The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

Civil Appeal No. P084 of 2018
Claim No. CV2014-03174

Between

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant

And

KHIMRAJ KATWAROO

Respondent

PANEL:

N. BEREAUX J.A.
M. MOHAMMED J.A.
M. WILSON J.A.

Date of delivery: August 13, 2021

APPEARANCES:
Mr. E. Jones instructed by Mr. N. Smart attorneys-at-law for the appellant
Mr. C. Persadsingh instructed by Mr. R. Katwaroo attorneys-at-law for the respondent

JUDGMENT

Delivered by Bereaux J.A.

(1) There are two issues in this appeal; whether the State as employer, owed a duty of care to the respondent, a police officer, for an injury suffered during the course of his duties as a police officer and whether it was a breach of that duty that resulted in his injury. I hasten to add, however, that this is not a case in which a police officer is injured in the ordinary course of prevention and detection of crime, which is inherently full of risk. This is a case of a policeman being assigned to traffic duty in which he was required to lift and rotate a one hundred pound traffic barrier so as to permit ingress of vehicles and their egress from a cordoned off area in the street.

(2) The trial judge held that such a duty of care existed, that there was a breach of that duty resulting in the respondent's injury and awarded him the sum of one hundred and twenty thousand dollars ($120,000.00) general damages. The question in this appeal is whether she was plainly wrong in her decision.

<u>Relevant facts</u>

(3) The respondent was attached to the Biche Police Station. On 19th February 2012 at 7:00 p.m. he was assigned to traffic duty along the Cunapo Southern Main Road, Biche in the vicinity of the Biche Health Centre. It was Carnival Sunday and there were carnival activities and events being held there. Police Constable Heeraman, who gave evidence for the appellant, was assigned to work with him. As is typical with such carnival events, the access roads were cordoned off. In this case, two metal barriers were placed across

the road to prevent the entry of vehicles and to facilitate the free movement of people within the area of activity. Management of the traffic included allowing authorized vehicles to enter and leave the prohibited area. This required the respondent and PC Heeraman to move one of the barriers. The undisputed evidence is that they took turns in moving the barrier and would do so by lifting one end of the barrier and rotating it from the centre of the road towards the pavement to allow for sufficient space to enable the vehicle to enter or exit the prohibited area. The end of the barrier closest to the pavement would remain on the ground and mostly stationary while the end closest to the centre would be lifted and moved towards the pavement and then returned to the centre of the road. When both constables arrived at the site, the two barriers were already in place. According to both officers the barriers each weighed about one hundred pounds. On each barrier there was a hook on one side and a lip on the other to facilitate joinder although on this occasion they were not joined. They were placed between two streetlights such that the lights did not shine directly on them and as such, the area was not well lit.

(4) It was during the course of lifting one of the barriers, that the respondent complained of a sudden sharp pain in his lower back, which required him to be assisted back to the Police Station. He brought this action claiming damages, inter alia, in negligence, the particulars of which included failing to take reasonable care to maintain a safe working environment by providing proper equipment such as a back-belt/brace for the moving of the heavy metal barrier. The respondent alleged that his injury and loss were caused by the failure of the State to observe its common law duty of care.

(5) The appellant Attorney General, in his defence, admitted the respondent's injury and the circumstances under which it occurred but denied any breach

of common law duty or any negligence. He contended that the respondent's injury was *"unfortunate"*, not reasonably foreseeable and *"wholly accidental"*. He alleged in the alternative that the respondent was contributorily negligent and that he *"should have been more cautious as to the trajectory of the barrier when he was moving it, to avoid it awkwardly and dangerously falling into potholes and causing avoidable injury."*

(6) The Attorney General further alleged that its duty of care was *"reasonably discharged … by the provision of a reliable and safe method of lifting the … metal barrier (side hooks) as well as the pairing of the claimant with another officer who was able, and did, render immediate assistance to him in the event of an unforeseeable accident"*.

(7) The trial judge found the Attorney General liable and awarded the sum of one hundred and twenty thousand dollars ($120,000.00) general damages. This is the Attorney General's appeal from that decision. Counsel for the Attorney General confirmed that this appeal is concerned only with the judge's finding on liability. There has been no cross-appeal on quantum by the respondent. I shall thus confine myself to the issue of liability.

<u>The judgment below</u>

(8) Gobin J gave two decisions. Judgment on liability on 19th January 2018 and judgment on quantum on 5th February 2018. Her brief reasons for decision were delivered on 24th April 2018. The judgment is concerned solely with the issue of the appellant's liability. The crux of the judge's decision is set out at paragraphs 8 to 13 of her judgment. She rightly rejected any contributory negligence for the reasons she gives at paragraph 14 and with which I agree. She was also correct in her observation that it was not the

Attorney General's pleaded case that the two officers were expected to lift the barriers at all times. Paragraphs 8 to 13 of Gobin J's judgment stated:

> ***8. The evidence established that each barrier is about 8 feet long and according to the Defendant's witness, Officer Heeraman each weighs in excess of 100 lbs. The Claimant said, and his colleague PC Heeraman confirmed that the officers had never received training on how to lift heavy objects such as the barriers, nor were they ever provided with any equipment such as back braces, lifts or belts to assist them in lifting. This issue of the lack of training was never disputed by the Defendant.***
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> ***9. Secondly, PC Heeraman confirmed that it was not expected or the practice to have both officers lift one of the barriers. The defence when it is examined closely is that the "pairing of" the claimant with another officer "to provide able assistance in the event of an unforeseeable accident."***
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> ***10. I found that something on the road caused the end of the barrier to stick or cause some resistance with a jolting effect which caused the injury. Whether it was a pothole (of the usual obvious sort) or a sink because of the weight of the barriers sinking into the hot asphalt over several hours before dark, it mattered not.***
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> ***11. I rejected the Defence's position that this was unforeseeable or that it was not liable because the state of the road, potholes and all is not within its control. I found however that whatever the condition of the road, the accident occurred***

because of the system which was in place which required officers to lift and drag heavy metal barriers. This method, especially with the barriers unconnected, allowed shifting of the other end of it on the roadway. There are several features which could have presented resistance to the pulling part of the exercise that the claimant was engaged in. It may have been a small hole or some feature which rendered the surface of the road uneven.

12. These barriers are heavy and the officers were expected in addition to other duties of crowd control and providing security to repeatedly lift and carry them dragging one end over uneven road surfaces for a tour duty over several hours. They had no training. They had no proper back braces. The risk of the kind of jolt the claimant suffered and the resultant injury ought to have been foreseeable.

13. The duty of the state to provide employees a safe system of work and to safeguard them from harm is trite. Insofar as the Defendant claimed it had discharged its duty in the specific ways referred to paragraph 5, above, the defence was quickly put to rest. As I have said before both officers accepted that the barriers were not connected or hooked on to each other on that evening. This meant that there was no anchoring in the middle to prevent the shifting of the end the barrier that was not being lifted and pulled. It therefore allowed movement and shifting of its position on the unmanned side.

(9) The question then is whether the judge can be said to be plainly wrong in

her decision. *"Plainly wrong"* simply means that the findings of the judge cannot be supported having regard to the entire evidence or that she failed to take into account material evidence which would have affected the outcome or that she drew inferences which were not open to her on the evidence. It does not mean that the judge is wrong because the Court of Appeal would have come to a different conclusion. See **Beacon Insurance Company Ltd. v. Maharaj Bookstore Limited [2014] UKPC 21**.

(10) The question of the correctness of the judge's decision turns on two issues:

(i) Did the State as employer owe a duty of care to the respondent? and

(ii) On the facts of this case, was that duty breached?

In my judgment, the answers to both questions are in the affirmative.

<u>Duty of care</u>

(11) The issue of the existence of a duty of care is entirely founded in employer's liability and the case law which buttresses it. The issue is one of foreseeability. It is not necessary to resort to the three-stage test set out in **Caparo Industries plc v Dickman [1990] 1 All ER 568**. The decision in **Robinson v Chief Constable of West Yorkshire Police [2018] 2 All ER 1041** is apposite. The issue in **Robinson** was whether police officers owed a duty of care to the claimant for injuries suffered when she was knocked over by two *"sturdily built"* police officers and a suspected drug dealer, who were engaged in a struggle on the street as the officers attempted an arrest. The trial judge held, inter alia, that a duty of care did exist because there was a foreseeable risk of injury to the claimant. The claim was dismissed on another ground. The Court of Appeal also dismissed the appeal applying a three-stage test of foreseeability; proximity; and fairness, justice and

reasonableness. It held that it would not be fair, just and reasonable to impose a duty of care on the police in that case having regard to the public interest. It also held that it would have reversed the judge's finding of negligence. On appeal to the Supreme Court, it was held that the police officers owed a duty of care to the claimant. It was not only reasonably foreseeable that if the arrest was attempted at a time when pedestrians were close to the suspect, pedestrians might be knocked into and injured in the of course the suspect's attempt to escape. That reasonably foreseeable risk of injury was sufficient to impose on the officers a duty of care towards pedestrians in the immediate vicinity when the arrest was attempted.

(12) In finding that a duty of care existed, the Supreme Court held that it was a mistake to proceed on the basis that a three stage test had to be applied to all claims in the *"modern law of negligence"*. It held that settled authority had repudiated the idea that there was a single test which could be applied in all cases in order to determine the existence of a duty of care. Instead, it had adopted an approach based on precedent and the development of the law incrementally and by analogy with established authorities. In the ordinary run of cases, courts should consider what had been decided previously and follow the precedents – unless it is necessary to consider whether such precedents should be departed from. In cases where the question whether a duty of care arose had not previously been decided, the courts would consider the closest analogies in the existing law with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. The courts also had to exercise judgment when deciding whether a duty of care should be recognised in a novel type of case. It was the exercise of judgment in those circumstances which required consideration of what was fair, just and reasonable. (My summary is taken from the headnote which in my judgment accurately summarizes the

holding of the Supreme Court)

(13) This is not a novel case. The issue is founded in tort per employer's liability in which there is an abundance of authority. The short question is whether the State as the employer owed a duty of care to the respondent to maintain a safe working environment by providing proper equipment such as a back-brace/ belt for the moving of heavy equipment. **Charlesworth & Percy on Negligence 13th Edition** states that:

> ***"an employer may incur liability to an employee sustaining injuries in the course of employment in one of two ways:***
>
> ***i. Vicariously as a result of the negligence of another employee, or***
>
> ***ii. Where personally in default of some non-delegable duty of care".***

In this case having regard to the pleadings, we are concerned with a personal default as opposed to vicarious liability. Consequently, the claim falls within the provisions of section 4(1)(b) of the **State Liability and Proceedings Act Chap 8:02** which provides that the State is subject to all liabilities in tort to which, if it were a private person of full age and capacity, it would be subject –

> ***(a) …***
>
> ***(b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer.***

(14) It is a case of direct liability. The proceedings are brought against the Attorney General as mandated by section 19(2) of the **State Liability and Proceedings Act**. In this regard, the Attorney General personifies the State itself. **Charlesworth & Percy on Negligence (supra)** at page 872, paragraph 11:02 states that the common law duty of an employer to employees is to take reasonable care for their safety and cites the following passage from **Wilsons & Clyde Coal Co Ltd. v English [1938] AC 57** at page 84 per Lord Wright:

> ***"I think the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company…***

(15) While the respondent was employed by the State under a contract of employment, the issue is founded in tort and the question of a duty of care turned on foreseeability; that is to say, was it foreseeable that the respondent would suffer injury from lifting and pulling a heavy metal barrier during the course of his duties. In my judgment it was foreseeable. A one hundred pound barrier is a comparatively heavy object in the ordinary course. It is foreseeable that a police officer lifting such a barrier intermittently, over a four to five hour period, can suffer injury. In such a case, the State as the employer did owe the respondent a duty of care to provide a safe system of work and proper equipment to prevent injury as far as that is possible. The duty to provide proper equipment such as back braces was specifically pleaded by the respondent and was accepted by the judge. She cannot be said to be plainly wrong.

Breach of duty

(16) As to whether the appellant was in breach of duty and whether Gobin J was correct to have so found, it is necessary to look at the evidence. The two relevant witnesses in this case were the respondent and PC Heeraman. I shall refer to the relevant parts of their respective witness statements.

(17) The respondent deposed at paragraphs 7 to 12 as follows:

> *"7. I was stationed alongside PC Heeraman. Our duties were to manage and regulate the traffic in the area by directing traffic away from the cordoned off area and also by removing the barriers to allow certain authorised vehicles such as emergency vehicles (Police, Fire Services, Ambulance etc.) and music trucks to enter and exit.*
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> *8. There were two barriers blocking the roadway in the area where myself and PC Heeraman were located. If ever a vehicle needed to pass only one of the barriers were required to be moved and there would be sufficient space for even a truck to pass. Each metal barrier is approximately 8 feet in length and I would estimate its weight to be at least 100 pounds (lbs). There are "hooks" and "lips" on either ends of the barriers which are used to join barriers together to form a longer barrier. However, the two barriers that we had charge of were not joined together.*
>
> *9. The road was in a fairly good condition. I do not recall seeing any potholes at all on the road. The roadway was not well lit.*

There were two light poles with street lamps but the barriers were located almost in the middle of those two street lamps and was therefore in the least lit area.

10. We were not provided with any sort of equipment such as back braces, lifts and/or belts to assist us in lifting heavy objects such as the barriers or prevent us from sustaining injury from lifting same. Also, I never received any training on how to lift heavy objects such as metal barriers during my training as a Police Officer.

11. Both myself and PC Heeraman would take turns in moving the barriers. When we needed to move the barriers, the person moving the barrier would hold the end located in the center of the road and rotate same toward the pavement side of road. The other end located closer to the pavement would remain stationary.

12. During the course of the evening I attempted to move the barrier for a vehicle to pass. I lifted the end of the barrier and began moving it in the manner stated above when I felt a sudden and sharp pain in my lower back. I immediately dropped the barrier. I held both sides of my lower back in pain. It was the first time I was experiencing such intense pain and in that area of my body. I couldn't stand up straight."

(18) PC Heeraman deposed at paragraph 6 to 11 as follows:

"6. We left the station around 7:30 pm that night and went to

the front of the Health Centre. There was the Sunday night party 50 feet away from where we were. The party is held every Carnival Sunday on the roadway. I am often called out for Carnival Season which consists of covering all the Carnival events in a particular area, Jouvert etcetera.

7. This was the first time working with PC Katwaroo. However we worked together for a short period in Mayaro Police Station in the same shift around 2010.

8. When [we](sic) were posted on Cunapo Southern Main Road where our duties consisted of overseeing the carnival event as well as regulating traffic. When we arrived at the post there were already two metal barriers placed across the Cunapo Southern Main Road to divert traffic to a side road to avoid traffic from flowing into where the event was being held. I do not know how long these barrier were there. The barrier were in fair condition in that they had some wear and tear but functional nonetheless. PC Katwaroo and I were posted by these barriers. We were instructed to move the barriers to allow certain vehicles to pass such as music trucks, vendor, police and emergency vehicles.

9. We were on duty there for about an hour taking turns moving the barrier. We moved the barriers approximately 5 times each during that period. The normal method of moving the barriers were lifting one end dragging it aside to allow the vehicle to pass. The usual method of moving the barrier is with a slight bend in the knee gripping the lower hook and lifting the barrier

approximately 4 – 6 inches off the ground and shifting it. There are two hooks on each side of each barrier which is used to connect multiple barriers if necessary, in this case no barrier was attached because the width of the street did not required it. The raised end of the barrier would be rotated while the other end would turn on the road. I believe the barrier weight in excess of 100 lb.

10. Around 8:30 pm that night I saw PC Katwaroo turned to move the barrier to allow a car to pass, he lifted the side of the barrier as usual and began to rotate it to the side of the road, however the dragging end on the roadway barrier fell into a hole on the roadway. This cause the barrier to tilt causing jolt like motion which resulted in PC Katwaroo injuring his back. The roadway was oil sand and had several small holes about 4 – 6 inches in diameter. These hole were as a result of the normal wear and tear of the road. We did not notice the hole before the barrier fell into it. This was because the closest street light was about 30 feet away on the Police Station side and about 40 feet away from the Health Center side. There were no other building in the area and thus no other artificial lights. We did have torchlights which we used to regulate vehicular traffic.

11. When the end of the barrier entered the pothole, he started groaning loudly in pain. He was bent over holding both sides of his back. I rushed to his assistance and asked him what happened. He told me that he injured his back. I assisted him to return to an upright position and placed his left arm over my right shoulder and my right arm was across his back. We walked

approximately 20 feet to the station and up a flight of stairs about 20 feet in length. I left him sitting on a chair in front of the station and I reported the incident to Sergeant Downing who was at that time in the reception area of the Biche Police Station. He instructed me to make an entry in the station diary with respect of what had transpired."

(19) Gobin J had to consider this evidence. She found that PC Heeraman, the appellant's witness, corroborated the respondent's evidence that police officers were never trained on how to lift barriers nor were they ever provided with equipment such as back-braces, lifts or belts to assist in that task. She noted, correctly, that this lack of training was never disputed by the appellant. She also noted and found, as PC Heeraman had confirmed, that the practice was not for both officers to lift one of the barriers. It may be that such a practice should be introduced in the future. It may reduce the risk of injury.

(20) The judge's findings may be summarized as follows:

Something on the road caused the end of the barrier to stick or cause some resistance with a jolting effect which caused the injury whether it was a pothole or a sink in the road caused by the weight of the barrier, it matters not. Whatever the condition of the road, the accident occurred because of the system in place which required officers to lift and drag heavy metal barriers repeatedly during a several hours-long tour of duty. They had no training and no proper back braces. The risk of the kind of jolt the claimant suffered and the resulting injury was foreseeable. The duty of the State to provide a safe system of work and to safeguard them from harm is trite.

(21) The judge was entitled to come to this conclusion having regard to the evidence. It was not disputed by the defendant that the officers had no training in the lifting of the barriers. It was also not disputed that the barriers were heavy. The fact that the respondent conceded in cross examination that, in moving the barriers, one would not be subjected to their full weight is of no moment. The duty of the State is to take reasonable care against injury caused by moving heavy objects such as the barriers. The respondent's case did not turn on whether he lifted the full weight or a fraction. It is sufficient that he was required to and did move the metal barrier of considerable weight resulting in personal injuries. The injury was caused by the sudden jolting of the barrier. This was PC Heeraman's evidence which the judge accepted. She found that there was always the foreseeable risk of the barrier jolting whatever the state of the road. I agree. It is to be expected that jolting, shaking or even the collapse of the barrier may occur in the course of moving it. That it may occur because of sinking of the barrier into the road surface, or some sinking or pothole in the road is foreseeable. Road surfaces are not always even and potholes form from a variety of causes. What is foreseeable is that in the course of moving the barrier it may jerk or jolt causing bodily injury to the police officers. The judge was entitled to come to that conclusion.

(22) She was also entitled on the evidence to reject the claim of contributory negligence for the reasons she gave at paragraph 14 and with which I agree.

(23) The judge's finding on liability cannot be disturbed and the appeal must be dismissed. The appellant shall pay the respondent's costs of the appeal assessed at two-thirds of the prescribed costs ordered in the High Court.

Nolan Bereaux
Justice of Appeal

I have read the judgment of Bereaux JA and I agree.

Mark Mohammed
Justice of Appeal

I also agree.

Maria Wilson
Justice of Appeal