THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2015-02046

BETWEEN

NATALIE CHIN WING

Claimant

AND

MARITIME LIFE INSURANCE COMPANY LIMITED

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances

1. Mr Dipnarine Rampersad for the Claimant
2. Mr Javed O. Mohammed and Mr Roger-Mark Kawalsingh for the Defendant

Date of Delivery:27th September, 2017

DECISION

1. Before the Court for its determination was the issue as to whether or not the Claimant should elect to proceed with her claim on the basis of negligence and/or breach of statutory duty or place her reliance on the doctrine of *res ipsa loquitur*.

Procedural History

2. At the Pre-Trial Review on the 24th May, 2017 the Defendant made an oral application to the Court to call upon the Claimant to elect whether she was proceeding with her case premised on the pleaded particulars of negligence and a breach of statutory duty or whether she would rely upon the maxim of *res ipsa loquitur*.

3. The Court adjourned the matter to enable the Claimant to consider the issue and on the 6th July 2017, the Claimant indicated that she was of the view that the need for an election did not arise. The Court proceeded to issue directions for submissions and delivered an oral decision on the 27th September, 2017 which called upon the Claimants to elect within 7 days whether she was going to proceed with her case on the basis of negligence and breach of statutory duty or rely on the doctrine of *res ipsa loquitur*. The Claimant was also ordered to pay to the Defendant the costs associated with the determination of the said oral application to be assessed by the Court in default of agreement.

The following is the rationale adopted by the Court in its issuing of the order as aforesaid:

4. The Court considered the learning on the maxim of *res ipsa loquitur* as outlined in Halsbury's Laws of England (4th issue) Vol. 33 at paragraph 664 and the dicta of Megaw LJ in **Lloyde v. West Midlands Gas Board (1971) 2 AER 1240 at pg. 1246** and surmised that for the doctrine to apply there must be a simultaneous concurrence of two factors, namely:
    a. The precise act or omission which set in train the events leading to the accident must be unknown; and

b. The evidence available must be such as to raise a prima facie case that it is more likely than not that the effective cause of the accident was some act or omission of the Defendant or of someone for whom the Defendant was responsible, which act or omission constitutes a failure to take proper care for the Claimant's safety.

5. Having regard to the law, the Court noted that the pleadings outlined very specific particulars of negligence and this position appeared to conflict with the reliance on the Res doctrine as both positions are mutually inconsistent. The Claimant pellucidly outlined the circumstances that set in train the events which she alleged led to the accident. Consequently if the evidence as contained in the Claimant's witness statement is adduced at the trial in support of the pleaded particulars of negligence, such evidence would preclude any reliance on the maxim of *res ipsa loquitur*.

6. The Court also considered the effect of **CA 98 of 2011 Adriana Ralph and Lee Ralph v. Weathershield Systems Caribbean Limited and PETROTRIN**. The Attorneys at Law for the Claimant suggested that the Court of Appeal decision in Adriana Ralph permits and enables a Claimant to lead divergent evidence and therefore the Claimant is not required to elect between the two positions i.e. negligence or reliance on the maxim. The Court found that this was not an accurate or a proper interpretation of the said decision.

7. It appears that the said decision focused on a point of pleading and the issue of an election as to the evidence that would be adduced, was not addressed. The Court of Appeal rejected the contention that the Claimants' indication at trial that they were going to tender a receipt and adduce expert evidence, amounted to an unequivocal election. The issue as to whether divergent facts could be pleaded was also central and the Court of Appeal stated that a Claimant can plead alternative or divergent facts. However the issue as to whether divergent evidence could be led at trial was not addressed and the Court of Appeal did not sanction the leading of evidence in support of two divergent pleaded positions which are mutually inconsistent.

8. On the face of the instant pleadings there were two mutually inconsistent set of pleaded facts. This matter was not one where the alternative causes of action can be borne out by

the same set of facts. In the instant case, multiple causes of action are pleaded, that is to say, particular breaches of the common law duty of care owed to the Claimant and/or breaches of statutory duty owed to the Claimant and, in the alternative, that the cause of the accident is unknown.

9. The Defendant submitted that it would be left in a quandary as to the case that it is required to meet at the trial and this prejudices its ability to properly prepare for trial. A Defendant faced with an action where there is reliance on particulars of negligence and particulars of breaches of the statutory duty can test the Claimant's evidence on the pleaded particulars but the burden of proof rests solely with the Claimant to prove her case on a balance of probabilities and establish that due to negligence and/or breaches of statutory duty, she suffered damage and loss. The position is different when there is reliance on the Res maxim.

10. When *res ipsa loquitur* is raised the Claimant is only required to lead the evidence so as to raise a prima facie case and lay the evidential foundation that whilst she does not know the precise cause of the accident, by reason of the circumstances of her particular case, she would not have become injured had it not been for the negligence of the Defendant. In such a case, where the Claimant successfully meets the threshold of raising a prima facie case, the evidential burden of proof shifts to the Defendant to negate the inference and prove on a balance of probabilities that it was not his act or omission that resulted in the injuries sustained by the Claimant.

11. The Claimant filed a detailed witness statement in which she outlined the reasons for her fall and it must be presumed that she would present herself at trial and that her witness statement would be adduced into evidence. It is therefore not a situation where she should be permitted to say "it is for these reasons I fell" and also say "I don't know why I fell".

12. The CPR requires that witness statements be filed prior to the trial and this enables the other party to assess how it should prepare to cross examine the particular witness and forces litigants and their lawyers to critically consider their respective cases. Where

however the Defendant does not know what facts the Claimant intends to corroborate with the evidence it proposes to lead, it cannot properly prepare to cross examine the witnesses.

13. The Court of Appeal in **Adriana Ralph (supra)** stated that inconsistent facts may be pleaded provided that the requirements as set out by Patten J in **Clarke v. Marlborough Fine Art Ltd. (Ch D) (2002) 1 WLR 1731** are met. In that case, Patten J stated at paragraph 30:

> *"If one of the consequences of CPR Pt. 22 is to exclude the possibility of pleading inconsistent factual alternatives then it will have achieved far more than the prohibition of dishonest or opportunistic claims. It will prevent even Claimants in the position of an executor or liquidator from advancing alternative claims based on incomplete but plausible evidence in circumstances where they are not able to choose decisively between the rival possibilities without access to the trial processes of disclosure and cross-examination. A Defendant to an honest claim will be able to compel the Claimant either to choose between seemingly viable alternatives or to abandon the claim altogether. The former will require the Claimant make a judgment on the basis of incomplete information and in relation to witnesses to whom he may not have ready access and will mean that in many cases the alternative claim will resurface at trial compelling the Claimant to make a late application to amend with all the obvious difficulties which that will entail. I do not believe that this is what CPR Pt. 22 was intended to achieve. Nor do I believe that it is what the statement of truth requires. If the alternative set of facts is clearly pleaded as such then the Claimant is not necessarily stating that he believes both sets of facts are true. In the present case if Parts E1 a and E1 b are properly expressed as alternatives leading to an allegation of undue influence then what the Claimant is affirming is honest belief that on the basis of either one set of facts or the other Bacon was the subject to undue influence in his dealings with the Defendants. It is really matter of drafting but unless it can be said that one of the alternatives is unsupported by any evidence and is therefore pure speculation or invention on the Claimant's part he is entitled in my judgment to sign a statement of truth in these circumstances. I reach this conclusion not without some hesitation*

and those responsible for reviewing the operation of the Civil Procedure Rules should take the earliest opportunity of reconsidering the provisions of Part 22 in order to provide some proper and clearer guidance in relation to alternative pleas".

14. While inconsistent facts may be pleaded in accordance with the aforesaid dicta, the Court cannot sanction any attempt by a Claimant to simultaneously lead evidence in support of mutually inconsistent positions and a balancing exercise has to be undertaken so as to obviate any prejudice to a Defendant.

15. In the instant matter the Claimant pleaded 18 particulars of negligence and breaches which she attributed to the Defendant, this aspect of her pleading is inherently inconsistent with her reliance on the maxim of *res ipsa loquitur* and the proof of one automatically precludes the other. Having filed a witness statement the Claimant must have finalized in her mind the facts upon which she intends to rely upon at the trial and she should not be permitted to raise two divergent set of facts before the Court.

16. The Court therefore found that it would be prejudicial and unfair if the Defendant was forced to enter the trial with uncertainty as to the case to be met. At the stage of a Pre-Trial Review the parties know the evidence, as well as the witnesses who should be available at the trial and it is therefore possible to determine which of the two mutually inconsistent pleaded set of facts is the truth and which was merely speculative. Accordingly, a decision ought to be taken as to the premise upon which the case proceeds. It is for the aforesaid reasons that the Court issued the order.

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FRANK SEEPERSAD

JUDGE