not do*”.

30. At common law an employer has a non-delegable duty to take reasonable care for the safety of his employee in all circumstances and extends to providing him with a safe system of work.

31. Prescribing a safe system of work must also be accompanied by taking reasonable steps such as, for example, inspection and supervision to ensure that its systems are followed **McDermid v. Nash Dredging & Reclamation Co Ltd [1987] AC 906.**

32. Even though an employer may have a safe systems, policies and provide training, they may still be found liable if those measures are not properly implemented, supervised or enforced¹.

34. The observations of Lord Wright in the English case **Lochgelly Iron Coat Co. Ltd v McMullan [1934] A.C. 1** are instructive:

“... in strict legal analysis, “negligence” means more than heedless or careless conduct whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.”

35. The Court is guided by the learning in **Clerk & Lindsell on Torts 21st Edition at Para 8-04** which sets out the elements that a Claimant must prove to establish a Defendant’s liability for negligence and these were listed as follows:

- (1) The existence of a duty of care situation, i.e. one in which the law attached liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question on the class of person to which the claimant belongs by the class of person to which the defendant belongs is

¹ McGregor v. A.A.H. Pharmaceuticals 1996 S.L.T. 1161

actionable;

- (2) Breach of the duty of care by the Defendant, i.e. that he failed to measure up the standard set by law;
- (3) A causal connection between the Defendant's careless conduct and the damage;
- (4) That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

37. In the case of **Wagon Mound (No 2) Overseas Tankship v Miller Steamship [1966] 2 ALL ER**, two of the plaintiff's vessels were undergoing repairs in Sydney Harbour. Due to the carelessness of the defendant's engineers, a large amount of furnace oil overflowed onto the surface of the water and drifted to the wharf, where it subsequently caught fire causing extensive damage to the plaintiffs' vessel. The Privy Council held that there would have been present to the mind of a reasonable man in the position of the engineer of the defendant that there was a real risk of fire, through a continuing discharge of furnace oil on the water. His knowledge that oil so spread was difficult to ignite and that that would occur only very exceptionally, would not, in the circumstances of this discharge, have caused a reasonable man to think it justifiable to neglect to take steps to eliminate the risk. Accordingly negligence, for which the defendant was vicariously responsible, was established.

The principle of negligence was stated at 704 to 718 as follows:

“ the general principle that any person must be regarded as negligent if he does not take steps to eliminate risk which he knows or ought to know is a risk and not a mere possibility which would never influence the mind of a reasonable man. ”

38. In **Smith v Baker & Sons 1891 AC 325** per Lord Hershell cited that the Employer has a duty to take reasonable care “so to carry on his operations as to not subject those employed by him to unnecessary risk”

39. **Harris v Bright Asphalt Contractors (1953) 1QB 617Slade J** offers guidance and explains that the duty of the employer is:

“...not to subject the employee to any risk which the employer can reasonably foresee or to put it slightly lower not to subject the employee to any risk that the employer can reasonably foresee and against which he can guard by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved”.

40. In **Charlesworth and Percy on Negligence, 12th Edition Page 812** the employer’s duty as opined by Swanwick J in **Stokes v Guest, Keen and Nettleford (Bolts and Nuts) Ltd. 6 [1968] 1 WLR 1776** was cited as follows:

“[T]he overall test is still the conduct of the reasonable and prudent employer, taking positive thought the safety of his workers in light of what he knows or ought to know.....where he has in fact greater than average knowledge of the risks, he may be thereby obliged to make a more than average or standard precautions.... He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does, and he must balance against this the probably effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve.

If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.”

Application of the Law and the Facts

41. The Court accepted on a balance of probabilities that based on the evidence adduced by the Claimant that the brakes failed and were defective while he was driving the vehicle. The Court found as a fact that the Claimant made previous complaints about this vehicle, that it was taken in for repairs and that he was instructed to collect the vehicle from the work centre on August 14, 2013. The Court noted that no one was called from the work centre to give evidence as to whether the issues previously complained of in relation to the said vehicle as outlined in the defect form annexed as “JB4” to the Claimant’s witness statement were ever addressed. The

Defendant owed the Claimant a duty of care to provide him with a safe system of work and more particularly with a vehicle that was in good working condition. The Defendant failed to do so and Mr. Greenidge who was the Claimant's Supervisor, instructed him to take the vehicle to Henry Street despite being informed that it was defective. This directive was ill advised and exposed the Claimant to risk. The Defendant should have implemented an effective system so as to ensure that vehicles which had to be repaired were properly repaired and that vehicles were in good working condition before the Claimant was asked to drive.

42. The Claimant was exposed to foreseeable risk when he was instructed by Mr. Greenidge to continue driving the vehicle to Henry Street and no proper regard was had for the Claimant's safety. As a result the Claimant in the heat of the moment had to pull off of the road to the right and through no negligence in relation to his control or the way in which he drove the vehicle, the collision with the median occurred.

43. There is dire need for all employers in this Republic to methodically address matters of safety so as to ensure that employees are afforded a safe place of work. For far too long, safety of buildings, plant and equipment have not been adequately addressed and a proactive approach has to be taken. Productivity cannot be achieved in a vacuum and a suitable, safe and comfortable work environment is integral if workers are to optimize their time and skill set.

44. In the circumstances the Court finds that the Defendant is liable for the damages and loss suffered by the Claimant as a result of the accident on August 14, 2013. Accordingly, there shall be judgment in favour of the Claimant against the Defendant. The quantum of damages and costs is to be assessed and determined before a Master in Chambers.

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FRANK SEEPERSAD

JUDGE