

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

Claim No. **CV2015-00720**

BETWEEN

**NEELA SAWH**

Claimant

AND

**AMERICAN LIFE AND GENERAL INSURANCE COMPANY (TRINIDAD & TOBAGO)  
LIMITED**

First Defendant

**MARK BARTLET trading as  
BARTLET HAULAGE**

Second Defendant

**MARITIME GENERAL INSURANCE COMPANY LIMITED**

Third Defendant

**SANJA RAMJATTAN**

Fourth Defendant

**SHAWN MC SWEEN trading as  
"FULLY LOADED SOUND SYSTEM"**

Fifth Defendant

AND BY ANCILLARY CLAIM

Between

**MARK BARTLET trading as  
BARTLET HAULAGE**

Ancillary Claimant

And

**SHAWN MC SWEEN trading as  
"FULLY LOADED SOUND SYSTEM"**

Ancillary Defendant

**AMERICAN LIFE AND GENERAL INSURANCE COMPANY (TRINIDAD & TOBAGO)  
LIMITED**

Ancillary Co-defendant

**Before the Honourable Mr. Justice R. Rahim**

Date of Delivery: January 17, 2019

Appearances:

Claimant: Mr. L. Sanguinette instructed by Mr. T. Dassyne

Second Defendant/ Ancillary Claimant: Mr. A. Hosein instructed by Ms. K. Manohar-Gokool

Third Defendant: Mr. R. Persad instructed by Ms. S. Parsad

Fourth Defendant: Mr. I. Ali instructed by Ms. Nalini Bansee

## JUDGMENT

1. By Claim Form filed on March 6 2016, the forty-two year old claimant claims damages and consequential loss as a result of negligence of the second, fourth and fifth defendants.
  
2. By Notice of Discontinuance filed on December 17, 2015 the ancillary claimant discontinued his claim against the ancillary co-defendant. By Order dated March 4, 2016 the following orders were made in relation to the ancillary claim;
  - i. There be judgment against the ancillary defendant for damages, interest and costs for which the ancillary claimant and/or fourth defendant is found liable.
  
  - ii. An indemnity and/or contribution in respect of the claimant's claim and any costs and interests which the ancillary claimant may be ordered to pay to the claimant.
  
  - iii. Costs of the ancillary claimant's claim to be paid by the ancillary defendant.
  
3. On May 6, 2016 the claimant was granted permission to discontinue her claim against the first defendant upon the first defendant paying to her the sum of \$25,000.00 in full and final settlement of all claims arising whatsoever as against the first defendant and under policy of insurance number 5903862 inclusive of interest and costs.
  
4. On March 11, 2016 judgment in default of defence was entered against the fifth defendant for the payment of an amount of money to be decided by the court together with interest and costs.

5. Accordingly, for all intents and purposes, the issues of liability to be determined in this action, arise as between the claimant and the second, third and fourth defendants only.

### **THE CLAIM**

6. On March 8, 2011, Carnival Tuesday (“the said date”), the claimant was part of a group of persons on board a trailer registration number TBG 482 (“the trailer”) which was being towed by a truck registration number TBE 5103 (“the truck”). The truck and trailer were being used for a Carnival Monday midnight mass band and were together commonly referred to as a music truck. The trailer was loaded with speakers and other electronic equipment and a DJ. At the material time, the truck and trailer were owned by the second defendant and insured by the first and third defendants. The truck and trailer were being driven by the fourth defendant who was the servant and/or agent and/or permitted driver of the second defendant. The fifth defendant was the D.J. onboard the trailer and also the hirer of the truck and trailer from the second defendant for Carnival.
7. At around 2:00 am on the said date, the truck and trailer whilst in the midst of the Carnival celebrations came to a complete stop on the Southern Main Road, Pleasantville, in the vicinity of Circular Road. As the truck and trailer came to a stop, the claimant’s companion went to the steps located at the right back side of the trailer near the wheels to jump off the trailer. As he did so, the claimant noticed that he was clutching his left leg and seemed to be in pain.
8. The claimant in an attempt to go to the aid of her companion went to the steps but her left foot got caught on the stairwell and at that same time the truck and trailer began to move which resulted in the claimant losing

her balance. The claimant fell down onto the roadway and her right leg went under the trailer where it was crushed by the back wheel of the truck. She also suffered a fracture of the right mid tibia, right proximal fibula, left superior acetabula hip, degloving of the right lower limber and crushed muscle right lower leg. She was taken to the San Fernando General Hospital where her right leg was amputated and she was warded.

9. The claimant avers that the incident was caused as a consequence of the negligence of the fourth defendant, the servant and/or agent and/or authorized and/or permitted driver of the second defendant. The claimant further avers that as a result of the incident, she has suffered severe personal injury, damage, loss and expenses.

#### **THE DEFENCE OF THE SECOND DEFENDANT**

10. By Re-Amended Defence filed on February 18, 2016 the second defendant denies that the alleged incident was caused by any negligence on his behalf and/or his agents and/or servants. The second defendant avers that the incident was caused wholly or in part by the negligence of the claimant.
11. The second defendant admits that he is the owner of the truck and trailer but avers that at the material time he was not in possession and/or control of same. The second defendant avers that the truck and trailer were leased to the fifth defendant from March 4 to March 8, 2011 for the fifth defendant's own business, use, benefit purpose and concern. According to the second defendant, at the material time, the fourth defendant was not acting as his servant and/or agent but was the authorized driver of the truck and trailer on behalf of the fifth defendant. As such, the second defendant avers that the fifth defendant was at the material time in

control of the fourth defendant who was hired out by the second defendant to the fifth defendant.

12. The second defendant claims that at the material time, the third defendant issued insurance policies including Truck Policy, Trailer Policy and Public Liability Insurance Policy to him and that those policies related to and/or covered his business. The second defendant's business comprised hauling, transportation of goods and leasing of equipment and truck and trailers owned and/or in the possession of the second defendant. The second defendant further avers that the nature and operations of his business were disclosed to the third defendant via the application process which was made through Sterling Insurance Services Ltd., a registered and recognized insurance brokerage firm.

#### **THE DEFENCE OF THE THIRD DEFENDANT**

13. By Amended Defence filed on July 16, 2015 the third defendant avers that in the event that it is required to indemnify the second and/or fourth and/or fifth defendants in relation to any judgment, inclusive of interest thereon and/or costs which may be obtained by the claimant, the limits of its liability are circumstanced by the Motor Vehicles Insurance (Third Part Risks) Act, Chapter 48:51 ("the Act") and/or the Policies of Insurance No. CVP 504 369 000 ("the truck policy") and No. STP 504 412 000 ("the trailer policy"), beyond which the claimant may not recover.
14. The third defendant reserves its right (in the event that it is required to indemnify the second and/or fourth and/or fifth defendant in relation to any judgment, inclusive of interest and/or costs which may be obtained by the claimant) to seek to recover from the second and/or fourth and/or fifth defendants for any breach of the truck policy and trailer policy all such

sums which may be so paid by it to the claimant as required thereunder or under the Act.

15. Notwithstanding, the above, the third defendant avers that it is not liable under the provisions of the Act to indemnify the second and/or fourth and/or fifth defendants nor it is liable to satisfy or pay any judgment which may be obtained by the claimant against each or any of them because at the material time the truck and trailer were being used in a manner for which coverage was excluded under the truck policy and the trailer policy (and the agreements encompassed thereby between the parties) and/or in breach of such terms and/or conditions.

16. The third defendant further avers that at all material times, the fifth defendant was not insured in fact or in law and that he is not covered or encompassed under the truck policy and the trailer policy and/or is and was at all material times a person unknown to the third defendant and for whom it is not liable by way of indemnity or otherwise.

17. The third defendant admits the fact of personal injury to the claimant, however, it does not admit or deny the nature and extent thereof and requires that same be strictly proven. Also, the third defendant avers that the incident was caused or contributed by the negligence of the claimant.

#### **THE DEFENCE OF THE FOURTH DEFENDANT**

18. By Re-amended Defence filed on February 17, 2016 the fourth defendant admits that he was a servant and permitted driver of the second defendant having been in the employ of the second defendant from the year 2007 and continuing and wherein his duties consisted inter alia of driving the second defendant's trucks with trailer in tow. However, the fourth defendant avers that at the material time by virtue of the agreement for

the lease of the truck and trailer, he was an agent and/or servant of the fifth defendant and was under the control of the fifth defendant.

19. The fourth defendant denies that the alleged incident was caused by the alleged or any negligence on behalf of himself or his agent and/or servant. The fourth defendant avers that he has never been involved in an accident and that he is well versed in driving the trucks and trailers as he has the requisite license granted from the Licensing Authority and is the holder of a valid Defensive Driving Certificate.

20. Further or in the alternative, the fourth defendant avers that the incident was caused wholly or part by the negligence of the claimant.

### **THE ISSUES**

21. The second defendant in his submissions submitted that damages in this case has been agreed by the parties so that the court is called upon to make a finding upon liability. As such, the issues for determination in this case are as follows;

- i. Whether the incident occurred in the manner in which the claimant alleges;
- ii. Whether the fourth defendant owed a duty of care to the claimant and if so what was the extent of that duty of care;
- iii. Did the fourth defendant breach the duty of care with resultant damage;
- iv. Whether the fourth defendant was at the material time acting as the servant and/or agent of the second defendant or the fifth defendant;



- v. Whether there was contributory negligence on the part of the claimant;
- vi. Whether the second defendant's liability is cover by the Policy of Insurance in force at the material time.

### **THE CASE FOR THE CLAIMANT**

22. The claimant gave evidence for herself. She is a medical clerk. On March 8, 2011 ("the said date") the claimant was part of a group of persons on board a trailer registration number TBG-482 ("the trailer") which was being towed by a truck registration number TBE-5103 ("the truck"). As mentioned above, the truck and trailer are owned by the second defendant and were at the material time insured with the third defendant. Further, at the material time, the truck and trailer were being driven by the fourth defendant and the fifth defendant was the D.J. on board the trailer.

23. According to the claimant, on the said date at around 2:00 am the truck and trailer whilst in the midst of the Carnival celebrations came to a complete stop on the Southern Main Road, Pleasantville, in the vicinity of Circular Road. The roadway at the time was lit by street lights. As the truck and trailer came to a stop, the claimant saw her then boyfriend, Servan Chapman ("Chapman"), go to the steps located at the right rear side of the trailer, near the wheel wells, and jump off. As Chapman did so, he landed on the roadway and the claimant saw that he was clutching his left leg and he seemed to be in pain.

24. The claimant thinking that Chapman was hurt, proceeded to the steps in order to descend. There were three steps. She was wearing a push-toe slipper with a soft leather flower attached to the top of the strap which

was across her toe. As she descended the first two steps and was going onto the third step the flower on her left slipper got stuck in the metal part of the step. She began pulling her foot to try to free her slipper, when the other strap on the slipper going across the top of her entire foot ripped off. At that same time, the truck and trailer began to move and as a result of the forward motion, the claimant lost her balance and fell down onto the roadway. Her right leg went under the right rear of the trailer, right in front of the wheels of the trailer which then ran over her right leg.

#### The cross-examination of the claimant

25. The claimant began participation in the Carnival celebrations at around 6:00 pm on Carnival Monday. Sometime after mid-night she proceeded onto the trailer. Prior to Chapman jumping off the trailer, the claimant and he were sitting on the edge of the trailer with their feet hanging off. When she observed that Chapman was injured, she was in a hurry to get to him. The claimant testified that at the material time, she was consuming beers. That she had a beer approximately every half an hour. She stopped drinking around 11:00 pm.

26. The claimant did not inform anyone when she went aboard the trailer neither did she tell anyone when she was disembarking. When she began descending the stairs, the music was still playing. To reach to the steps she was facing forward but when she put her first foot on the first bar of the steps she turned around so that her back was facing the road. Whilst she was on the step, she heard the horn. Prior to her falling, the truck was on the left side of the road. She fell off of the driver's side of the truck and trailer on her back in the roadway.

27. The claimant was referred to two photographs attached to the second defendant's list of documents. On those photographs it was seen that the steps were on the passenger's side of the truck and trailer and that there was no step on the driver's side of the truck and trailer. The claimant denied that the steps on the passenger's side of the truck and trailer were the steps she was speaking about in her evidence. She reiterated that she came off the driver's side of the truck and trailer and that there were steps on that side.

28. The claimant was referred to letter dated February 6, 2015 which was written by her then attorney-at-law to the defendants. This letter failed to mention that she was wearing a push-toe slipper with a soft leather flower. She was then referred to letter dated March 22, 2012 which was written by her then attorney to the second defendant. In this letter, the claimant failed to mention that the flower on her slipper got stuck in the metal part of the step of the trailer. Thereafter, she was referred to letter dated February, 2014 which was sent by her then lawyer to the second defendant. In this letter there was nothing to suggest that the claimant was descending steps at the time the incident occurred.

29. The claimant was then referred to a police report dated April 20, 2012 she exhibited to her Statement of case. This statement stated that the claimant jumped off the trailer, lost her balance, fell onto the roadway and that the trailer passed over her right leg. The claimant testified that the police report was not accurate. She does not know who gave that report.

#### **THE CASE FOR THE SECOND DEFENDANT**

30. The second defendant gave evidence and called two witnesses, Peter Flament and Ricky Bisnath.

## The evidence of the second defendant

31. The second defendant is the owner and Manager of Bartlett Haulage. Bartlett Haulage has been in operation since on or about May 27, 1999.<sup>1</sup> The second defendant testified that Bartlett Haulage was created for the purpose of general hauling, transporting of goods and/or renting and/or leasing of equipment and vehicles owned and/or in his or his business' possession.
32. The second defendant retained the services of Sterling Insurance Services Limited ("Sterling Insurance"), a registered and recognized Insurance Brokerage firm, as the Insurance Brokers for Bartlett Haulage since in or about 2009. He testified that as part of the application process to Sterling Insurance and/or Maritime General Insurance Company ("Maritime"), he had to produce his business' registration documents and to fill out forms which outlined the modus operandi of his business. He was shown a copy of those forms during the discovery stage of these proceedings.
33. The second defendant eventually took out insurance with Maritime as the insurance providers for Bartlett Haulage through his insurance broker Sterling Insurance as he found Maritime to be offering him the most cost effective Insurance coverage for his business. Bartlett Haulage and by extension the second defendant and his vehicles were insured at all material times and covered for General Cartage (Truck Policy, Trailer Policy) and Public Liability Insurance by Maritime.

---

<sup>1</sup> A copy of the Certificate of Registration of Bartlett Haulage was annexed to the second defendant's witness statement at marked "M.B.1."

34. The second defendant testified that from his understanding of the policy coverage offered, they were insured and/or indemnified by the third defendant in respect of such liability as was encompassed under the respective policies and included inter alia liability arising out of ownership, possession of all plant, machinery, equipment owned, hired, borrowed or used by them.
35. Since then and on an annual basis, Sterling Insurance would upon the eve of the expiration of the second defendant's policies, call him in to pay and to renew his policy and he would later receive the broker slip or invoice detailing amongst other things the premium and vehicles to which the insurance applies.<sup>2</sup>
36. According to the second defendant, during the material time, he was duly insured with Maritime and as far as he was aware, his rates remained the same immediately prior to, during and after the material time as is evidenced in his slips or invoices exhibited above.
37. In or around February 4, 2011 the fourth and fifth defendant went to the yard of Bartlett Haulage as they had done in previous years and indicated the fifth defendant's intention to lease one of the trucks and one of the trailers to transport fifth defendant's music system for Carnival Monday and Tuesday of the said year.
38. The second defendant agreed to allow the fifth defendant to do so at a cost of \$8,000.00. The fifth defendant duly paid in full on the said date and in response to this, the second defendant caused a receipt to be issued to him.<sup>3</sup> The second defendant testified that as part of the agreement terms for the leasing of the truck and trailer, the fifth defendant had to take out

---

<sup>2</sup> Copies of those slips were annexed to the second defendant's witness statement at "M.B.2."

<sup>3</sup> A copy of the receipt was annexed to the second defendant's witness statement at "M.B.3."

a separate Carnival Insurance on the truck and trailer to cover any incidences that may occur during the fifth defendant's period of leasing. Additionally, the fifth defendant was also fully responsible for obtaining all the necessary approvals from the Licensing Authority and Police Service prior to the truck and trailer going on to the road.

39. The second defendant testified that as further part of the agreement, the fifth defendant had to supply a driver for the truck and trailer, who at all material times would be under the care, control and supervision of the fifth defendant. The fifth defendant was also responsible for compensating the driver. That driver was the fourth defendant.

40. The second defendant was out of the country during the material time. However, upon his return, he was duly informed of the incident. He caused a report to be lodged with the third defendant and ensured that the fourth defendant also lodged a report with the Trinidad and Tobago Police Service.

41. The second defendant testified that subsequent to the lodging of those reports, the fourth defendant was never charged with any wrongdoing. Further, neither was Bartlett Haulage nor the second defendant ever issued warning notices or higher premiums from the third defendant. Additionally, Licensing Authority inspected the vehicle and found no wrongdoing. Moreover, no charges were brought by the Police Service.

42. According to the second defendant, the claimant has had three different pre-action protocols issued to him. He testified that each pre-action contained a materially different version of the incidents surrounding the incident.<sup>4</sup>

---

<sup>4</sup> Copies of those pre-action protocols and the second defendant's responses issued through his Attorney-at-Law were attached to the second defendant's witness statement at "M.B.4"

### The cross-examination of the second defendant

43. The second defendant testified that when the fifth defendant rented the truck and trailer, the keys for same were given to the fourth defendant. He further testified that only persons with his authorization could drive the truck and trailer.
44. The fourth defendant was employed with the second defendant for about eight years. The second defendant testified that at the time of the incident, the fourth defendant was on holidays and so the fourth defendant was not hired out by him to the fifth defendant.
45. The second defendant was referred to the Maritime proposal form annexed to Janice George's witness statement at "J.G.1". He testified that the signature on the form was that of his wife. He denied that he and Bisnath filled out that form together. He further denied that the renting out of the truck and trailer was not authorized under the insurance he held with Maritime.
46. According to the second defendant, notice of the incident was given to his broker prior to March 22, 2012.

### The evidence of Peter Flament

47. Peter Flament ("Flament") is employed at the San Fernando City Corporation. On the said date, Flament together with Akile Wickham ("Wickham"), Kern Douglas ("Douglas"), Justin Timothy ("Timothy") and the fifth defendant amongst other workers were all on board the trailer which was being pulled by the truck. The truck and trailer were being used as a music truck. All the persons who were assisting the fifth defendant

were on the trailer. There were approximately eight or ten persons assisting the fifth defendant.

48. Wickham, Douglas and Flament acted as security for the truck and trailer. They were on the road from very early in the day as it was Carnival Monday and the fifth defendant was hired to play music for a midnight mas band from Orchid Gardens, Pleasantville.

49. Flament testified that the trailer was built up with railings on both sides, and to the left of the trailer (the court interprets this evidence to mean the passenger side of the truck) there was a step rail for persons to embark and disembark from the trailer. To the right side (driver's side) and right back there are guard rails. There were also guard rails on the both sets of wheels to the rear of the trailer. Inside the trailer there were more than sixteen sub base boxes as well as the different control systems for the fifth defendant to play the music from. Flament helped the fifth defendant every year to build up the trailer, so he was accustomed to how the final product looked.

50. There were banners hanging from the side railings of the trailer which blocked off parts of the trailer but the abovementioned step railings remained clear. For the majority of the day and night, Flament was positioned at the entrance from the railings.

51. The fifth defendant possessed a microphone which he used for his DJ duties and which he also used for announcing the movement or stoppage of the vehicle. In other words, he used the said microphone to advise the fourth defendant when to go and when to stop.

52. Wickham, Douglas and Flament tried to keep unauthorized revelers from getting onto the trailer and in way of the movement of the vehicle.



53. Around midnight or thereafter, the midnight mass had come to an end and the truck and trailer reached the vicinity of T&TEC on Ciper Street, San Fernando. A police officer came up to the truck and trailer and instructed them to stop the music and the fifth defendant complied. The fourth defendant then turned left to go to Park Street, crossed the by-pass and then into Circular Road, Pleasantville to drop off Timothy and the items belonging to the band. Upon reaching the home of Timothy, the fourth defendant stopped the vehicle for Timothy to disembark. Flament testified that when Timothy disembarked and they all looked out and saw that it was clear, the fifth defendant told the fourth defendant to move off. Flament heard the fourth defendant sound the horn before pulling off.
54. As soon as Flament felt some movement of the vehicle, he heard a loud scream that seemed to have come from outside of the trailer. He together with the rest of persons on the trailer and on the street shouted for the fourth defendant to stop and he did so as soon as he could which was about twenty to twenty five feet away.
55. When Flament looked he saw two persons lying on the right side of the vehicle (driver's side) to the side of the road, one was male and the other was female. Flament came off of the trailer and ran towards the persons and he realized that the man was a Police Officer who he knew as Chapman and who had earlier taken a ride on the trailer with a female friend (the claimant) and both of whom Flament had thought had come off of the trailer before. Flament observed the woman holding her leg as it was bleeding heavily. He spoke to Chapman and the ambulance was called. The truck left and Flament stayed behind to assist. Flament testified that prior to hearing the screams, he saw Chapman and the claimant on the trailer.

56. Flament testified that he has known the fourth defendant in the capacity of a truck driver for a number of years. That he has seen the fourth defendant as a capable driver and has never witnessed him being involved in an accident before.

#### The cross-examination of Flament

57. Flament was shown two photographs of the truck and trailer attached to the second defendant's list of documents. He testified that the photographs depicted the condition of the truck and trailer at the time of the incident. He further testified that the steps shown on the passenger side of the truck and trailer was the only set of steps on the trailer.

58. Flament did not see how the claimant got injured. He saw her when she was already injured. She was lying in the middle of the roadway on the driver's side of the truck and trailer. Further, when Flament saw the claimant, the truck and trailer was on its proper left lane.

#### The evidence of Ricky Bisnath

59. Ricky Bisnath ("Bisnath") is the Chief Executive Officer ("the CEO") at Sterling Insurance. He has been employed in the Insurance sector since in or around 1983 and has been the CEO of Sterling Insurance, an Insurance Brokerage Firm since in or around 2005.

60. Bisnath testified that Sterling Insurance has been the Insurance Brokerage firm for Bartlett Haulage since in or around 2009. He is able to speak on this matter as part of his role as the CEO, he is kept abreast of their clients and have access to all their files and information.

61. Bisnath testified that as an Insurance Brokerage Firm, they are employed to source the best insurance coverage available to cover the nature of the insurance needs of the client. That in the case of Bartlett Haulage, Sterling Insurance brokered Maritime as the insurance providers for Bartlett Haulage for general haulage/cartage.
62. Bisnath further testified that he is aware that Bartlett Haulage is in the business of general hauling, transporting of goods and leasing of equipment and vehicles as Sterling Insurance requires copies of all the relevant incorporation and business documents of their clients and they would have been provided with copies of same.
63. According to Bisnath, the specific Insurance policies for the truck and trailer from their records show that the truck and trailer were insured for transport of General Cartage use by Maritime. The premium rates incurred by Bartlett Haulage for insurance of the truck and trailer by Maritime for the period 2010 to 2011 was \$848.00 and \$2,415.81 respectively.
64. The premium rates incurred by Bartlett Haulage for insurance of the truck and trailer by Maritime for the periods of 2011 to 2012 and 2012 to 2013 were \$848.00 and \$2,415.81 respectively. According to Bisnath, the aforementioned sums were the rates for General Haulage or Cartage.<sup>5</sup>

#### The cross-examination of Bisnath

65. Bisnath was referred to Maritime's proposal form dated April 17, 2007 annexed to Janice George's witness statement at "J.G.1". Bisnath testified that he and the second defendant would have filled out this form and submitted it to Maritime for insurance coverage. The second defendant

---

<sup>5</sup> Copies of the Brokerage Slips that were issued by Sterling Insurance Services Limited were annexed to Bisnath's witness statement at "W.S.1."

did not deal directly with Maritime and so all the information that Maritime had on the second defendant would have come from Bisnath. The proposal form listed the use of vehicles as being that of company use. Bisnath testified that the second defendant wanted coverage for general cartage and own goods cartage. That company's use meant general cartage and own goods cartage.

66. Bisnath was then referred to a part of the proposal form headed "For Commercial Vehicle Insurance Only". Under that section, the answer to the question, will the vehicles be used for the purpose other than the carriage of your own goods was given as "no". Bisnath agreed that nothing in the proposal form and the information he advanced to Maritime to seek insurance coverage indicated that the second defendant would be renting trucks and trailers.

67. Bisnath testified that it would not be true that the second defendant filled out forms on the modus operandi of his business.

68. Bisnath was then referred to the General Terms and Conditions for Commercial Vehicle Policy in relation to the truck and trailer annexed to Janice George's witness statement at "J.G.2". Bisnath testified that he was familiar with those terms. He agreed that under those terms, the use of the truck and trailer was restricted. That the use of the truck and trailer were limited to being used only in relation to the second defendant's business and that it was restricted to the carriage of passengers other than passengers for hire reward in connection with the second defendant's business. He was directed to the heading "general exceptions" under which Maritime excluded liability unless the use of the vehicle was in accordance with the permitted uses. Bisnath agreed that as the rental of

the truck and trailer was not a permitted use, Maritime's coverage did not relate to the rental of the truck and trailer.

69. Bisnath was then directed to Roman numeral (iii) under the heading "Exception to Section II". Roman numeral (iii) provides that *"death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arise"*. Bisnath agreed that pursuant to Roman number (iii), Maritime was not liable to passengers disembarking from the vehicle.

70. He was then referred to the certificates of insurance concerning the truck and trailer at the time of the incident which was annexed to Janice George's witness statement at "J.G.3". He was directed to look at certificate of insurance number 111639. This certificate of insurance was in relation to the truck. He agreed that that certificate's coverage excluded the use for hire or reward.

71. He was then directed to look at certificate number 345755. This certificate was in relation to the trailer. This certificate's coverage excluded the use for the carriage of passengers for hire or reward.

72. Bisnath was referred to the brokerage slips he annexed to his witness statement. He testified that the "PL" coding on those slips referred to public liability insurance coverage. However, public liability insurance coverage does not cover incidents such as the one before the court.

## THE CASE FOR THE THIRD DEFENDANT

73. The third defendant called two witnesses, Anthony Orié and Janice George.

### The evidence of Anthony Orié

74. Anthony Orié (“Orié”) is an Underwriter with Maritime. He obtained an Associate in Risk Management Designation and have attended various Workshops and Training Seminars hosted by external parties.

75. Since 1995, he has been employed in the insurance industry. He began his career as a Junior Clerk from August, 1995 to January, 2001. He then moved to Underwriting Assistant around January, 2001 and then to Underwriter in January, 2003.

76. According to Orié, Maritime has motor insurance as well as non-motor insurance portfolios. The evidence given by Orié related specifically to Maritime motor insurance portfolio. Orié is aware of the incident which occurred on March 8, 2011. He is also aware that at the time of the incident, both the truck and trailer had been insured with Maritime under a commercial vehicle policy. The Insured was the second defendant.

77. Orié is familiar with the nature, terms and conditions of Maritime’s commercial vehicle policy. He testified that the coverage provided under such a policy does not include passengers except where those passengers are acting in the course of their employment.<sup>6</sup> He further testified that

---

<sup>6</sup> A copy of the general terms and conditions of Maritime’s commercial vehicle policy in relation to the truck and trailer which excepted liability for bodily injury to any person [apart from a passenger carried by reason of or in pursuance of a contract of employment] being carried in, or upon, or entering, or getting onto, or alighting from, the truck and trailer at the time of the

based on that exception, Maritime is not liable for the claim being made in this action by the claimant.

78. According to Orié, the truck and trailer were commercial vehicles for the transportation of goods and/or materials and/or equipment. Orié was aware that that was the business of the Insured.<sup>7</sup>

79. Orié testified that since vehicles such as the truck and trailer are not in the nature of passenger vehicles but are transport vehicles for goods, materials and equipment, if they are being used to carry passengers during the Carnival celebrations, additional insurance coverage would be required to cover those passengers. Maritime's commercial vehicle policy such as the one that was in force in relation to the truck and trailer would not have covered that. Coverage in the nature of additional Personal Accident Injury Insurance would have been required.

80. Maritime's procedure when additional coverage is required for transport vehicles such as the truck and trailer to carry passengers during Carnival is as follows;

- i. Notification of such use must be given by the insured to Maritime.
- ii. Further information is required by the Underwriting Department so that Maritime's exposure and the risk may be gauged.
- iii. An assessment of the additional risk would be undertaken.
- iv. If the additional risk is accepted, then an additional premium is paid and the coverage is extended.

---

occurrence of the event out of which any claim arises was annexed to Orié's witness statement at "A.O. 1".

<sup>7</sup> Copies of Certificates of Insurance Nos. 111639 and 345755 for the coverage period 2010 to 2011 when the incident occurred were annexed to Orié's witness statement at "A.O. 2".

- v. The Licensing Authority is then notified by Maritime of the additional coverage for passengers [other than those being carried by reason of their employment with the Insured].<sup>8</sup>

81. Orié has seen exhibit “ALG” (the Algico Policy) which was attached to the Statement of Case. He testified that that is the type of additional coverage of which he spoke of above which was required for Carnival. It was Personal Accident Injury Insurance. According to Orié, at the time of the incident, such coverage was provided by American Life and General Insurance Company (Trinidad and Tobago) Limited for the truck and trailer and not Maritime.<sup>9</sup>

82. It was the testimony of Orié that it is a requirement of the Licensing Authority that vehicles such as the truck and trailer which are not insured for the carriage of passengers (apart from passengers being carried by reason of their employment with the Insured) obtain Personal Accident Injury Insurance coverage as was encompassed by the Algico Policy if they were being used for Carnival.

83. According to Orié, Maritime’s policy in relation to the truck and trailer did not permit or cover the lease or rental of same. As such, Orié testified that the lease or rental of the truck and trailer was not in accordance with the prescribed limitations as to use and was a breach of Maritime’s policy covering the truck and trailer and the Insured. The lease or rental of the truck and trailer by the Insured meant that such use or risk or peril was not covered and that Maritime was not liable for any loss sustained thereby.

---

<sup>8</sup> A copy of Maritime’s Form of notification to the Licensing Authority of such additional coverage for passengers [other than those being carried by reason of their employment with the Insured] was annexed to Orié witness statement at “A.O. 3”.

<sup>9</sup> A copy of the Algico Policy was annexed to Orié’s witness statement at “A.O. 4”.



### Cross-examination of Orié

84. Orié testified that one of his duties as an underwriter is to assess risk. That if the information supplied is not sufficient to assess the risk, he would make enquiries from the customer. However, Orié was not the underwriter who assessed the risk when the second defendant first proposed insurance with Maritime.

85. Orié was referred to the Maritime proposal form annexed to Janice George's witness statement at "J.G.1". He was referred to the several places on the proposal form which were not filled out. He testified that as a prudent and reasonable underwriter, he would have required the proposal form to be completed properly in order to assess the risk of the vehicles.

### The evidence of Janice George

86. Janice George ("George") is a Claims Adjudicator with Maritime. She has been employed in the insurance industry since 1991 and has been employed with Maritime since 1993. She has been a Claims Adjudicator with Maritime since 2009. Some of George's evidence was the same as Orié's and so that evidence need not be repeated.

87. George testified that for each motor insurance policy issued by Maritime, it maintains a Policy File into which all documents, and/or notations, and/or information, relative to that policy are kept. Such policy files are created, maintained and kept by Maritime's Underwriting Department. If a claim is made under any particular policy, then, in addition to the policy file, a claim file is opened and maintained into which all documents, and/or notations, and/or information, relative to the management and processing of that claim are kept. Such claim files are created, maintained and kept by

Maritime's Claims Department whilst the policy files remain in Maritime's Underwriting Department.

88. There is a measure of overlap and duplication of information between both the policy file and claim file for any particular claim. When a claim is made, documents relating to the applicable policy may be copied from the policy file and placed in the claim file. In addition, some information is also inputted and maintained on Maritime's computer system – to which George has access.
89. George has direct knowledge of the claim in relation to the incident and she is in possession of the claim file ("the file") maintained by Maritime for it. She is the custodian of the file. As a Claims Adjudicator, she also has access to the policy file for this claim. Copies of documents from the policy file for this claim were placed in the file. The information which she gave in this witness statement was derived in part from her direct knowledge and, in part, from her review of the file. The file contains all the relevant documents, and/or notations, and/or information, relative to the processing and management of this claim. Further, the documents which are exhibited to this witness statement were all derived from the file and/or comprise a part of its records.
90. From her review of the file, she knows that by Maritime's Proposal Form dated April 17, 2007 ("the proposal form"), the second defendant, ("the Insured"), made a proposal for motor insurance coverage for several trucks, including truck registration number TBE 5103 ("truck TBE 5103") in this matter, as well as the trailers stated thereon for use with them.<sup>10</sup>

---

<sup>10</sup> A copy of the Proposal Form was annexed to George's witness statement at "J.G. 1".

91. At the time of the proposal, the trailers covered for use with the several trucks did not include trailer registration number TBG 482 (“trailer TBG 482”) which was added later on. The several trucks as well as the trailers covered for use with them will be collectively referred to as the covered vehicles.

92. As was the case with all policies of insurance issued by Maritime, the purpose of the proposal form was to obtain all relevant information from the insured so that Maritime could properly assess the risk which it would be assuming in providing motor insurance coverage for the covered vehicles (“the risk”). According to George, the proposal form sought to obtain all relevant information from the insured so that Maritime could decide whether or not to accept the risk and provide the motor insurance cover which was being sought. She testified that for that purpose, amongst other things, Maritime sought specific information from the Insured on the manner in which the covered vehicles would be used.

93. In response to its specific enquiries, the Insured responded in the proposal form as follows (“the responses”);

- i. The covered vehicles would not be used solely for the Insured’s social, domestic and pleasure purposes but also for his business.
- ii. The covered vehicles would not be used for purposes other than the carriage of the Insured’s own goods.

94. Based upon the responses and the other information stated by the Insured in the proposal form, and upon his payment of the applicable premium, Policy of Insurance No. CVP 504 396 000 (“the truck policy”) was issued by Maritime in relation to the several trucks, including truck TBE 5103. At the

same time, in addition, Policy of Insurance No. STP 504 412 000 (“the trailer policy”) was issued by Maritime in relation to the trailers covered for use with them. Both the truck policy and the trailer policy contained the same General Terms and Conditions for Commercial Vehicle Policies.

95. Maritime agreed to insure the Insured upon the terms contained in General Terms and Conditions for Commercial Vehicle Policies. The proposal form was a part of both the truck policy and the trailer policy.

96. According to George, from inception, a fleet of the Insured’s trucks and trailers were insured by Maritime under the truck policy and the trailer policy. That fleet changed from time to time and the practice or agreement between Maritime and the Insured (“the practice”) was that trucks and/or trailers would be added and/or covered under the truck policy and/or the trailer policy upon their renewal, at which point a Certificate of Insurance would then be issued in relation to such new trucks and trailers as were then added.

97. Under the practice, the proposal form continued to be the basis of coverage for each addition of any new truck or trailer under the truck policy and/or the trailer policy. Similarly, under the practice, the same General Terms and Conditions for Commercial Vehicle Policies covered each addition of any new truck or trailer under the truck policy and/or the trailer policy.

98. Further, under the practice, each new truck which was added for coverage under the truck policy was assigned the same No. CVP 504 396 000. Maritime’s code “CVP” is assigned to commercial and general cartage vehicles (vehicles registered as “T”), excluding special type vehicles.

99. Additionally, under the practice, each new trailer which was added for coverage under the trailer policy was assigned the same No. STP 504 412 000. Maritime's code "STP" is assigned to special type vehicles such as trailers and other types of equipment (some of which are registered as "T" or may have chassis/serial numbers).

100. Trailer TBG 482 was added under the trailer policy on May 20, 2008.<sup>11</sup> According to George, the terms and/or conditions of the truck policy and the trailer policy provided that the use of truck TBE 5103 was restricted or limited as follows;

- i. In connection with the Insured's business.
- ii. For the carriage of passengers (other than for hire or reward) in connection with the Insured's business.
- iii. For social, domestic and pleasure purposes.

101. As such, George testified that the terms and/or conditions of the truck policy specifically excluded the use of Truck TBE 5103 for hire or reward and/or any use otherwise than in accordance with the prescribed limitations as to use. She further testified that the terms and/or conditions of the truck policy and the trailer policy excluded the use of Truck TBE 5103 and Trailer TBG 482 otherwise than in accordance with the prescribed limitations as to use.

102. Under the truck policy and the trailer policy, the use of truck TBE 5103 and trailer TBG 482 in a manner which was excluded meant that such

---

<sup>11</sup> Copies of the General Terms and Conditions for Commercial Vehicle Policies in relation to the truck policy and the trailer policy; Certificate of Insurance No. 104989 dated April 17, 2007 in relation to truck TBE 5103; and, Certificate of Insurance No. 289439 dated May 20, 2008 in relation to trailer TBG 482 were annexed to George's witness statement at marked "J.G. 2".

use or risk or peril was not covered and that Maritime was not liable for any loss sustained thereby.

103. The truck policy and the trailer policy were renewed from year to year on essentially the same terms and conditions up to time of the incident.<sup>12</sup> In fact, both continued to be renewed for some years after the incident as is evident from the documents disclosed on Maritime's List of Documents dated and filed on June 3, 2016.

104. According to George, on March 22, 2012, notice of the incident was received on behalf of the claimant by her then Attorney. This was the first time that Maritime became aware of the incident and the file was then opened for this claim. The insured had not up to then reported the incident and Maritime then went about gathering information on the same in its usual way by seeking to contact the Insured, collating statements and investigating the circumstances.

105. Maritime then ultimately discovered the following which had not been known to it before the incident:

- i. That on or about February 4, 2011, the Insured leased or rented truck TBE 5103 and trailer TBG 482 to the fifth defendant from on or about February 4, 2011 to a date unknown – for use as a music truck during the Carnival celebrations up to, and including, at least March 8, 2011 for the sum of \$8,000.00.

---

<sup>12</sup> Copies of the renewal documents in relation to truck TBE 5103 and trailer TBG 482 up to the period of coverage for 2011 to 2012 were annexed to George's witness statement at "J.G. 3".

- ii. At the time of the incident, truck TBE 5103 and trailer TBG 482 were not being used in connection with the Insured's business or for any purpose of his.
- iii. At the time of the incident, truck TBE 5103 and trailer TBG 482 were not being used for the carriage of passengers in any way in connection with the Insured's business.
- iv. At the time of the incident, truck TBE 5103 and trailer TBG 482 were not being used for the Insured's social, domestic and pleasure purposes.
- v. At the time of the incident, truck TBE 5103 and trailer TBG 482 were being used for hire or reward.
- vi. At the time of the incident, truck TBE 5103 and trailer TBG 482 were being used otherwise than in accordance with the prescribed limitations as to use as contained in the truck policy and the trailer policy.
- vii. At the time of the incident, truck TBE 5103 and trailer TBG 482 were being used in a manner and for purposes of which Maritime had no knowledge or notice.
- viii. At the time of the incident, truck TBE 5103 and trailer TBG 482 were being used in the manner detailed in paragraph 7A of the Defence of the Insured dated and filed on May 15, 2015. This Defence was later Re-amended on February 18, 2016 but paragraph 7A was unaltered except for an addition to sub-paragraph 7A(v).

106. George testified that the lease or rental of truck TBE 5103 and trailer TBG 482 was contrary to the terms and conditions of the truck policy and the trailer policy and that at the time of the incident, truck TBE 5103 and trailer TBG 482 were being used in a manner for which coverage was excluded. She further testified that at no time was the fifth defendant

Maritime's insured. The fifth defendant was not covered under the truck policy and the trailer policy.

107. On October 16, 2013, Maritime retained the services of Insurance Investigations Services Limited ("IISL") to conduct investigations into and report on the facts and circumstances of the incident. Pursuant to that retainer, on January 14, 2014, IISL furnished to Maritime an investigation report which included written statements which were recorded or obtained from the fifth defendant and Chapman dated November 4, 2013 and November 15, 2013, respectively.<sup>13</sup>

108. According to George, at the time of the incident, the Insured was a transport contractor engaged in the business of the transportation of heavy equipment; and, both truck TBE 5103 and trailer TBG 482 were used for that purpose. The truck and trailer were not private vehicles for the carriage of passengers. Rather, they were commercial vehicles for the transportation of goods and/or materials and/or equipment.

109. She testified that both the truck policy and the trailer policy expressly excluded liability for bodily injury to any person being carried in, or upon, or entering, or getting onto, or alighting from truck TBE 5103 and trailer TBG 482, apart from passengers being carried by reason of their employment with the Insured.

110. As such, it was the testimony of George that were truck TBE 5103 and trailer TBG 482 to be used for any purpose involving the carriage of passengers (apart from passengers being carried by reason of their

---

<sup>13</sup> Copies of both statements were annexed to George's witness statement at "J.G. 5".



employment with the Insured), Personal Accident Injury Insurance coverage as was encompassed by the Algico Policy was required so that such passengers may be covered. This was a requirement of the Licensing Authority as vehicles such as truck TBE 5103 and trailer TBG 482 were not insured for the carriage of passengers (apart from passengers being carried by reason of their employment with the Insured).

111. George testified that Maritime denied liability to satisfy this claim and/or indemnify the Insured on the basis that at the time of the incident it was not on risk and/or that the Insured had breached the terms and/or conditions of truck policy and trailer policy. She further testified that by virtue of the Algico Policy, the first defendant was on risk for the incident and is liable to the Claimant.

#### The cross-examination of George

112. George testified that the policy for the truck and trailer is one policy. That the only difference is the certificate of insurance.

113. As part of her duties, George would know the contents of proposal forms and what is required on proposal forms. She was directed to the Maritime proposal form annexed to her witness statement at "J.G.1". She was then referred to the heading "Use of vehicles" and asked whether the response "Company's use" was sufficient to assess the risk of a haulage company. She responded by stating that she was not the person who was dealing with the proposal forms at that time.

114. She was then referred to the Commercial Vehicle Policy ("the policy") annexed to her witness statement at "J.G.2". She testified that the

policy was a sample policy and that it may or may not reflect all the terms and conditions.

115. George was then directed to certificate number 111639 (the truck certificate) which was annexed to her witness statement at “J.G.3”. She was referred to the heading “Limitations of Use”. She agreed that under that heading is stated that the policy does not cover use for hire or reward. She was then referred to certificate number 345718 (the trailer certificate). She was directed to the heading “Limitations of Use”. She agreed that under this heading the wording was different from certificate in relation to the truck. That under the truck certificate, the policy specifically stated that the policy does not cover use for hire or reward whereas as the certificate for the trailer does not mention that restriction.

#### **THE CASE FOR THE FOURTH DEFENDANT**

116. The fourth defendant gave evidence for himself. He is forty years old. Presently, he is employed as a Driver with the second defendant. He is the holder of a driver’s license. He was first issued his driver’s license on February 24, 2000 and he has renewed his license when he has been required by law to do so. At present his driver’s license is for Classes 3, 4 and 5 vehicles so that he is licensed to drive light motor vehicles, heavy motor vehicles and extra heavy motor vehicles.<sup>14</sup>

117. In or around the year 2006, the fourth defendant commenced employment with the second defendant. When he started working with the second defendant, he took on the position as a driver and a dispatcher. His duties during his employment were to drive trucks assigned to him and

---

<sup>14</sup> A copy of the fourth defendant’s licence was annexed to his witness statement at “S.R.1”.

also to dispatch trucks to customers. Driving trucks was not a new job to him as prior to his employment with the second defendant, he was employed as a driver at Union Steel for approximately five years where he drove Class 4- Heavy-T trucks.

118. On or about December 6, 2008 he underwent a Defensive Driving Course at Training & Logistics Ltd. and on completion of this course he obtained a Certificate.<sup>15</sup>

119. From time to time during the course of his employment with the second defendant, he was tasked with the further responsibility of driving when a driver did not come to work. During the course of his employment, he drove from time to time trucks with trailers, low boys trailers and high deck trailers.

120. Further, during his course of employment with the second defendant, he was assigned to drive various trucks and from the year 2010 and continuing into March 2011 he was assigned to drive TBE 5103, a blue Benz model truck (“the truck”).

121. The fourth defendant testified that on the instruction of the second defendant, he drove the truck during the Carnival period for the year 2010 and then in March 2011. To his knowledge having worked for the second defendant and having been involved in the dispatching of trucks and or trailers, the procedure which he followed and which was put in place by the second defendant was that when a customer called and requested a truck and/or a trailer, the customer was provided with the information that they would be responsible for the insurance for the day(s) the truck

---

<sup>15</sup> A copy of that Certificate was annexed to the fourth defendant’s witness statement at “S.R.2”.

and/or trailer was being leased and that the person driving the truck would be the second defendant's driver and no one else.

122. The fourth defendant testified that it was a requirement of the second defendant that when a truck was being leased, the customer could not use their own driver and had to pay for the services of the second defendant's drivers to drive the leased vehicle.

123. In or about February 2011, prior to Carnival Monday, the fifth defendant telephoned the fourth defendant in his capacity as a servant and/or agent of the second defendant in relation to the dispatching and/or leasing of a truck and trailer. The fourth defendant knew the fifth defendant from before and was well acquainted with him.

124. The fifth defendant informed the fourth defendant that he wanted to get a truck and trailer for Carnival Monday and Carnival Tuesday. After speaking to the fifth defendant, the fourth defendant had a conversation with the second defendant and it was agreed that he would be assigned to drive the truck and trailer and the second defendant set the cost for the leasing of the truck and a trailer for the Carnival Monday and Carnival Tuesday.

125. After the fourth defendant spoke to the second defendant, the fourth defendant telephoned the fifth defendant and informed him of the costs and told him that he would have to attend the office of the second defendant to pay the cost for the leasing.

126. On or about February 4, 2011 the fifth defendant went to the Bartlett Haulage and met with the second defendant and paid the sum of

\$8,000.00. One this same day, the fifth defendant was informed by the second defendant that the trailer being leased would be provided to him earlier to allow him to do all such things as was required of him which included it being inspected and obtaining the necessary approvals and insurance and outfitting it with the necessary railings and equipment he required and needed on it for the Carnival period.

127. It was agreed between the second defendant and the fifth defendant that the fourth defendant was only required to drive the truck and trailer and that the fifth defendant was to make the necessary arrangements to pay the fourth defendant for driving the truck and trailer on the Carnival Monday and Carnival Tuesday.

128. The fourth defendant testified that he understood that by the second defendant leasing the truck and trailer to the fifth defendant meant that the fifth defendant was in control of the truck and trailer and that he (the fourth defendant) was also under the fifth defendant's control, direction and supervision.

129. On March 6, 2011 the fourth defendant drove the truck to the fifth defendant's home. On his arrival there, the fourth defendant proceeded to latch the truck to the trailer which was already at the fifth defendant's home in preparation to drive the truck and trailer. Prior to latching the trailer to the truck, the fourth defendant walked around the trailer and inspected it. He observed that the trailer had railings around it and one staircase and that the sound boxes located on the trailer were secured with straps.

130. Pursuant to custom and practice as a truck driver for over ten years prior to driving the truck with the trailer in tow, the fourth defendant ensured that the truck was working properly and he hooked up the airline from the truck to the trailer to make sure that all the air was flowing so that the braking system was working. He also checked the truck's oil, lights, tyres, horn, mirrors and he observed that on the trailer a swivel light was also hooked up and working.

131. Additionally, prior to driving the truck with the trailer in tow on Carnival Monday and Carnival Tuesday, the fourth defendant spoke to the fifth defendant and it was agreed and communicated that the fifth defendant would issue commands to the fourth defendant by means of a microphone connected to the loud speakers installed on the trailer. The commands that were to be issued to the fourth defendant by the fifth defendant were as to when he (the fourth defendant) should commence driving, when he should slow down, when he should bring the truck and trailer to a stop and when he should turn.

132. Prior to the commencement of driving, the fifth defendant showed the fourth defendant a permit showing that he had permission for six to eight persons to be on the truck and trailer for the period. The fourth defendant does not have the permit in his possession or a copy of same and he believes that it is in the possession of the fifth defendant.

133. Additionally, the fifth defendant produced and/or showed to the fourth defendant a copy of an Insurance Policy taken out for the Carnival period.<sup>16</sup>

---

<sup>16</sup> A copy of the Certificate of Insurance obtained by the fifth defendant for the Carnival period was annexed to the fourth defendant's witness statement at "S.R.5".

134. On March 7, 2011 the fourth defendant commenced driving the truck and trailer at 4:00 a.m. When he commenced driving, he observed that the fifth defendant was on the trailer along with four other persons who were sound engineers to assist him. Sitting in the cab of the truck was a friend of the fourth defendant's.

135. The fourth defendant was instructed to drive to Pleasantville where the J'Ouvert Band that was following the truck and trailer was left. From 11:00 a.m. to 2:00 p.m. The fourth defendant took a break from driving and he parked the truck and trailer up and rested in the cab of the truck.

136. At around 2:00 p.m. the fifth defendant instructed the fourth defendant to drive to San Fernando where they met a band and this band followed the truck and trailer between 2:00 p.m. and 6:00 p.m. At 6:00 p.m. the band that was following the truck and trailer left and the fourth defendant was instructed to return to Pleasantville.

137. On arrival at Pleasantville, the fourth defendant parked up the truck and trailer and the fifth defendant told the fourth defendant that he should return for the midnight mas. The fourth defendant went to his home where he showered, had dinner and relaxed. He then returned to Pleasantville where at around 11:00 p.m. after checking the truck and trailer to ensure that it was functioning properly and upon getting directions from the fifth defendant he commenced driving the truck and said trailer.

138. They were pulling a band called "Royalty & Friends" which was based in the Pleasantville area. The fifth defendant was playing music for

the masquerades in the band that were on the streets and was issuing instructions directing the fourth defendant's driving of the truck and trailer.

139. The fifth defendant instructed the fourth defendant to drive to Navet where the fourth defendant parked the truck and trailer by the KFC restaurant located in that area. A short while after the fifth defendant instructed the fourth defendant to drive down to Ciperio Street and turn by T&TEC and then return to Pleasantville.

140. At or around 3:00 a.m. on the Carnival Tuesday morning the fourth defendant drove the truck and trailer on the North Circular Drive, Pleasantville at a speed of about five kilometres per hour. He observed that this street was brightly lit as it had working street lights and the road was dry and he was able to properly see the road ahead of him with the street lights and the lights affixed to the truck and he was further able to see to the sides of the truck through the side mirrors affixed to the truck.

141. The fifth defendant instructed the fourth defendant over the microphone to bring the truck and trailer to a complete stop and he did so. When he caused the truck and trailer to come to a halt, he observed and/or heard the bandleader who was working alongside the fifth defendant thank all the masqueraders for participating and he said some prayers. After the prayers were said, the fifth defendant by means of the microphone instructed the fourth defendant to drive and the fourth defendant sounded the truck horn, looked in his mirrors to ensure that it was safe to drive and only after ensuring that he began driving.



142. As the fourth defendant drove the truck and trailer along North Circular Road, he then heard the fifth defendant over the microphone instruct him to stop the truck and when the truck came to a stop he saw Timothy, one of the persons working with the fifth defendant exit the trailer using the step. After Timothy left the trailer and was on the road, the fifth defendant instructed the fourth defendant over the microphone to return to base which was at Union Hall. At this time no music was being played so that the fourth defendant was able to hear clearly and also receive instructions clearly.

143. On receiving instructions to return to base, the fourth defendant then sounded the horn on the truck to indicate to persons who were still on the street that he was ready to proceed. He looked into his mirrors to ensure that no one was to the side of the truck and trailer and only after seeing that the roadway was clear to allow him to continue driving and without any indication that it was unsafe to proceed, he put the truck into first gear and drove forward at about five kilometres per hour. At no time when the fourth defendant proceeded to drive the truck and trailer did anyone including the fifth defendant communicate to him that someone was coming off the trailer and that he should bring the said truck and/or trailer to a halt.

144. Only after driving about twenty five feet, he heard persons on the street shouting for the fourth defendant to stop the truck. He immediately brought the truck and trailer to a complete stop and pulled the hand brakes. He then proceeded out of the truck where he heard a stranger on the road say that a lady, who he later learned was the claimant, was bleeding on the right side of the trailer.

145. He further heard a stranger in the crowd state that the claimant's companion, Chapman, a police officer and who was not on duty at the time, had jumped off of the trailer and twisted his ankle as he landed on the ground and that the claimant upon seeing this also jumped off the truck whilst it was in motion and she hooked her foot on the stairway and her right foot remained in the pathway of the trailer and was then driven over by the trailer.

146. As the fourth defendant made his way towards the trailer he observed that the claimant was on the ground and there was blood by her right leg. Chapman informed the fourth defendant that all was well and that they would handle everything and that he (the fourth defendant) could proceed to base. Only after receiving this assurance, the fourth defendant proceeded to return to the truck and drove to base.

147. On Carnival Tuesday, the fourth defendant again drove the truck and trailer and it was only upon his returning to base later in the afternoon was he met by officers of the Mon Repos Police Station inquiring about the incident. A report was made subsequently to the Mon Repos Police Station on the Carnival Tuesday.

148. To the fourth defendant's knowledge only the fifth defendant, Timothy, Redman and another person was on the trailer. The fifth defendant was behind the generator and from the fourth defendant's observations as to where that was situated he would be able to see the sides and to the back of the said trailer.

149. The fourth defendant testified that the claimant and Chapman were never authorized to be on the trailer. He further testified that at no

time when he proceeded to drive the truck and trailer after receiving communication to do so and ensuring that it was safe to do so, did anyone including the claimant or the fifth defendant communicate to him that someone was coming off the trailer and that he should bring the truck and/or trailer to a halt.

150. When he drove the truck and trailer and at the time of the incident, there were speed bumps on the road and because of the trailer and heavy load, he could not drive fast and in fact he drove in first gear and at a slow rate of speed.

151. On March 10, 2011 the truck and trailer were parked at the second defendant's business place when licensing officers came and the fourth defendant was instructed by one of them to drive forward, mash brakes and reverse. The fourth defendant observed that the licensing officers checked the lights, tyres, horn, air leaks in brake system, hose from truck to trailer and left.

152. The fourth defendant testified that up until March 8 2011, he had never been involved in a road traffic accident and at all times and specifically including the material time when he drove the truck and trailer he exercised due care and caution. Save and except for this action, the fourth defendant has never been charged or summoned to court for any offences relating to this incident.

153. Further, the fourth defendant testified that at the material time he was under the control, direction and supervision of the fifth and second defendants.

Cross-examination of the fourth defendant

154. The fourth defendant drove for the fifth defendant in 2009 and 2010. However, subsequent to the incident, he did not drive for the fifth defendant.

155. The fourth defendant was referred to two photographs annexed to the second defendant's list of documents. He testified that the photographs depicted the truck and trailer he was driving at the time of the incident. He further testified that the steps in the photograph located on the passenger's side of the truck and trailer were the only steps on the trailer. That there was no steps on the driver's side of the truck and trailer.

156. When the incident occurred, the fourth defendant was driving the truck and trailer on the proper left lane. After the incident occurred, he saw the claimant lying on the driver's side of the truck and trailer in the middle of the road.

157. The trailer was approximately forty feet in length and approximately three feet from the ground. The truck has five mirrors within the cab and two mirrors externally. As such, it was the testimony of the fourth defendant that if anyone was at the side of the truck and trailer prior to him moving off, he would have seen them.

**ISSUE 1** - *whether the incident occurred in the manner in which the claimant alleges*

158. Oral submissions were invited and made on the issue of liability in relation to the manner in which the incident occurred. Written submissions were then ordered and filed in relation to the other issues.

159. It is undisputed that the claimant's right leg was crushed by the wheel of the trailer and that because of that injury, her right leg had to be amputated. However, the manner in which the incident occurred was hotly contested. The only direct viva voce evidence of the manner in which the incident occurred came from the claimant herself. There is no other such evidence. However, her evidence as to how the incident occurred proved to be highly implausible and illogical when taken with the other evidence in the case.

160. In her witness statement, the claimant testified that on the said date at around 2:00 am the truck and trailer whilst in the midst of the Carnival celebrations came to a complete stop on the Southern Main Road, Pleasantville, in the vicinity of Circular Road. The roadway at the time was lit by street lights. As the vehicle came to a stop, the claimant saw her then boyfriend, Chapman, go to the steps located at the right rear side of the trailer, near the wheel wells, and jumped off. As Chapman did so, he landed on the roadway and the claimant saw that he was clutching his left leg and he seemed to be in pain.

161. As the claimant thought that Chapman was hurt, she went to the steps to descend in an effort to assist him. At the time she was wearing a push-toe slipper with a soft leather flower attached to the top of the strap which was across her toe. As she descended the first two steps and was going on the third step the flower on her left slipper became stuck in the metal part of the step. She began pulling her foot to try to free her slipper, when the other strap on the slipper running across the top of her foot ripped off. At that same time, the vehicle began to move and as a result of the forward motion, the claimant lost her balance and fell down onto the

roadway. Her right leg fell under the right rear of the trailer in front of the wheels of the trailer which then ran over her right leg.

162. During cross-examination, the claimant testified that prior to her falling, the truck was on the left side of the road. That she fell off of the driver's side of the truck and trailer on her back onto the roadway.

163. Further during cross-examination, the claimant was referred to two photographs attached to the second defendant's list of documents. On those photographs it was seen that the steps of the trailer were in fact on the passenger's side of the truck and trailer and that there were no steps on the driver's side of the truck and trailer, the side from which the claimant allegedly descended. The claimant denied that the steps on the passenger's side of the truck and trailer were the steps she was speaking about in her evidence. She reiterated that she came off the steps located at the driver's side of the truck and trailer and that there were steps on that side. However, the photographs clearly depicted that there was only one set of steps on the trailer located on the passenger's side of the truck and trailer.

164. Flament, witness for the second defendant, acted as the security for the truck and trailer at the material time. He testified that the trailer was built up with railings on both sides, and to the left of the trailer there was a step rail for persons to embark and disembark from the trailer. During cross-examination, Flament was shown the same two photographs that were shown to the claimant. He testified that the photographs depicted the condition of the truck and trailer at the time of the incident. He further testified that the steps shown on the passenger's side of the truck and trailer were the only set of steps on the trailer.

165. According to Flament, around midnight or thereafter, the midnight mass had come to an end and the truck and trailer had reached in the vicinity of T&TEC on Cipero Street, San Fernando. The music was stopped and they eventually proceeded to the home of Timothy. The fourth defendant stopped the vehicle for Timothy to disembark. After Timothy disembarked he looked out and saw that it was clear, the fifth defendant told the fourth defendant to move off. Flament heard the fourth defendant sound the horn before pulling off. It is to be noted that the claimant's evidence is equally that she heard the horn sound before she fell.

166. As soon as Flament felt some movement of the vehicle, he heard a loud scream that seemed to have come from outside of the trailer. He together with the rest of persons on the trailer and on the street shouted for the fourth defendant to stop and he did so as soon as he could which was about twenty to twenty five feet away.

167. When Flament looked out from the trailer, he saw Chapman and the claimant laying on the right side of the truck and trailer to the side of the road. As such, Flament did not see how the claimant got injured. He saw her when she was already injured. He testified that she was lying in the middle of the roadway on the driver's side of the truck and trailer. He further testified that when he saw the claimant, the truck and trailer was on its proper left lane. Clearly therefore this witness' evidence was in keeping with the physical makeup of the truck and with the area of the roadway in which the claimant was seen on the ground. Namely the middle of the road. Had the claimant attempted to descend the steps as she claimed, the truck being on the left lane, the steps would have been close to the side of the roadway and she would have fell on the left side of the roadway close to the grassy area. But even the claimant agreed that she

fell in the middle of the road. This was of course in keeping with the logical conclusion that the claimant stepped off the trailer on the driver's side.

168. The fourth defendant, the driver of the truck, testified that as he drove the truck and trailer along North Circular Road, the fifth defendant instructed him over the microphone to stop the truck and when the truck came to a stop he saw Timothy, one of the persons working with the fifth defendant exit the trailer using the step. After Timothy left the trailer and was on the road, the fifth defendant instructed the fourth defendant over the microphone to return to base which was at Union Hall. At this time no music was being played so that the fourth defendant was able to hear clearly and also receive instructions clearly.

169. On receiving instructions to return to base, the fourth defendant then sounded the horn on the truck to indicate to persons who were still on the street that he was ready to proceed. He looked into his mirrors to ensure that no one was to the side of the truck and trailer and only after seeing that the roadway was clear to allow him to continue driving, he put the truck into first gear and drove forward at about five kilometres per hour. Only after about driving about twenty five feet, did persons on the street shout for him to stop the truck. He immediately brought the truck and trailer to a complete stop and pulled the hand brakes. He then proceeded out of the truck where he heard a stranger on the road say that a lady, who he later learned was the claimant, was bleeding on the right side of the trailer.

170. During cross-examination, the fourth defendant was also referred to the two photographs. He testified that the photographs depicted the truck and trailer he was driving at the time of the incident. He further



testified that the steps in the photograph located on the passenger's side of the truck and trailer were the only steps. That there were no steps on the driver's side of the truck and trailer.

171. Moreover, the fourth defendant testified that when the incident occurred, he was driving the truck and trailer on the proper left lane. That after the incident occurred, he saw the claimant lying on the driver's side of the truck and trailer in the middle of the road.

172. Consequently, on the evidence it is pellucid that there were only one set of steps located on the passenger's side of the trailer. It was also pellucid that for the claimant to have fallen in the middle of the road to the driver's side of the truck and trailer, she could not have used the steps to disembark the trailer. As such, the claimant's version as to how the incident occurred lacked logic, credibility and plausibility.

173. Lord Ackner in the Privy Council decision of **Horace Reid v Dowling Charles & Anor**<sup>17</sup>, at page 6 had the following to say;

*“Mr. James Guthrie, in his able submissions on behalf of the Mr. Reid, emphasized to Their Lordships that where there is an acute conflict of evidence between neighbours, particularly in rights of way disputes, the impression which their evidence makes upon the trial judge is of the greatest importance. This is certainly true. However, in such a situation, where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanour of the witnesses, it is important for him to check that impression against contemporary documents, where they exist, against the pleaded case and against the inherent probability or improbability of the rival contentions, in the light in particular of facts and*

---

<sup>17</sup> PCA No. 36 of 1987

*matters which are common ground or unchallenged, or disputed only as an afterthought or otherwise in a very unsatisfactory manner. Unless this approach is adopted, there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seen and heard the witnesses.”*

174. In a road traffic accident report form dated April 20, 2012 which was disclosed by the claimant and formed part of the agreed list of documents, the incident was described to have occurred in the following manner;

*“Around 3:00 am on 8.3.11 truck TBE 5103 with a 40 feet trailer TBG 482 was proceeding north along Circular Right Pleasantville when SERVAN CHAPMAN who was on the trailer got off and in attempting to get back on slipped and fell on the road injuring his left foot. Neela Sawh who was sitting on the trailer attempted to assist and jumped off the trailer, lost her balance and fell in the roadway and the rear wheel of the trailer passed over her right foot causing serious injury...”*

175. During cross-examination, the claimant was referred to this report. She testified that the police report was not accurate and that she does not know who gave that report.

176. Further during cross-examination, the claimant was referred to letters dated March 22, 2012, February 19, 2014 and February 6, 2015 which were written on her behalf by her then attorneys-at-law to the defendants.

177. Letter dated March 22, 2012 failed to mention that the claimant was wearing a push-toe slipper with a soft leather flower attached to the

top of the strap and that the flower on her left slipper got stuck in the metal part of the step. This letter described the incident as follows;

*“...My client then attempted to exit the trailer by descending the stairs and while she was in the process of so doing, the driver of TBE 5103 drove off from the standstill position causing my client to lose balance and fall off the said stairs...”*

178. Letter dated February 19, 2014 failed to mention that the claimant was descending the steps of the trailer and that the leather flower on her slipper got stuck in the metal part of the step. This letter described the incident as follows;

*“...on the 8<sup>th</sup> March, 2011 Motor Truck Registration Number TBE-5103, pulling Trailer Registration Number TBG-482 was so negligently driven by your insured... that the wheel of the Trailer went over the right leg of the claimant (who had fallen on the road from the Trailer) crushing her right leg.”*

179. Letter dated February 6, 2015 mentioned that the claimant was descending the steps and that her foot got stuck but failed to mention that it was the flower on her slipper which got stuck. This letter described the incident as follows;

*“The claimant in the emergency of the situation and in an attempt to go to the aid of her companion went to the said steps, but her foot got caught on the stairwell at the same time the truck and trailer began to move...the claimant lost her balance causing her to fall down onto the roadway where her right leg went under the trailer where it was crushed...”*

180. Upon on an evaluation of the evidence therefore, the court finds that was it in fact the case that the incident took place in the manner in which the claimant said it did, the facts as she has set them out would have found themselves in the letters and the police report. It is therefore more probable than not that when the truck and trailer stopped, the claimant attempted to disembark. However, she did not use the steps on trailer to disembark same. That in her attempt to assist her then companion, she disembarked on the driver's side of the truck and trailer where there were no steps and fell onto the roadway where her leg was unfortunately crushed. The court further finds that as the claimant did not use the steps to disembark from the trailer, the claimant's slipper played no part in the incident. She was not stuck on any step and was not jolted off any steps while descending.

181. The court notes that in oral submissions Attorney for the claimant eventually conceded that the version of the events given by the claimant in evidence was not plausible having regard to the all the other evidence in the case. In the court's view this was a proper concession.

182. However, it is clear that the intention of the claimant was that of an attempt to deceive the court by pursuing the case on a factual basis that was clearly manufactured and untrue in light of logic and reasoning. In so doing the claimant was in the court's view being very dishonest in an attempt to recover a sum for her loss. It is not lost on the court that the claimant suffered a life changing debilitating injury from which she can never recover but that was in the court's view no reason to concoct a story. The court therefore finds that the claimant's evidence was gravely lacking in credibility.

183. In so saying the court is mindful of the grievous injury sustained by the claimant but quite simply, sympathy cannot be a factor for the court's consideration. The evidence is what it is, and the chips must fall where they may.

### **ISSUES 2 & 3** – *Duty, breach and causation*

184. A finding of negligence requires proof of (1) a duty of care owed to the claimant by the defendant; (2) breach of that duty and (3) damage to the claimant attributable to the breach of the duty by the defendant.<sup>18</sup>

185. There must be a causal connection between the defendant's conduct and the damage. Further, the kind of damage suffered by the claimant must not be so unforeseeable as to be too remote.<sup>19</sup>

### **Duty**

186. Kokaram J in **Aaron Jairam v Trincan Oil Ltd.**<sup>20</sup> set out as follows;

*“The establishment of that duty of care calls for a close examination of the relationship between persons to determine whether an obligation can be imposed for the benefit of the other to take reasonable care in the circumstances. Lord Wright in Grant v Australian Knitting Mills Limited [1936] AC 85 identified the need to define the precise relationship from which the duty can be deduced: “All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is deduced. It is however essential in English Law that the duty should be established the mere fact that man is injured*

---

<sup>18</sup> Charlesworth & Percy on Negligence Thirteenth Edition, Chapter 1, paragraph 1-19

<sup>19</sup> Clerk & Lindsell on Torts Nineteenth Edition. Chapter 8, paragraph 8- 04.

<sup>20</sup> CV2010-04153 at paragraphs 101 &102

*by another's act gives in itself no cause of action if the act is deliberate the party injured will have no claim in law even though the injury is intentional so long as the other party is merely exercising a legal right if the act involves a lack of due care against no case of actionable negligence will arise unless the duty to be careful exists."*

### **Findings**

187. It is pellucid that the fourth defendant owed a duty of care as the driver of the truck and trailer to safely convey the claimant and the other persons on board the trailer. It does not matter that the claimant did not have permission to be on board the trailer as it is very reasonable in a Trinidadian society for persons who have no permission to be onboard trucks and trailers carrying music at carnival time.

188. Consequently, it would have been foreseeable to the fourth defendant that there would be persons embarking and disembarking the trailer. He was therefore duty bound to take reasonable care in the circumstances, to ensure that such persons were safely off-board and out of the way of the truck and trailer prior to proceeding so as to not cause risk or danger to such persons.

189. The fourth defendant gave evidence that the street was brightly lit as there were working street lights and that the road was dry. He testified that he was able to properly see the road ahead of him with the street lights and the lights affixed to the truck and that he was further able to see to the sides of the truck through the side mirrors affixed to the said truck. It is equally clear that the mirrors were large and gave a full view (as far the laws of physics permitted) of both sides.

190. According to the fourth defendant, upon receiving instructions to return to base, he sounded the horn on the truck to indicate to persons who were still on the street that he was ready to proceed. He then looked into his mirrors to ensure that no one was to the side of the truck and trailer and only after seeing that the roadway was clear to allow him to continue driving, he put the truck into first gear and drove forward at about five kilometres per hour. After about driving for about twenty five feet, persons on the street shouted for him to stop. He immediately brought the truck and trailer to a complete stop and pulled the hand brakes. He then proceeded out of the truck where he heard a stranger on the road say that a lady, who he later learned was the claimant, was bleeding on the right side of the trailer.

191. Flament testified that when Timothy disembarked and he saw that it was clear, the fifth defendant told the fourth defendant to move off. Flament heard the fourth defendant sound the horn before pulling off. As soon as Flament felt some movement of the truck and trailer, he heard a loud scream that seemed to have come from outside of the trailer. He together with the rest of persons on the trailer and on the street shouted for the fourth defendant to stop and he did so as soon as he could which was about twenty to twenty-five feet away.

192. Consequently, it is clear that if the fourth defendant did in fact keep a proper lookout by observing his mirrors prior to proceeding, he would have seen that Chapman was in the road and/or that the claimant was attempting to disembark from the driver's side of the trailer. As such, the court finds that the fourth defendant failed to exercise due care and attention prior to and during the driving of the truck and trailer and that his action caused the injury to the claimant.

193. In relation to liability of the fifth defendant it is to be noted as stated above that judgment was taken up against him prior to trial.

**ISSUE 4** - *whether the fourth defendant was at the material time acting as the servant and/or agent of the second defendant or the fifth defendant*

194. A court must adopt a common sense approach when analyzing evidence. According to the **Halsbury's Laws of England, Volume 39 (2014), Paras 1–353**, employer means the person by whom the employee is (or, where the employment has ceased, was) employed; 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment; 'employment', in relation to an employee, means employment under a contract of employment and, in relation to a worker, means employment under his contract; and 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and, if it is express, whether it is oral or in writing.

195. In order to ascertain who the employer of the fourth defendant was, the court has to determine who was entitled to instruct the fourth defendant on the way in which he had to do the works upon which he was engaged: **See Mersey Docks and Harbour Board v Coggins & Griffiths (Liverpool) Ltd and McFarlane [1946] 2 All ER 345.**

196. The second defendant testified that as part of the agreement he had with the fifth defendant, the fifth defendant had to supply the driver for the truck and trailer. As such, it was the testimony of the second defendant that the fourth defendant (the driver) was at all material times



under the care, control and supervision of the fifth defendant. The fifth defendant was also responsible for compensating the driver.

197. During cross-examination, the second defendant testified that the fourth defendant was employed with him for about eight years but that at the time of the incident, the fourth defendant was on holidays and so the fourth defendant was not hired out by the second defendant to the fifth defendant. Further during cross-examination, the second defendant testified that that only persons with his authorization could drive the truck and trailer.

198. The fourth defendant testified that in or around the year 2006, he commenced employment with the second defendant. When he started working with the second defendant, he took on the position as a driver and a dispatcher. His duties during his employment were to drive trucks assigned to him and also to dispatch trucks to customers.

199. The fourth defendant further testified that on the instruction of the second defendant, he drove the truck during the Carnival period for the year 2010 and March 2011. Having worked for the second defendant and having been involved in the dispatching of trucks and or trailers, the procedure which the fourth defendant followed (which was put in place by the second defendant) was that when a customer called and requested a truck and/or a trailer, the customer was provided with the information that they would be responsible for the insurance for the day(s) the truck and/or trailer was being leased and that the person driving the truck would be the second defendant's driver and no one else.

200. Moreover, the fourth defendant testified that it was a requirement of the second defendant that when a truck was being leased, the customer

could not use their own driver and had to pay for the services of the second defendant's drivers to drive the leased vehicle.

201. According to the fourth defendant, the fifth defendant informed him that he wanted to get a truck and trailer for Carnival Monday and Carnival Tuesday. After speaking to the fifth defendant, the fourth defendant had a conversation with the second defendant and it was agreed that he would be assigned to drive the truck and trailer. The fourth defendant testified that it was further agreed between the second defendant and the fifth defendant that he (the fourth defendant) was only required to drive the truck and trailer and that the fifth defendant was to make the necessary arrangements to pay the fourth defendant for the driving of the truck and trailer on the Carnival Monday and Carnival Tuesday.

202. The fourth defendant testified that he understood that by the second defendant leasing the truck and trailer to the fifth defendant meant that the fifth defendant was in control of the truck and trailer and that he (the fourth defendant) was also under the fifth defendant's control, direction and supervision. Prior to driving the truck with the trailer in tow on Carnival Monday and Carnival Tuesday, the fourth defendant spoke to the fifth defendant and it was agreed and communicated that the fifth defendant would issue commands to the fourth defendant by means of a microphone connected to the loud speakers installed on the said trailer. The commands that were to be issued to the fourth defendant by the fifth defendant were as to when he (the fourth defendant) should commence driving, when he should slow down, when he should bring the truck and trailer to a stop and when he should turn.

203. As such, it was the testimony of the fourth defendant that at the material time he was under the control, direction and supervision of the fifth and second defendants.

204. On appeal in the case of *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd*,<sup>21</sup> the issue arose as to who could be considered to be the employer where the employee's regular employer loaned out the employee for a specific task to a temporary employer and the Court of Appeal held it conceivable in principle that both employers should be liable.

205. May LJ had the following to say at paragraphs 46 to 49;

*“[46] In summary, therefore, there has been a long-standing assumption, technically unsupported by authority binding this court, that a finding of dual vicarious liability is not legally permissible. An assumption of such antiquity should not lightly be brushed aside, but the contrary has scarcely been argued and never considered in depth. This is not surprising, because in many, perhaps most, factual situations, a proper application of the Mersey Docks principles would not yield dual control, as it so plainly does in the present case. I am sceptical whether any of the cases from this jurisdiction which I have considered would, if they were re-examined, yield dual vicarious liability. Even Mileham is not transparent.*

*[47] I conclude below in considering contribution that, if the relevant relationships yield dual control, it is highly likely at least that the measure of control will be equal. An equal measure of control will not often arise. Dual vicarious liability is most unlikely to be a possibility if one of the*

---

<sup>21</sup> [2005] EWCA Civ 1151, [2006] QB 510

*candidates for such liability is also personally at fault. It would be entirely redundant, if both were.*

*[48] Academic commentary tends to favour the possibility of dual vicarious liability, but feels that authority constrains it. Other jurisdictions have reacted variously, giving no clear lead. Their decisions range from articulating the assumption to favouring or adopting dual liability.*

*[49] In my judgment, there is, in a modern context, little intrinsic sense in, or justification for, the assumption. Multiplicity of claims is not a modern impediment. A contest between two Defendants, where only one could be liable, is just as likely as a claim against the same two Defendants, if both could be liable. The underlying basis for the assumption appears to be the notion, exposed as a device by Denning LJ in Denham, that, to find a temporary employer vicariously liable, you have to look for a transfer of employment. Although the nature and incidence of the employee's employment is plainly material, I do not read Mersey Docks as saying that these are the determinative matters in all cases. If, on the facts of a particular case, the core question is who was entitled, and in theory obliged, to control the employee's relevant negligent act so as to prevent it, there will be some cases in which the sensible answer would be each of two "employers". The present is such a case. In my judgment, dual vicarious liability should be a legal possibility, and I would hold that it is. It follows that I would allow this appeal to the extent of holding each of the second and third Defendants vicariously liable for Darren Strang's negligence."*

206. Upon an evaluation of the evidence, the court finds that at the material time the fourth defendant was an employee of the second defendant and that the fourth defendant could not have driven the truck and trailer without the authorization of the second defendant to so do. In

the court's view, the second defendant's evidence that the fourth defendant was on vacation at the material time and so he was not hired out by the him to the fifth defendant is an attempt by the second defendant to bolster his case that the fourth defendant was not acting as his agent and/or servant at the time of the incident. However, the second defendant's evidence was clear that the fourth defendant could not have driven the truck and trailer without his permission.

207. The court also accepts the evidence of the fourth defendant that it was a requirement of the second defendant that when a truck was being leased, the customer could not use their own driver and had to pay for the services of the second defendant's drivers to drive the leased vehicle. Consequently, the court finds that the fourth defendant was acting in the course of his employment with the second defendant by driving the truck and trailer for the fifth defendant. The second defendant is liable for the torts of the fourth defendant so long as they are committed in the course of the fourth defendant's employment. The nature of the tort is immaterial.<sup>22</sup> As such, the court finds that the actions of both the second and fourth defendants on that day also caused injury to the claimant. It is therefore the finding of the court that the second and fourth defendants are liable for the following in that they;

- i. Failed to ensure that no person was disembarking before moving off;
- ii. Failed to have any security and/or any adequate security to ensure that no person was disembarking before moving off; and
- iii. Failed to ensure that no person was climbing on or off the trailer whilst it was in motion.

---

<sup>22</sup> See Clerk & Lindsell on Torts Twentieth Edition, Chapter 6, para 6-28.

**ISSUE 5** - *whether there was contributory negligence on the part of the claimant*

208. Contributory negligence means some act or omission by the injured person which constituted a fault, in that it was blameworthy failure to take reasonable care for his or her own safety and which has materially contributed to the damage caused.<sup>23</sup>

209. **Halsbury's Laws of England, Volume 78 (2010), paragraphs 76, 77, 78 & 80,** provides the following in relation to contributory negligence;

*"76. In order to establish contributory negligence the defendant has to prove that the claimant's negligence was a cause of the harm which he has suffered in consequence of the defendant's negligence. The question is not who had the last opportunity of avoiding the mischief but whose act caused the harm. The question must be dealt with broadly and upon commonsense principles. Where a clear line can be drawn, the subsequent negligence is the only one to be considered; however, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the person secondly negligent might invoke the prior negligence as being part of the cause of the damage so as to make it a case of apportionment. The test is whether in the ordinary plain common sense the claimant contributed to the damage.*

*77. The existence of contributory negligence does not depend on any duty owed by the claimant to the defendant and all that is necessary to establish a plea of contributory negligence is for the defendant to prove that the claimant did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury.*

---

<sup>23</sup> See Munkman: Employer's Liability at Common Law, Fifteenth Edition, Chapter 6, paragraph 6.10

*78. The standard of care in contributory negligence is what is reasonable in the circumstances, and this usually corresponds to the standard of care in negligence. The standard of care depends upon foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent person, he might hurt himself ...As with negligence, the standard of care is objective in that the claimant is assumed to be of normal intelligence and skill in the circumstances...If the negligence of the defendant puts the claimant in a position of imminent personal danger then conduct by the claimant which in fact operates to cause harm to him, but which is nevertheless reasonable in the agony of the moment, does not amount to contributory negligence.*

*80. Knowledge by the claimant of an existing danger or of the defendant's negligence may be an important element in determining whether or not he has been guilty of contributory negligence. The question is not whether the claimant realised the danger but whether the facts which he knew would have caused a reasonable person in his position to realise the danger. It is a question of fact in each case whether the knowledge of the claimant in the particular circumstances made it so unreasonable for him to do what he did as to constitute contributory negligence... On the one hand, the claimant must act reasonably with regard to the dangers which he knows, or ought to know, exist, and to any regulations or other precautions imposed for the purpose of avoiding them. On the other hand, he is entitled to rely on reasonable care and proper precautions being taken..."*

210. As was mentioned above, the court found that the claimant did not use the steps on trailer to disembark same. It is abundantly clear that the claimant no doubt contributed in large measure to the cause of her own

injury by attempting to disembark in an unsafe manner from the side of the trailer which was not fitted with steps having failed to warn or inform the fourth and/or fifth defendants that she was so doing.

211. In this regard the court is of the view that she must bear responsibility for her negligent acts since she failed to have any proper regard for her own safety. The facts of this case are unique in that it is one of those cases in which the claimant's contribution to her own injury far outweighs the liability of the defendants because of the facts as the court has found them to be. The court finds therefore that a contribution on the part of the claimant in the amount of 70% is appropriate and liability will therefore be reduced accordingly.

**ISSUE 6** - *Whether the second defendant's liability is cover by the Policy of Insurance in force at the material time.*

**Law**

212. The following sections of **the Motor Vehicles (Third Party Risks Act) Chapter 48:51** ("the Act") are relevant for the determination of this issue;

i. Section 3(1) which provides as follows;

*"Subject to this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle or licensed trailer on a public road unless there is in force in relation to the user of the motor vehicle or licensed trailer by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act."*



ii. Section 4 which provides as follows;

*“4. (1) In order to comply with the requirements of this Act, a policy of insurance must be a policy which—*

*(a) is issued by a person who is an insurer; and*

*(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of any death of or bodily injury to including emergency treatment therefor performed by a duly registered medical practitioner or damage to the property of any person caused by or arising out of the use of the motor vehicle or trailer mentioned in the policy on a public road.*

*...*

*(7) Notwithstanding anything in any written law, rule of law or the Common Law, a person issuing a policy of insurance under this section shall be liable to indemnify the person insured or persons driving or using the vehicle or licensed trailer with the consent of the person insured specified in the policy in respect of any liability which the policy purports to cover in the case of those persons.*

*(8) A policy shall be of no effect for the purposes of this Act unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate (in this Act referred to as a “certificate of insurance”) in duplicate in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances...”*

iii. Section 8(1) which provides;

*“Any condition in a policy or security issued or given for the purposes of this Act, providing that no liability shall arise under the policy or security, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connection with such liability as is mentioned in section 4(1)(b)”*

iv. Section 10 which provides as follows;

*“10. (1) If, after a certificate of insurance has been delivered under section 4(8) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under section 4(1)(b) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, in addition to any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.*

...

*(3) No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure*

*of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled to do so apart from any provision contained in it.”*

v. Section 12 (1) which provides as follows;

*“12. (1) Where a certificate of insurance has been delivered under section 4(8) to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters:*

*(a) the age or physical or mental condition of persons driving the vehicle;*

*(b) the condition of the vehicle;*

*(c) the number of persons that the vehicle carries;*

*(d) the weight or physical characteristics of the goods that the vehicle carries;*

*(e) the times at which or the areas within which the vehicle is used;*

*(f) the horse power or value of the vehicle;*

*(g) the carrying on the vehicle of any particular apparatus; or*

*(h) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by or under this Act,*

*shall, as respects such liabilities as are required to be covered by a policy under section 4(1)(b), be of no effect.”*

vi. Section 12A which provides as follows;

*“Where a certificate of insurance has been delivered under section 4(8) to the person by whom a policy has been effected, so much of*

*the policy as purports to restrict the insurance of the persons insured by the policy as regards liability in respect of the death of or bodily injury to persons being carried in or upon the motor vehicle at the time of the occurrence of the event out of which the claims arise by reference to whether or not those persons are carried gratuitously or belong to any particular class of persons shall, as respects such liabilities as are required to be covered by a policy under section 4(1)(b), be of no effect.”*

### **Analysis and Findings**

213. The third defendant accepted that by virtue of **Sheryl Ann Dyer and Joselle Byron v. Claude A. Benjamin Jnr. & Associates, Kendal Lewis and Reinsurance Company of Trinidad and Tobago**<sup>24</sup>, Section 12A of the Act overrides a policy of insurance which purports to restrict the insurance of authorized drivers covered by the policy as regards liability in respect of death of or bodily injury to persons being carried in or upon the vehicle at the time of the occurrence of the event out of which the claims arise and caused by the use of the vehicle.<sup>25</sup>

214. However, the third defendant submitted that the facts of this case can be distinguished from the case of **Sheryl Ann Dyer** supra.

215. According to the third defendant, in **Sheryl Ann Dyer** supra, the Court of Appeal held that section 12A of the Act overrode the limitations as to use provision in the policy of insurance and found the insurer liable to indemnify its driver since the provision relied upon sought to exclude

---

<sup>24</sup> Civ. App. No. S-252 of 2017

<sup>25</sup> See paragraph 39

the insurer's liability to persons who were being carried in the vehicle by reference to them being fare paying passengers. The third defendant submitted that congruent with the rationalization in *Sheryl Ann Dyer* supra, a clause which seeks to restrict the liability of the third defendant in respect of persons being carried in or upon the truck and/or trailer would be subsumed under section 12A of the Act and afford no defence. In other words, the third defendant submitted that a pre-requisite to triggering the protection of section 12A is that the third party was being carried in or upon the subject vehicle at the material time.

216. The third defendant submitted that the exclusion clause in this instant however goes beyond the circumstance of persons being carried in or upon the truck and/or trailer. That it excludes, in addition, liability for persons alighting therefrom (as was the case with the claimant in this Action). As such, the third defendant submitted that insofar as this action concerns, the claimant's alighting from the trailer at the material time, it is distinguishable from *Sheryl Ann Dyer* supra and is not caught by section 12A.

217. In the Commercial Vehicle Policy ("the policy") attached to George's witness statement under the heading "Exception to Section II" the following is stated;

*"The Company shall not be liable in respect of*

*....*

*(iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting onto or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises."*

218. During cross-examination, George testified that the policy for the truck and trailer is one policy. That the only difference is the certificate of insurance. She was then referred to the policy annexed to her witness statement and she testified that that policy was a sample policy and that it may or may not reflect all the terms and conditions.

219. In that regard the court finds that the policy for the truck and trailer was not one and the same. This was evident by the fact that 1) the policy numbers on the certificates of insurance issued for the truck and trailer were different and 2) the certificates of insurance issued for the truck and trailer contained different limitations. The policy number on the certificate of insurance for the truck is CVP 504 396 000 whereas the policy number on the certificate of insurance for the trailer is STP 504 412 000.

220. At number 6 on the truck certificate the following is stated;

*“6. Limitations as to Use*

*Use in connection with the Policyholder’s business.*

*Use for carriage of passengers (other than for hire or reward) in connection with the Policyholders business*

*Use for social, domestic and pleasure purposes.*

*The Policy does not cover*

*(1) Use for hire or reward or racing competitions, rallies or trails.*

*(2) Use for the carriage of passengers for hire or reward.*

*(3) Use whilst drawing a greater number of trailers in all than is permitted by law.”*

221. At number 6 of the trailer policy the following is stated;

*“6. Limitations as to Use*

*Use in connection with the Policyholder's business.*

*Use for carriage of passengers (other than for hire or reward) in connection with the Policyholders business*

*Use for social, domestic and pleasure purposes.*

*The Policy does not cover*

*(1) Use for racing competitions, rallies or trails.*

*(2) Use for the carriage of passengers for hire or reward.*

*(3) Use whilst drawing a greater number of trailers in all than is permitted by law."*

222. As such, the third defendant cannot properly submit that the facts of this case can be distinguished from the case of **Sheryl Ann Dyer** on the basis that the exclusion clause in the policy annexed at "J.G.2" goes beyond the circumstance of persons being carried in or upon the truck and/or trailer because 1) George admitted that the policy annexed was that of a sample which may or may not have contained all the terms and conditions and 2) it was clear on the evidence that the policy for the truck and trailer were not one and the same.

223. As set out above, the truck's certificate of insurance specifically states that the policy does not cover use for hire or reward. However, under the trailer's certificate of insurance, there was no such exclusion.

224. The third defendant submitted that at the material time the truck and trailer were not being used in connection with the second defendant's business but, rather, for the purpose, benefit and concern of the fifth defendant. As such, the third defendant submitted that at the material time, the second defendant was in breach of the policy coverage for the truck and trailer with the consequence that third defendant bears no liability to third parties such as the claimant.

225. The court finds that the pertinent certificate of insurance to these proceedings is that of the trailer. That although the truck was pulling the trailer and the action of the driver caused the incident, the trailer is clearly covered separately from the truck. Consequently, any breaches of the truck policy is in the court's view of no moment as the claimant was being carried on the trailer.

226. The third defendant submitted that taken at its height, assuming that the rental of the trailer was permitted under the policy coverage, it would only be so permitted if the trailer was rented in connection with the second defendant's business. In other words, coverage would extend in such an instance only to the rental of the trailer for the purpose of carrying the second defendant's own goods.

227. The third defendant further submitted that there was no incongruity in construing the policy in such manner, that is, that the trailer could be rented whilst the truck could not. According to the third defendant, the trailer, unlike the truck, is non-motorized and requires a motorized vehicle to haul it. As such, the third defendant submitted that conceivably in the normal course of business, the trailer could be rented out to be hauled by a truck not owned by the second defendant for the transportation of the second defendant's own goods (for instance, where the second defendant's fleet of trucks were otherwise engaged). That such use of the trailer, whilst being for hire or reward, would have still been consistent with the limitations as to use under the policy coverage for it, such use being in connection with the second defendant's business.

228. In the Maritime proposal form dated April 17, 2007 it was stated that 1) the proposer's name is Mark Bartlett trading as Bartlett Haulage, 2) the covered vehicles would not be used solely for the insured's social,



domestic and pleasure purposes but also for his business and 3) the covered vehicles would not be used for purposes other than the carriage of the insured own goods.

229. The claimant submitted that as the second defendant's business is haulage, an implication could have been made that same would have involved the business of transporting goods for others by road generally for a fee. The claimant further submitted that although the proposal form stated that the covered vehicles would not be used for purposes other than the carriage of the insured own goods, the question thereafter which was the nature of the goods to be carried was left blank. According to the claimant, since there is a difference in premium between own goods cartage insurance and general cartage insurance, it was incumbent upon the third defendant to make the relevant enquires to determine what insurance the second defendant required.

230. Haulage is the business of transporting goods by road. However, the court finds that the proposal form as filled out, specifically stated that the covered vehicles would not be used for the purposes other than the carriage of the insured own goods it was pellucid that the proposer was seeking own goods cartage insurance. If the yes box as opposed to the no box was checked, then the implication may have been drawn that second defendant's business involved the transporting of good for others but that is not the case here. Consequently, it is clear to this court that the proposal was made in relation to insurance coverage for the cartage of own goods and that the insurance was issued on that basis only. In so saying the court does not accept the argument of the claimant that it was incumbent upon the insurer to make further enquires of the second defendant.

231. Accordingly, as the music and other equipment that were being hauled on the trailer at the material time were not owned by the second defendant, the trailer was clearly not being used in connection with the second defendant's business which is that of cartage of his own goods. The court therefore agrees with the submissions of the third defendant that at the material time, the second defendant was in breach of the policy coverage for the trailer with the consequence that third defendant bears no liability to third parties such as the claimant.

### **Disposition**

232. The court will therefore dispose of the claim as follows;
- i. Judgment for the claimant against the second and fourth defendants for negligence reduced by a contribution of 70% on the part of the claimant.
  - ii. It is declared that the third defendant is not liable to indemnify the second and fourth defendants in relation to this judgment, inclusive of interest and/or costs.
  - iii. In default of agreement, damages are to be assessed by a Master on a date to be fixed by the court office.
  - iv. The parties shall file and serve written submissions on costs by February 14, 2019.

Ricky Rahim  
Judge