THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2017-00103

BETWEEN

DARLINGTON FRANCOIS

Claimant

AND

WELL SERVICE PETROLEUM COMPANY LIMITED

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances

1. Mr Roopnarine instructed by Ms Balgobin for the Claimant.
2. Ms Caesar for the Defendant.

Date of Delivery: 28th February, 2018.

JUDGMENT

(Oral decision reduced into writing)

Overview

1. Before the Court for its determination is the Amended Claim Form and Amended Statement of Case whereby the Claimant alleges that as a result of the negligence and/or nuisance and/or breach of contract of employment, he suffered personal injuries, loss and damages. He is seeking compensation by this action.

2. This trial proceeded on the issue of liability only and the Court is tasked with the responsibility of determining whether or not the Defendant should be held liable for the injuries sustained by the Claimant which said injury occurred on or about 4th May, 2015.

The Evidence

3. The Claimant at the material time was employed with the Defendant as a derrick man and was assigned to work on Rig No. 53. The Claimant's evidence was that on the morning of the incident, he was present on the site and attended the toolbox talk which was held and proceeded to commence the duties with which he was tasked to perform, namely the securing of doors on the piece of equipment, a portion of which was being lowered.

4. The Claimant's case is that having undertaken his duty and while still on the floor of the rig, he heard a loud sound and the top section of the mast started to topple over. As a result, the Claimant said that he and other crew members scrambled for their safety and in his attempt to run and exit the area so as to avoid the emerging danger which was unfolding, he fell and sustained the injuries outlined in his pleaded case.

5. The Defendant contends that the Claimant exposed himself to an unnecessary risk by firstly not ensuring that the safety doors of the crown section of the mast were secured and that he failed to adhere to the relevant safety regulations and procedures. The Defendant avers that the Claimant's fall was as a result of his own negligence as he failed to look where he was running and contributed to his own injuries.

6. On the morning of the trial the Claimant sought to adduce into evidence a photograph of the rig which was taken after the incident occurred. The photograph showed that the mast

had toppled. This photograph was allegedly taken by Mr Anthony Ruiz who was one of the witnesses called. The Court having looked at the photograph admitted same into evidence. There was no dispute that the photograph did depict the rig after the incident occurred and the witnesses all subsequently identified the photograph as being a true representation of the rig. The Court found that the said photograph did help it to visualise and put into context the size of the mast which fell on the day in question.

Issues

7. The issues to be resolved by the Court are:
   i. Whether the incident which occurred on the 4th May, 2015 was as a result of any negligence by the Defendant; and/or
   ii. Whether the doctrine of *res ipsa loquitur* is applicable in the circumstances.

The Law

8. The Court considered the law on negligence in respect of an employer in relation to an employee which may be two-fold. An employer may be liable for the breach of a personal duty which he owes to the employee and he may also be vicariously liable for a breach by one employee of the duty of care he owes to a fellow employee. The law is settled that the employer has a duty to ensure that there is a safe system of work, safe and suitable equipment and that processes are put in place to ensure that employees are working in a safe environment when engaging in assigned tasks.

Res ipsa loquitur

9. The applicability of the doctrine of *res ipsa loquitur* is one which is applied only where the cause of the incident is unknown. The learned authors of **Charlesworth & Percy on Negligence 13th Edition** at paras 5-16, 5-18, 5-36 and 5-44 summarise the tenets of the doctrine in the following terms:

> "The question whether to apply the maxim has usually arisen where the Claimant is able to prove the happening of an accident but little else. He might well be unable to prove the precise act or omission of the Defendant which caused an accident to occur, but if on the evidence it is more likely than not that its effective cause was some act or omission of the Defendant, which would constitute a failure to take

reasonable care for his safety, then in the absence of some plausible explanation consistent with an absence of negligence, the claim would succeed.

A prima facie case. It has been said that "a prima facie case" should be the preferred terminology. It means essentially a case which calls for some answer from the Defendant and will arise upon proof of: (1) the happening of some unexplained occurrence; (2) which would not have happened in the ordinary course of things without negligence on the part of somebody other than the Claimant; and (3) the circumstances point to the negligence in question being that of the Defendant, rather than that of any other person.

Rebuttal of negligence. When a prima facie case of negligence against the Defendant has been established, it is insufficient for the Defendant merely to say that he had acted carefully, but he can rebut the case by proving that he was not negligent, even though he cannot prove how the accident happened.

Negligence need not be disproved. When *res ipsa loquitur* applies, it is not strictly necessary for the Defendant to disprove negligence. It is sufficient for him to neutralise the effect of the presumption, raised by the *res*. The Court has to judge, after all the evidence has been put before it, whether on balance the facts establish that the Claimant has proved his case, the burden of which remains in the end, as it was at the beginning, on him to discharge. Where the Claimant establishes a prima facie case by relying on the fact of an accident and the Defendant produces no evidence, the inference of negligence is not rebutted. But if evidence is adduced then it has to be evaluated to see if the inference of negligence is still one that should be drawn. If the Defendant casts such doubt upon the Claimant's account that the inference of negligence is regarded as unsafe, then the claim will fail."

10. According to **Halsbury's Laws of England Vol 78 (2010) intituled "Negligence" at para 64**, the inference of negligence may be determined under the doctrine where:

> "[…]a Claimant establishes a prima facie case of negligence where (1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; and (2) on the evidence as it stands at the relevant time 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 is responsible, which act or omission constitutes a failure to take proper care for the Claimant's safety. There must be reasonable evidence of negligence. However, where the thing which causes the accident is shown to be under the management of the Defendant or his employees, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the Defendant, that the accident arose from want of care.

11. The authors went on to say at paragraph 67 that:

> "The harm must be of such a kind that it does not ordinarily happen if proper care is being taken. The doctrine of *res ipsa loquitur* has been applied to things falling from buildings, and to accidents resulting from defective machines, apparatus or vehicles. It has also been applied where motor cars mount the pavement or where aircraft crash on taking off. On the other hand, it was held inapplicable where a fire, having been left by a lodger in his grate, spread from his room and damaged neighbouring rooms. Even though the matter is not one of common experience, where an unexplained accident occurs from a thing under the Defendant's control, and medical or other expert evidence shows that such accidents would not happen if proper care were used, there is at least evidence of negligence for the Court. [emphasis added]

Pleading of res ipsa loquitur

12. There is no express rule that *res ipsa loquitur* must be pleaded but the facts which infer the application of the doctrine must be pleaded. The Court considered the case of **Bennett v Chemical Construction (GB) Limited (1971) 3 All ER 822**. In that case, the plaintiff, a foreman steel erector, was supervising his workmen while they carried a heavy piece of electrical equipment. While the men were moving the piece of equipment, the plaintiff

observed that the piece of equipment was about to topple and rushed to steady it. However, in the process of steadying it, another heavy electrical panel fell in the way and both toppled, causing the plaintiff significant injuries. The plaintiff was not able to show what caused the equipment to fall but the Defendants did not proffer an explanation to rebut the presumption of negligence put forward by the plaintiff. The Court reasoned that:

> "In my view it is not necessary for that doctrine to be pleaded. If the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the Defendants, then it is for the Defendants to explain and show how the accident could have happened without negligence. As I have said, they made no attempt to do that in this case. In my judgment this is really a classic case of res ipsa loquitur. Here one has the panel being moved by the Defendants' men, and it falls. It should not have fallen. The Defendants might, as Edmund Davies LJ said in the course of the argument, if it were so, have called evidence to show that one or more of the men had a sudden stroke or something of that kind, which no one could foresee. But here the panel fell, and I entirely agree with the learned judge that it could not possibly have fallen without some negligence on the part of the Defendants."

Findings

13. In relation to the evidence which was before the Court, the Claimant testified and called one witness, Mr Ruiz. Mr Ruiz filed a witness statement which in large measure was consistent with a prior statement that was given to the company on the 6th May, 2015. Mr Ruiz also filed a witness statement on behalf of the Defendant Company. His initial report given to the company which was prepared on 6th May, 2015 was silent with respect to the manner in which the driller engaged the drum clutch on the day in question. However, before this Court, Mr Ruiz sought to say that it was the operating procedure by the driller in the lowering of the mast that was flawed on the day in question. Mr Ruiz accepted that there was a toolbox talk in the morning and that a risk assessment was conducted. The witness also indicated that he was a driller of some experience but that he was employed as an assistant driller and no information or evidence was put before the Court to assist it in formulating a position as to whether his skills would have been the same skills that the

drillers had. No application was made on either side to treat with Mr Ruiz as an expert and while the Court found that he was a witness who engendered in the Court a feeling that he was truthful, the Court was not prepared to treat with his evidence as that of an expert witness and therefore had very little regard to his opinions as they related to the cause of the incident which occurred.

14. The Claimant also testified. He admitted that he was trained and that there was a toolbox talk that morning and he also prepared a contemporaneous statement given on or about the 6th May. In his contemporaneous statement he did not make express mention of the fact that he would have secured the doors which was a task that he was assigned. He however maintained in his evidence before this Court that he secured the door that he had charge over and that Mr Richards, another worker, secured the other door. The Claimant stated that he heard this loud and unusual noise and then observed that the mast appeared to be toppling over. The parties were ad idem that this piece of equipment was large and extremely heavy. The Claimant said that having seen this incident unfolding, all that he could do was to run for his life and it is in the course of running that he fell.

15. The Defendant also relied on Mr Ruiz's statement on their behalf and on the statement of Mr Deon Richards. Mr Richards explained that the crown of the mast has to be lowered into a "telescope" affixed to the foundation. His evidence was fairly consistent with Mr Ruiz insofar as the witness accepted that while the mast was lowered, something went wrong that caused it to tip over. Mr Richards explained that he secured one door and that the Claimant secured the other. When asked about how many doors there were, there was some conflict as to whether there were two doors or four doors but he said that he could only speak about two doors. He explained that he and the Claimant had to engage in proper communication with each other to ensure that there was an 'all clear' before the lowering of the mast.

16. The Defendant further relied on the evidence of Mr Vialva who was charged with the responsibility of supervising the exercise and he held a senior position at that material time. Mr Vialva in his evidence accepted that something went very wrong on the day in question.

He indicated that in all of his years of working with rigs, such an occurrence never transpired. His further evidence was that the Claimant was responsible for securing doors but could not proffer any reason for why the mast collapsed on that day.

17. The Court noted that the Defendant's contention is that the Claimant failed to secure the safety doors on the crown section of the mast and that that contributed wholly or partially to the occurrence of the incident. The Court found that this assertion was unsustainable for the following reasons. There was no evidence adduced on either side to assist the Court in determining on a balance of probabilities that the cause for the toppling over of the mast was the fact that doors were not properly secured. The evidence led suggested that these doors were secondary safety features and Mr Vialva's evidence in cross examination alluded to the doors being a secondary feature, would not play an integral part in the toppling over of the mast.

18. The Court noted that after this incident occurred there was a revised procedure generated by the company. In that revised procedure it was expressly provided that there would be a double check or verification by a third party as to the securing of the doors. Mr Vialva's evidence was that the process of double checking was in place even before the incident occurred. The evidence however established that no such double checking was done and the Court felt that the policy ought to have been implemented and the process should have been engaged on the morning of the accident so as to verify and be certain that all the safety doors were properly closed before any lowering of the mast. The Defendant Company was charged with the responsibility of ensuring that all of the systems, processes and procedures were safe when this mast was lowered. There was no evidence to suggest that the Claimant did anything that contributed to the incident which occurred. On the evidence, it is more likely than not that the effective course of the toppling of the mast was an unexplained occurrence, which in the ordinary course of things could not have occurred without negligence. There was no evidence to suggest that the negligence was attributable to the Claimant and therefore liability fell at the feet of the Defendant. The Court was not satisfied by the Defendant's evidence and found that it did not rebut the prima facie case of negligence. On the evidence the Court found that the incident must have occurred as a

result of the negligence of someone other than the Claimant over whom the Defendant was responsible, such as the driller or person who was charged with the responsibility of lowering the mast. The Defendant did not adduce any evidence from any person charged with the responsibility to recover the mast and there is also no evidence to suggest that the toppling over of the mast occurred as a result of an Act of God.

19. While not expressly pleaded, the Court has an obligation having regard to the facts of the case, to consider the doctrine *res ipsa loquitur*. It was stated in the case of *Bennett (supra)*, that though not specifically pleaded, the Court can have regard to the doctrine where the facts of the case requires the Court to do so. All of the evidence, inclusive of the evidence adduced by the Defendant, is to the effect that something went awry on the 4th May, 2015. The toppling over of the mast with the size and weight that it carried, was not a usual occurrence and had not occurred before. The incident reports which were generated thereafter indicated that the doors were open when the mast fell over but no evidence was adduced to the effect that the securing of the doors caused the mast to topple over. It may very well be that in the toppling over of the mast, the doors came open. The Court is of the view that with respect to the nature of the act itself, on a balance of probabilities, some operational or systematic failure occurred on that day which caused the mast to topple and that such operating failure must be attributed to the Defendant Company. The Court also rejected categorically, the contention by the Defendant that the Claimant failed to take proper precautions when he was attempting to get away from the area where the mast was toppling over. In fact, the Defendant's witnesses testified that they had to run for their lives. In that circumstance, it is ridiculous to contend that someone escaping from an emerging danger that would threaten one's life, would be cautious and would look at the terrain upon which they were traversing.

20. It is entirely implausible that any person placed in such a predicament would have the presence of mind or could determine in those few moments whether it would be safe to run in whichever direction they chose. This was an incident in which evasive, immediate action had to be undertaken by all of the persons which were in the vicinity of the area where the

mast was toppling over. The Claimant's fall in such a circumstance does not obviate the need for the Defendant to be held responsible for the Claimant's injuries.

21. The Court feels compelled to express its disapproval that a matter such as this one had to be determined at trial especially given the fact that the Defendant earlier accepted that things went awry and that the occurrence was unusual. The Court felt that the Defendant as a diligent employer and having regard to the fact that the Claimant was at work when he sustained the injury ought to have adopted a more conciliatory approach. Employers must understand that their ultimate success is dependent upon the symbiotic relationship which exists with its employees and the adoption of an adversarial approach in circumstances such as these does not serve to engender in employees any confidence in their employers. When such feelings are allowed to fester, they are not conducive to maximum productivity.

22. For the reasons outlined, the Court finds on a balance of probabilities that there was a failure on the part of the Defendant to provide a safe system of work on the day in question, that the act spoke for itself and that the doctrine of *res ipsa loquitur* is applicable. Accordingly, there shall be judgment in favour of the Claimant as against the Defendant. The issue of quantum of damages and costs shall be assessed before a Master in Chambers.

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FRANK SEEPERSAD

JUDGE