

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES
SVGHCV2007 /002**



BETWEEN:

CAROL STAPLETON

CLAIMANT

-AND-

RANDOLPH CHAMBERS

FIRST DEFENDANT

DAVE WILLIAMS

SECOND DEFENDANT

Appearances: Mr Richard Williams and Mr Sten Sargeant of Williams and Williams Law Chambers for the Claimant, Mr Jaundy Martin for the First-named Defendant, and initially for the second named defendant; second named-defendant in person, subsequently.

2014: Nov. 17

Dec. 3 & 8

2015:Jan. 21

JUDGMENT

[11 **Henry, J. (Ag.):** The Claimant Carol Stapleton claims damages and special damages against the first and second defendants arising from injuries and loss she allegedly suffered as a passenger in an omnibus owned by the first defendant and

driven by the second defendant. The Claimant is 61 years of age, resides at Spring Village and is a vendor. The First defendant resides at Rose Hall and is self-employed as a farmer and businessman. He is the owner of motor omnibus HM631 and was the conductor on the bus at the time of the accident. The second defendant is a resident of Peter's Hope and is employed as a driver. He was driving omnibus HM 631 when the accident took place.

[2] On October 11, 2006, the Claimant was travelling as a passenger in the said omnibus along a portion of the Belle Isle public road when there was a loud explosion and the front hydraulic brake system failed. The sliding passenger door on the side of the omnibus was opened. The Claimant sustained injuries consequent on falling from the bus to the road while the vehicle was still in motion. She claims she fell out, while the defendants allege that she jumped out. The claimant alleges that her fall and injuries were occasioned by the defendants' negligence for which she seeks damages to be assessed. The defendants attribute the claimant's fall and injuries to her negligence and a latent defect in the brakes. The defendants deny liability.

[3] As against the first defendant the claimant pleads that he was negligent by opening the omnibus' door before it came to a stop and by disembarking the bus and leaving the door open while it was in motion. The claimant pleads that the second defendant was negligent by driving too fast, failing to apply his brakes in time or at all, failing to steer or control the omnibus in a manner to avoid the accident, causing the vehicle to swerve as to cause the claimant to fall out of the bus and losing control of the omnibus. The defendants filed a joint defence in which they plead that the claimant was negligent by attempting to jump out of or otherwise exit a moving vehicle, by leaving the seat she had taken in the vehicle when it was not safe to do so, by failing to adequately take proper precautions for her own safety or exercise appropriate caution when jumping or exiting the moving vehicle and by taking a foreseeable risk of injury to herself.

[4] When the trial started on November 17, 2014, the second defendant was absent. His counsel Mr Jaundy Martin informed the court that he was unable to contact him and the witnesses. The trial proceeded in their absence and the claimant and the first defendant testified without calling witnesses. The hearing was adjourned that day on an application by learned counsel on behalf of the second defendant. On the next adjourned date¹, the second defendant was again absent and the matter was adjourned once again on application by Mr Martin who indicated that he would be making an application to be removed as attorney for the second defendant. He indicated to the court that he was still unable to contact the second named defendant. On the next and final hearing date Mr Martin was removed from the record as attorney for the second defendant. The second defendant being present, personally conducted the remainder of his case. He gave evidence and called two witnesses - Ashaki Browne Williams and Nyoka James.

EVIDENCE

[5] The Claimant's testimony is that on October 11, 2006, she was riding in omnibus HM631, on the second row of seats in the seat closest to the door and immediately behind the first defendant who was sitting in the row behind the driver. She said that she was on her way to Kingstown to sell her produce which were also on the bus. She stated that the omnibus started speeding, the driver lost control of the vehicle and it started swerving violently, whereupon the first defendant opened the van door and jumped out leaving the door open. The claimant explained that as a result of the swerving of the bus she fell out of the bus onto the road and as a result damaged her left shoulder and had to be hospitalized. She also seeks compensation for her produce which were on the omnibus and not returned to her.

[6] Under cross-examination by learned counsel Mr Jaundy Martin on behalf of the defendants, the claimant stated that when the vehicle left the hill coming down, she

¹ December 3, 2014

heard a loud explosion and the van was going towards the drain. She said that the second defendant brought the vehicle back into the road and it then picked up speed at which point the first defendant opened the door and jumped out. The claimant explained that four other gentlemen jumped out the van, the van kept "swagging" from side to side and she fell out of the vehicle. She denied that anyone pushed her or the first defendant out of the bus. In her words "he just opened the door and pitched out himself".

[7] The evidence of the first defendant is that he and the second defendant went to NAPA Saint Vincent Limited on October 6, 2006 where he bought disc brake pads for the omnibus. He said that he had them installed on the bus later that day. The first defendant explained that on October 11, 2006 he was serving as conductor on the bus. The claimant was picked up at Spring Village with her belongings. As the vehicle proceeded down Belle Isle hill he heard a loud explosion and the vehicle seemed to speed up. The driver began changing down gears slowing the vehicle in the process. The driver then tried to drive the vehicle against the side of the drain and he then drove the vehicle from side to side attempting to bring it to a stop.

[8] The first defendant stated that the passengers began trying to get out of the bus, telling him to open the door and rush on him as if to crush him. He felt that he had no choice but to open the door. He said that some passengers were already jumping through the windows in desperation to get out. He opened the door and passengers began jumping out, pushing him out in the process. He claimed that the claimant instead of staying in her seat, tried to get out of the moving vehicle when it was not safe for her to do so and fell. He alleges that it was the claimant who took the risk of jumping out of the moving vehicle when it was not safe to do so. He denied that the vehicle was travelling fast. He also denied that he acted negligently when he was "forced upon by the passengers and had no choice but to open the passenger door". After the vehicle came to a stop, he said that he and the second defendant walked back to where the explosion happened and picked up two pieces of disc pads from the road.

[9] The first defendant explained that he got a pack of disc pads from another bus owner who was passing by. They were installed by a mechanic subsequently. While replacing the disc pads, he said that he observed that only one piece of the disc pad remained on the first wheel but it was broken. Likewise, he recounted that on removing the other front wheel he noticed that both disc pads were broken in half. He recalled that he reported the matter to the police, NAPA and the insurance.

[10] The first defendant was cross-examined by Mr Richard Williams on behalf of the claimant. Under cross-examination the first defendant said that he is not a mechanic and has no expertise in that field. He testified that he purchased the disc pads on the Friday, carried a funeral trip on the Saturday, did not work on Sunday and the accident happened on the Monday. He responded that the disc pads were installed at Rose Hall by a mechanic. He could not check to see if they were installed right and he could not say if they were installed properly. He indicated that the disc pads were non-genuine and they broke off. He stated that the vehicle had two different types of brake systems including hand brakes which were working. He explained that at the time of the accident the vehicle was swerving from left to right but not going fast at the time.

[11] The first defendant stated that he did not even know who open the van door. Initially, he denied opening the van door after he realized that the vehicle lost control, subsequently sought to clarify his earlier response by stating that he did not open the van door at first, but he did open it after people "started forcing out." I must remark that I formed the distinct impression that the first defendant was being less than truthful with his answers. His body language, his hesitation and his general demeanour during the responses left me with the distinct impression that he was being evasive and at times deliberately untruthful. He continued by saying that he reasoned that if people had not jumped out and eased off the weight it would have been worse. He denied being the one who first opened the door and being the first to exit the van. He stated that it was the proper thing to do for passengers to get out of the van to ease the load. He maintained that the claimant came out of the van "on her own steam". In answer to questions from learned counsel Mr Williams he responded that he was neutral as to

whether his memory was better "now" than in 2007 when he signed the defence, or than in 2009 when he signed his witness statement. Although it was evident that this witness understood the questions asked he sought to dodge them by providing these peculiar answers. He said in re-examination that it was the serviceman who installed the disc pads.

[12] The second defendant testified on December 8, 2014. He requested that his witness statement filed on 29 July, 2010 be amended by deleting the last sentence in paragraph 1.² He gave evidence that he and the first defendant went to NAPA Saint Vincent Limited on October 6, 2006 to purchase some disc brake pads which they had installed that same day. He stated that on the morning of October 11, 2006, he was driving from Rose Hall to Kingstown, stopped and picked up the claimant along the way at Spring Village. She got into the omnibus, sat behind the first defendant who put her belongings in the bus. The bus was driven up Belle Isle Hill in first gear he said. He then changed into second gear at the top of the hill before the road slopes downwards on the other side. He recalled that he shifted into second and then third gear as the bus descended; he heard an explosion and the brakes pedal on which he had his foot, "got soft and dropped iri". The vehicle speeded off he claims and he quickly transitioned the vehicle to second gear before the bus "reached the really steep and dangerous part of the hill." He drove the vehicle from side to side trying to bank it, without success.

[13] The second defendant recounted that while he was trying to bank the vehicle to bring it to a stop, he heard a passenger urging the first defendant to open the door but he does not know when the door was opened and when the passenger jumped out. He recalled hearing Ashaki Browne tell Nyoka James to jump, while he was moving the vehicle from side to side. He eventually drove the bus into some "sand" at the side of the road." The two front tires got stuck and the vehicle came to a standstill. There were only two passengers in the bus when he brought it to a stop - a police officer and a

² Which reads: "Rankings reported the matter to the police to NAPA Saint Vincent Limited and to the insurance."

school child. He denied losing control of the vehicle and maintained that he was able to bring it to a complete stop without functioning brakes and without causing damage to the vehicle. He denied acting negligently or irresponsibly.

[14] Under cross-examination the second defendant stated that the omnibus is an 18 seater minivan, He was adamant that when the sliding door on the van is fully opened, the first two rows of seat are exposed, but he denied that somebody sitting in the seat where the claimant was seated³ could fall out if the door is open and the van is in motion. He recalled that when the bus lost the hydraulic brakes, it was travelling about 40 miles an hour. He indicated that the bus has two braking systems: the back brakes which operate hydraulically and the one operated manually by the hand lever. He said that he did not use the back brake because he was not thinking about it at the time, rather he was thinking about slowing down the bus. He agreed with learned counsel Mr Sargeant that if he had "applied the hand brake, it would have slowed the vehicle even further" and brought it to a complete stop and added "if you are on a very flat road."

[15] He also admitted that he could not say definitively whether the claimant jumped out of the vehicle, whether the first defendant was forced out of the vehicle or not, or how the other passengers got out of the vehicle. He explained that the "sand" he referred to in his witness statement in which he stopped the bus in was in fact soil.

[16] The testimony of Ashaki Browne Williams⁴ and Nyoka James was short and very similar. They both testified that they were on the bus as passengers that fateful day and they were seated on the front seat next to the driver. As the bus proceeded along Belle Isle flat and was travelling down an incline, Ashaki Williams heard a bang and Ms James felt the vehicle swerve. They both asked the driver a question to which he responded. Passengers started jumping out of the "windows and doors", some crying

³ In the second row of seats, on the seat closest to the door

⁴ Mrs Williams testified that she had gotten married since she had provided her witness statement. She is referred to as Mrs Williams in the rest of the decision.

for murder. Ashaki Williams admitted⁵ that she became scared. James jumped out of the minivan and Williams followed suit. They both stated that the bus was travelling very slowly. Under cross-examination Mrs Williams estimated that the bus was travelling at about 40 mph and the driver tried to slow it down. He was driving the vehicle from side to side downhill. She claims she was "very calm, relaxed and okay all in one" and was not scared at all during this time. She states maybe she would have been if she was not looking at the second defendant.

[17] Mrs Williams said some passengers shouted out and some screamed at the top of their lungs. She explained that they said all kinds of things. She stated that she was at the end of the front seat while Nyoka James was in the middle; that she jumped out first and Nyoka James afterwards. She does not know if the claimant jumped out of the vehicle nor whether the passengers behind forced the first defendant out of the vehicle. She said that she could not recall if the bus stopped by colliding with a telephone post. Under re-examination however, she stated that the bus did not hit a pole at anytime.

[18] For her part, Ms James said under cross-examination that she was the last person to get out of the bus, after Ashaki, as she was sitting next to the driver. This conflicts with her witness statement,⁶ in which she states that she "opened the door and jumped out and the passenger next to me, Ms. Ashaki Browne also jumped out." She explained also that the vehicle swerved out of its lane. She admitted that she did not feel any sense of fright until she heard the explosion and a remark from another passenger that the brakes were gone. Like Mrs Williams, she claimed that she remained calm because the driver was calm. She also stated that she was preparing with Ms Browne to jump out if the bus did not come to a stop as the van could have gone over a bank. She initially described her exit from the bus by saying that she "stepped out" and later that she jumped out. She explained that she did so because she did not know it was going

⁵ Her witness statement filed on 25th June, 2009 - paragraph 3.

⁶ Filed on June 25, 2009 - paragraph 4.

to come to a complete stop. In re-examination, she said that the vehicle did not hit a pole to her knowledge.

[19] It did not go unnoticed that the testimony of Mrs Williams and Ms James were strangely almost identical, in relation to their emotional state which they both said was one of calm and also in respect of their seating position on the bus. It is also noteworthy that they both describe the material in which the bus eventually stopped as "sand" in their witness statements, but under cross-examination said like the second defendant that the substance was soil. Curiously, although they both claimed to be calm while the second defendant was trying to maneuver the bus to a standstill, they admitted that they jumped out a few seconds before the bus came to a stop. They explain that they did so because the bus was about to approach an "S" corner. Interestingly two persons, a police officer and a school child had reportedly remained in the bus until it came to a stop. The court is left with the unsettling feeling that these peculiar coincidences described by Mrs Williams and Ms James are more contrived than real. Having observed the witnesses, noting their demeanour as they testified, I conclude that Mrs Williams' and Ms James' testimonies are not reliable. Where therefore they conflict with the claimant who appeared to be a witness of truth, the claimant's testimony is accepted. The claimant by her expressions, body language and the forthright manner in which she gave her evidence impressed the court as a witness of truth, perhaps overly eager to recount her experience on the bus that day. The second defendant similarly appeared intent on recollecting and providing an accurate account of the incident. He strikes the court as a credible witness. His account like the claimant is therefore accorded significant weight.

CLAIMANT'S SUBMISSIONS

[20] Learned Counsel, Mr Sten Sargeant submitted on behalf of the Claimant that there are 4 issues to be determined:

- a) "Whether the negligent acts and/or negligent driving of the First and Second Defendant caused the injuries to the claimant.

- b) Whether the Defendants can reply on a plea *Valenti non fiat injuria*, or in the alternative the Claimant contributed to her own injuries.
- c) Whether the accident was caused by a latent defect of the disc pads of HM 631 of which the Defendants were unaware.
- d) Whether the Defendants are joint and severally liable, or is the First Defendant vicariously liable for the actions of the Second Defendant?"

[21] Mr Sargeant submitted further that the second defendant had no choice but to admit under cross-examination that the bus had two braking systems - the hydraulic front disc brake system and the manual rear drum brake system operated by hand lever and which he admitted that he *did not think about it* to use the hand brakes in conjunction with the gearing down to bring the bus to a stop. He added that neither the second defendant, nor his witnesses said they saw the claimant jump from the moving van. He also submitted that the court should consider the applicable law in respect of the duty of care, *volenti* defences, contributory negligence and latent defect. He argued that the test to determine whether the defendants owed the claimant a duty of care was refined in the well-known House of Lords case of **Caparo Industries plc v Dickman**⁷ in which Lord Oliver laid down the three-stage test comprising the considerations of whether: (i) the damage caused reasonably foreseeable? (ii) there is a relationship of proximity between the claimant and the defendant? and (iii) It is Just, fair and reasonable to impose a duty of care? He submitted that "reasonable foreseeability" has its roots in the classic case of **Donahue v Stevenson**⁸ and is essentially the "neighbour principle", which requires knowledge that an act or omission would reasonably cause loss and damage to another if done.

[22] Learned Counsel Mr Sargeant contends that the text **Bingham & Berryman - Motor Claims Cases**⁹ provides useful guidance in the case at bar specifically

⁷ [1990] 1 All ER 568

⁸ [1932] AC 562

⁹ Eleventh Edition - Butterworths 2000.

paragraphs [5.22], [6.84], [12.1] and [12.61]. He refers to the learned authors¹⁰ summary of three cases which are relevant. In **Doonan v Scottish Motor Transport Co**¹¹ where the fact that a bus struck a fence after a swerve raised a presumption of the driver's negligence despite the explanation that the swerve was due to a child's sudden running across the road; and the Privy Council decision in the case of **Samson v Aitchinson**,¹² where it was held that the fact that the owner being in his vehicle, (in possession and occupation of it), requests or allows another person to drive, will not of itself exclude his right and duty of control. Therefore, in the absence of further proof that he has abandoned that right by contract or otherwise, he retains the right of controlling the manner in which the vehicle is driven and remains liable as principal for damage caused by the negligence of the person actually driving.

[23] Learned counsel Mr Sargeant also cited as summarized in that text, the case of **Western Scottish Motor Traction Co Ltd v Allam**,¹³ where a passenger who was standing in a motor omnibus near the doorway in the forward part just behind the driver's cabin, was thrown through the doorway (that had not been closed) into the road while the bus was being driven around a curve. There were no vacant seats, the vehicle was not provided with any rails or straps and the passenger was not holding on to any part of the vehicle. The Court held that the driver was negligent in driving around the bend at high speed and there was no contributory negligence. Likewise, learned counsel submitted that the principle outlined in the said textbook,¹⁴ that a person who undertakes to carry another person in a vehicle either gratuitously or for reward will be liable to that other party if he causes him damage by negligence would apply in the instant case. He submitted further that the duty of the driver is to use reasonable care and skill for the safety of the passengers during the period of carriage.

¹⁰ At Chapter 5 under the rubric Res Ipsa Loquitur.

¹¹ 1950 SC 136, 1950 SLT 100, Court of Session.

¹² (1912] AC 844, 82 LJPC 1, 107 LT 106; referred to at Chapter 6 under the rubric Vicarious Liability.

¹³ (1943] 2 All ER 742; upheld on appeal to the House of Lords.

¹⁴ At Chapter 12 under the rubric Passengers Injured en route.

[24] Learned counsel Mr Sargeant contends that the issue of "Defendant-third party relationship of proximity & creation of risk of danger" is a live one in the instant case. In this regard, he argues that where a defendant creates a dangerous situation, even if this risk is created through no fault of his, the courts may impose a positive duty to deal with the danger - **Capital and Counties pie v Hampshire County Council**.¹⁵ He submitted also that a relationship of proximity can arise between the defendant and a third party who has injured the claimant where the defendant had a right or responsibility to control the third party. However, this he argues will rarely be enough in itself to create a duty of care. In addition, the claimant will need to be someone who was at a particular risk of damage if the defendants were negligent in controlling the third party, over and above the general risk such negligence might pose to the public at large.¹⁶

[25] On the issue of the *volenti* defences by the defendants, learned counsel Mr Sargeant submitted that a *volenti* defence fails in almost every instance in the absence of express or strongly implied acceptance or waiver. He added that in one of the leading cases on *volenti* is the judgment of Lord Denning MR in **Nettleship v Weston**¹⁷ in which Lord Denning MR stated¹⁸:

"This brings me to the defence of volenti non fit injuria. Does it apply to the instructor? In former times this defence was used almost as an alternative defence to contributory negligence. Either defence defeated the action. Now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of volenti non fit injuria has been closely considered, and, in consequence, it has been severely limited. Knowledge of the risk is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to

¹⁵ [1997] 2 All ER 865.

¹⁶ **Home Office v Dorset Yacht Co Ltd** - [1970] 2 All ER 294.

¹⁷ [1971] 3 All ER 581.

¹⁸ At page 587 *g-h*.

waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him."

[26] Mr Sargeant submitted that the burden is on the Defendants to prove contributory negligence. He quoted Lord Denning MR in **Froom v Butcher**¹⁹ where he said:

*"Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in breach of duty to others. Contributory negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might hurt himself"*²⁰

[27] He submitted further that the law is quite clear that if an accident is due to a latent defect, which is not discoverable by reasonable care, there is no negligence. However, once the Defendants allege that the accident was caused by a latent defect and it is submitted that the accident were caused by a latent defect, the onus is on the Defendants to prove that the defect could not have been discovered by them by reasonable skill care and inspection on their part. The defence does not apply where²¹ the defect could have been discovered had reasonable prudence been exercised.

[28] Learned counsel Mr Sargeant argues that from the evidence the Court should find that the Defendants owed the Claimant a duty of care by reason of her relationship with them, the First Defendant having being the Owner/Conductor, the Second Defendant

¹⁹ [1975] 3 All ER 520 at page 524 e

²⁰ Citing *Jones v Livox Quarries Ltd* - [1952] 2 QB 608

²¹ *Henderson v Henry E Jenkins & Sons and Evans* (1970) A.C. 280, H.L.; *Pearce v Round Oak Steel Works Ltd* [1969] 1 W. L. R. 595 as cited in Bingham & Berryman's Motor Claims Cases *ibid*.

the driver and the Claimant a fare paying passenger. He reasons that the Defendants admit by paragraph 2 of their Defence that the Claimant entered as a fare paying passenger save and expect she had not paid yet up to the time of the accident. Mr Sargeant concludes that the learning is that the duty exists whether the journey was gratuitous or for reward.

[29J Mr Sargeant submits also that there is evidence of negligence by the defendants as pleaded by the claimant. In this regard, he highlights the claimant's pleading that the second defendant drove too fast in all the circumstances. Referring to the second defendant's testimony where he stated that when he began to go down the first incline of Belle Isle Hill he was doing 40 miles per hour, learned counsel points out that the **Motor Vehicles and Road Traffic Act**²² sets the speed limit for omnibuses or lorries elsewhere in St. Vincent other than within the towns of Kingstown, Georgetown and Calliaqua, and on Kingstown Hill, Sion Hill Road, within the Villages of Sion Hill, Stubbs, Bridgetown and within Friendly Village and through Byrea Tunnell at 20 miles per hour. Mr Sargeant submits that not only was the second defendant driving in breach of that statutory duty, but on the balance of probability, if he was driving within the speed limit and lost hydraulic front brakes, it is more likely than not that if he shifted the vehicle into a lower gear (as he said he did) he could have brought the bus to a controllable very slow speed to stop without incident.

[30] . Mr Sargeant also submits that the evidence supports the claimant's case that the second defendant failed to apply his brakes. In this regard, he argues that both the first and second defendants admit that the bus has two brake systems and the second defendant admitted that he did not think about using it, while agreeing that it would have assisted him in coming to a stop sooner. Mr Sargeant submits that Nyoka James' evidence²³ where she stated: *"After we pass Belle Isle flat as was travelling down an incline I felt the vehicle swerve"* is probative of this fact. He contends that the second

²² Cap 483 of the Laws of Saint Vincent and the Grenadines; Second Schedule.

²³ At paragraph 3 of her witness statement.

defendant's failure to apply brakes, swerving from side to side in the vehicle and the vehicle having to hit a telephone pole in order to stop, equates with evidence of loss of control of the vehicle by the second defendant. He argues that even if the Court does not believe the claimant when she said the bus hit the pole, the fact that, as the defendants claim, it came to a stop in some loose sand, is still evidence to suggest that it was the sand that stopped the vehicle rather than the efforts of the driver being supposedly in control.

[31] Mr Sargeant submits that the claimant's testimony regarding her assertion that the first defendant opened the door of the omnibus before the vehicle came to a stop and disembarked whilst the bus was in motion leaving the door open should be accepted. In addition, he submits that the first defendant as owner of the vehicle had a duty to maintain control over how the vehicle was being driven, control the danger of having to open the door until the vehicle came to a stop. By failing to do so, he submitted that the first defendant created the risk of danger to the claimant by opening the sliding door.²⁴ Mr Sargeant contends that there is no evidence that the claimant jumped out of the bus on her own accord and accordingly the defence of *volenti* must fail, there being no written or implied waiver of loss and damage/personal injury by the claimant. He concludes that given the totality of the evidence there can be no contributory negligence on the part of the Claimant.

[32] Learned counsel Mr Sargeant submitted further that the Defendants led no independent evidence as to a latent defect which caused the brakes to fail, or evidence as to the servicing of the van or the competence of the person who installed the brakes. The first defendant also admitted in cross-examination that he could not say for sure if they were installed properly. The evidence is that they heard an explosion and the brakes dropped in. The first defendant he submits is not a mechanic and his evidence that he concluded that *"it was the disc pads breaking that caused the explosion"*²⁵ is not

²⁴ Capital and Counties pie case; Dorset Yacht Co. Ltd case; supra.

²⁵ See paragraph 7 of his witness statement.

conclusive of the cause of the explosion as he is not a mechanic. Mr Sargeant also submitted that there is no evidence that the vehicle was inspected by a professional after the accident to determine that that was the cause. The defendants have not produced any documentary evidence of any purchase or refund of the defective goods. It is submitted that this lack of evidence on the defendants' part, is fatal to the defendants' case. Without more, the defence of latent defect is mere speculation.

[33] Learned counsel Mr Sargeant submitted that The claimant submits that the first defendant should be made fully liable. In this regard, he urged the court to have regard to the second defendant's evidence that he was paid a wage for his services as a driver by the first defendant.

FIRST DEFENDANT'S SUBMISSIONS

[34] Learned Counsel, Mr Jaundy Martin submits on behalf of the first defendant that there are three issues to be determined: (i) Whether the first defendant negligently opened the passenger door of the vehicle and exposed the claimant to the risk of falling from the moving vehicle; (ii) whether the claimant fell from the vehicle as a result of the first defendant's negligence; and (iii) whether the second defendant negligently caused or contributed to the claimant's injuries.

[35] Mr Martin submits that the case is not a complex one. He posits that the claimant's case is for negligence as against the first defendant for opening the passenger door and causing her to fall out and as against the second defendant for speeding and running off the road into a pole and/or swerving the vehicle so as to cause her to drop out. Learned counsel Mr Martin contends that wrapped up in the issue of whether the first defendant negligently opened the passenger door and exposed the claimant to risk of falling from the vehicle is the consideration of whether there was a failure of the brakes of the vehicle. He submits that there is a preponderance of evidence that the brakes did fail or at least appeared to an ordinary person to fail. He submits further that the claimant herself under cross examination was forced to move away from her pleaded case and

admit that she heard the explosion after which the vehicle began to swerve. She abandoned the position taken that the second defendant was speeding and lost control. Learned counsel reasons also that perhaps the second defendant could have brought the vehicle to a stop by using the hand brakes and that he readily admitted that he did not think of this as he was concentrating on stopping the vehicle by other means. I must interject that the testimony of the claimant is not materially different from her pleadings except in one instance where the claimant admitted that she might have made a mistake when she stated in her witness statement that the vehicle ran off the road into an electrical pole. She did not abandon her position that the second defendant was speeding. In fact, she stated under cross-examination that "the van picked up a little speed". She made no mention in her pleadings of hearing an explosion. Rather than a departure, this is considered to be an omission which she readily admitted under cross-examination was part of the sequence of events.

[36] Mr Martin submits further that there is much evidence that after the explosion there was difficulty bringing the vehicle to a stop and after the vehicle did stop there is also evidence that the defendants went and collected the disc brake pads and later took them to the dealer. Learned counsel contends that another sub-issue is whether the defect in the brakes was latent and that there is much unchallenged evidence as to this aspect of the case from the defendants:- (i) the disc pads were bought at NAPA on the 6th of October 2006 and installed that very day; (ii) they broke on the 11th of October 2006. Mr Martin submits that the most that the breaking of the disc brake pads did was to cause the second defendant to swerve and maneuver the vehicle so as to bring it to a stop. The breaking of the disc pads he argues, did not directly result in the injuries to the claimant and she has not relied on this.

[39] The first defendant's position is that the defect was latent and undiscoverable by ordinary means. Even if the latent defect had caused the injuries directly the claimant could not rely on this as against the defendants on account of their lack of knowledge -

Mary Anne Emmanuel v. Northwest Ltd²⁶, Sonil Spencer v. Colin Browne²⁷ and Henderson v. Henry Jenkins and Sons, ²⁸ in the latter of which it was held that the first respondent could not rely on the defence of latent defect which could not be discovered by the exercise of reasonable care unless they had taken all reasonable steps to do so.

[40] Mr Martin submits further that the crux of the claimant's case and the first defendant's defence is the manner and circumstances of the opening of the passenger door. The evidence of the claimant is quite different from that of the first defendant. The first defendant maintains that he was forced out of the vehicle by the passengers who were in a panic. There is a preponderance of evidence supporting the first defendant's account. All the witnesses support the first defendant as to the general panicked state in the seats behind the driver. Mr Martin argues that the second defendant was certain when he stated under cross examination that the Claimant could not just fall from the vehicle from the seat she was in as she alleges. This does make sense, he urges. He adds that the claimant's testimony given the testimony of the other witnesses just does not add up. Learned counsel Mr Martin contends that it is significant that the witnesses apart from the claimant said that the vehicle was not travelling fast at all. This is opposed to her testimony that the vehicle was speeding and ran off the road. This was a complete exaggeration.

[41] Learned counsel Mr Martin submits also that the applicable law is well stated at paragraph 22 in the **Sonil Spencer** case.²⁹ He adds that there is evidence from the first defendant and the other witnesses in the case to displace the prima facie inference from the allegations of the claimant that the first defendant is liable in negligence. The act of the first defendant in opening the door could not amount to negligence as it was not

²⁶ SLUHCV2006/0226 at paragraph 14.

²⁷ SVGHCV2007/097 at paragraphs 16 - 18.

²⁸ Ibid.

²⁹ Ibid.

heedless or careless conduct on his part to open the door. Mr Martin submits that the first defendant was under extreme duress and it was demanded that he open the door.

[42] Learned counsel Mr Martin contends that the claimant did not fall as a result of the first defendant opening the door. She herself attempted to leave the vehicle as there was wild panic and was forced out of the vehicle. He submits further that the evidence from the second defendant is that upon the failure of the front brakes although he swerved the vehicle from side to side he eventually brought it to a stop notwithstanding that he did not think of engaging the hand brake. Mr Martin argues that the Claimant seems to suggest that the swerving of the vehicle caused her to fall from the same. while the second defendant was certain that because of the position of the claimant she could not have fallen out unless she got up from her seat. He submits also that the evidence is pellucid that the second defendant faced with a sudden emergency acted in the way an ordinary careful driver ought to in all the circumstances - **Carolyn Bodie v. Roy Rogers et al**³⁰ and in all the circumstances could not be liable in negligence. Mr Martin concluded that the claimant's claim in negligence is not made out against the first or the second Defendant and ought to be dismissed with costs.

SECOND DEFENDANT'S SUBMISSIONS

[43] At the end of his case, the second defendant made oral submissions in which he contended that he does not believe that the claimant fell out of the bus because in order to do so she would have to pry herself forward. He also filed written submissions on December 15, 2014. In his written submissions³¹, he argued that he has proven that there was no negligence on his part which caused injury to the claimant and that he has proven that he encountered "mechanical malfunctioning problem" when one of his brakes failed. He submitted that his witnesses Ashaki Williams and Nyoka James from their seats in the front seat next to the driver were able to view what was happening in

³⁰ SKBHCV1999/0005 at para. 8

³¹ Titled "Responsibility and Negligence of Driver and A Conductor".

front and beyond them and both attested under cross-examination that they were not scared but remained calm as they watched the second defendant who remained calm and focused.

[44] In response to the claimant's assertion that he failed to apply brakes, the second defendant submitted that he had mechanical brake failure which is supported by his testimony and that of his witnesses. Regarding the claim of failure to keep the bus on the road, he submitted that he changed his path to save lives. He denied losing control of the vehicle and relied on his witnesses' testimony that he remained calm and focused. In response to the claimant's accusation that he swerved and caused her to fall from the vehicle, he responded that no one could fall out when he swerved at such a slow pace. This was not pleaded in his defence. He submitted that contrary to the claimant's contention, he was not driving too fast and if he was the bus would have been "sailing down the road uncontrollably".

[45] The second defendant submitted further that the first defendant "exited the bus that was in motion thereby exposing passengers to injuries. By abandoning his post the first defendant "put all passengers in danger." Referring to the first defendant's testimony in which he told the court "I did not open the door. I do not know who opened the door;" the second defendant submitted that the first defendant is not telling the truth and he was negligent for opening the door of the minibus before it came to a stop and for disembarking the omnibus and leaving the door (sic)³² while the vehicle was on motion. It is this action he contends which resulted in the claimant's injury for which the first defendant should take responsibility.

[46] The second defendant submits that the claimant lied to the court when she stated that she fell from the position she was sitting in the bus and that the "vehicle slammed into a pole when it stopped." He contends that the first and second named defendant and the witnesses for the second defendant all gave evidence the bus did not slam into

³² Ostensibly "open".

a pole before it stopped. The claimant he submits is lying on this score. He explained that where the claimant was seated in the bus, "the seat is so designed that when occupied, the person's body is thrown backwards" and "he or she is away from the door when it closes and slides." To remove one's body from this position he submits, "you must pry or pull yourself forward and step down... you could never fly or fall out of that seat ... unless you bring the body forward and step down." He posits that the claimant exited the vehicle by "wedging herself out of this position, pulling herself forward, stepping down and exiting the vehicle" and that she got injured in this manner and not as she claims by falling out of a moving van. There is no evidence (expert or otherwise) supporting this scenario as all witnesses testified that they did not see the claimant exit the vehicle. He concluded that for those reasons, the claimant should not be compensated by the second defendant.

ISSUES

[47] The issues which arise in the instant case are:

1. Whether the claimant suffered loss and injury as a result of the first and/or the second defendant's negligence?
2. If issue 1 is resolved in the affirmative, whether:
 - (1) the accident was caused by a latent defect of the disc brake pads on motor vehicle HM 631?
 - (2) the first defendant is vicariously liable for the second defendant's negligence?
 - (3) the claimant is contributory negligent in respect of the injuries she sustained and the loss she incurred and whether she consented to incur the risk of falling from the vehicle ?

LAW. ANALYSIS AND FINDINGS

[48] Learned Counsel Mr Sargeant correctly referred the court to the applicable provision of the Motor Vehicles and Road Traffic Act³³ which sets the speed limit for motor omnibuses on the Belle Isle Road (where the accident occurred) at 20 mph. Similarly, both Mr Sargeant and Mr Martin have identified the applicable law and cited the leading cases in which binding pronouncements and rulings have been made on the applicable legal principles and issues in this case. I am grateful to them both.

Whether the claimant suffered loss and injury as a result of the first and/or the second defendant's negligence

[49] It is trite law that liability for negligence is summarized in the classic rule enunciated by Lord Atkin in **Donoghue v. Stevenson**³⁴ that "every man must take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure his neighbor."³⁵ Failure to do so would expose him to negligence for breach of that duty which results in damage. I accept the claimant's evidence that she was injured when she fell from the vehicle being driven by the second defendant after the first defendant opened the door to the bus and jumped out. The circumstances of her fall as described by the claimant are credible and were recounted by the claimant in a forthright and forceful manner. The claimant was not impeached under cross-examination and there is no evidence by the defendants or their witnesses to contradict or discredit her account. The second defendant opines that she could not have fallen in the manner she described. His explanation and supposition is based on an expectation that the claimant would throughout the journey be held in a rigid fixed position on the seat by some unknown, unseen force. This expectation goes against reason and logic and I reject it. Neither the defendants nor their witnesses saw the claimant fall or exit the

³³ Ibid.

³⁴ [1932] AC. 562 at 580.

³⁵ Bullen & Leake and Jacobs Precedents of Pleadings 11h edition, page 682.

vehicle and were unable to dispute her account. Having seen all of the witnesses, I formed the view that the claimant is a witness of truth and I accept her testimony on this issue.

[50] The claimant alleges that the first defendant opened the door to the omnibus before it came to a stop and that he disembarked and left the door open while the bus was still in motion. I have no difficulty in finding that he did so, as he admitted this in cross-examination. The second defendant and the claimant also gave evidence to this effect. Likewise, I have no difficulty in finding that the second defendant was driving above the speed limit along the Belle Isle road where the accident took place. He gave evidence that he was travelling about 40 mph and his witness Mrs Williams estimated his witness was therefore driving at twice the permitted speed limit of 20 mph, too fast in the circumstances. In addition, the second defendant admitted under cross-examination that he did not think about applying the hand brakes when the hydraulic brakes failed and he was driving the vehicle from side to side on the road in an effort to slow it down.

[51] I find that the combined motion of the excessive speed and the swerving of the vehicle created the necessary force to propel the claimant through the open door of the vehicle after the first defendant had opened it and jumped out. I am of the view that the first defendant by abandoning his post in the bus, acted without regard for the claimant's safety and by leaving the door open while the bus was still moving, coupled with the excessive speed of the vehicle and the swerving motion caused the claimant to fall from the moving bus, thereby suffering injury and incurring loss. Applying the principles contained in the authorities cited by learned counsel Mr Martin and Mr Sargeant, I accept Mr Sargeant's submission that the defendants owed the claimant a duty of care arising from the relationship between them, i.e. a duty to use reasonable care and skill for her safety while she was travelling on the bus, particularly when it was in motion. This duty includes that of ensuring that the door is kept closed while the vehicle is in motion and ensuring that the established speed limits are observed at all times and that the brakes on the vehicle are properly installed and the vehicle is regularly and properly maintained. I find therefore that the claimant has made out a prima facie case against

both defendants by proving those specific particulars of negligence against the first and second defendants. I do not find however that the second defendant lost control of the omnibus.

[52] In the **Henderson v Henry Jenkins case**³⁶ Lord Pearson had this to say:

"In an action for negligence the plaintiff must allege, and has the burden of proving that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The general burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants."

Whether the accident was caused by a latent defect of the disc brake pads on motor vehicle HM 631

[53] I turn now to consider the issue of latent defect in the brakes. The defendants in their pleadings and in their evidence seem to rely heavily on the excuse that the brakes failed. They also claim that there was a latent defect on the disc brake pads. They have however failed to provide the disc brake pads or a report from a mechanic or other expert as to the condition or any defect in them. The **Henderson** decision³⁷ was cited

³⁶ Ibid.

³⁷ Ibid.

with approval by Justice Thom (as she then was) in the **Sonil Spencer case** and is similar to this case.³⁸ As in **Spencer**, the defendants in the case at bar have not led any expert evidence to establish that the cause of the accident was a brake failure and what caused the failure. They also did not tender evidence from the mechanic who was responsible for maintaining the vehicle or who had installed the brake pads which they claim were defective and broke on that day. The mechanic who allegedly installed the brakes after the accident was not called either and there is no explanation before the court as to what if anything was wrong with the disc brake pads or the braking system. The court is left to speculate as to what really caused the accident and what if anything was wrong with the brakes. Neither the first nor the second defendant is a mechanic. They are therefore disqualified from diagnosing or purporting to diagnose a mechanical fault.

[54] In the case of **Brown v Brown**³⁹ St. Bernard J.A. addressing the issue of latent defect stated:

"... the mere statement "I had no brakes" is a neutral event equally consistent with negligence on the part of the defendant. To displace the presumption of negligence, the defendant must go further and prove, or it must emerge from the evidence, the specific cause of the failure of the brakes He must go further and prove that he exercised due diligence in the driving of his car and equal diligence in the maintenance and use of his vehicle, and that negligence was not a probable cause of the accident."

[55] The defendants have not provided any evidence on which the court could find that they exercised due diligence in the maintenance, use and driving of the omnibus HM 631, nor preliminarily of the specific cause of the brake failure. They have failed to

³⁸ Ibid.

³⁹ No. 13 of 1967 (WIAS Appellate Court Saint Vincent Circuit)

discharge the inference of negligence. In the circumstances, I find that the claimant has proven on a balance of probabilities that the accident involving her fall from the omnibus and her resultant injuries and loss was caused by the negligence of the first and second defendants.

Whether the first defendant is vicariously liable for the second defendant's negligence

[56] It is trite law that a master is liable for his servant's negligence which occurs during the course of his employment.⁴⁰ In the instant case, the second defendant and the first defendant have testified that the first defendant is the owner of omnibus HM 631 and at the material time, employer of the second defendant. On the date and at the time when the accident happened, the evidence of both defendants is that the second defendant was engaged in his employment as driver of the bus. In those circumstances, in the absence of any allegation and proof by the first defendant that the second defendant's negligence constitutes a breach of his contractual duty of care, the justice of this case requires that the first defendant be held liable and assumes liability for the second defendant's negligence. I so order.

Whether the claimant is contributory negligent in respect of the injuries she sustained and the loss she incurred and whether she consented to incur the risk of falling from the vehicle

[57] The defendants plead that the claimant contributed to her injuries and loss by jumping out of the bus. There is no evidence of this. Taking into account the dicta of Lord Denning MR in the **Froom v Butcher** case,⁴¹ I find that there is no factual or legal basis on which a finding of contributory negligence by the claimant is sustainable. I accordingly make no such finding. A defendant who seeks to rely on the defence of

⁴⁰ **Tubervill v. Stamp (1697) 1 Ld.Raym. 264.**

⁴¹ *Ibid.*

vo/enti non fit injuria will succeed if he can prove that the claimant voluntarily and freely with full knowledge of the nature of the risk he ran impliedly agreed to incur it."⁴² It is extremely doubtful that the claimant appreciated when she boarded that bus that fateful day in October 2006 that she was exposing herself to the risk of falling through a door left open by the conductor of the vehicle while it is still in motion, travelling at 40 mph while and swerving from side to side. There is no factual basis from which such conclusion can be drawn and I find that the defence of *volenti non fit injuria* raised by the defendants fails.

ORDER

[58] It is accordingly ordered that:

(1) Judgment is entered for the claimant Carol Stapleton against the first defendant Randolph Chambers and the second defendant Dave Williams.

(2) The first defendant Randolph Chambers shall pay to the claimant Carol Stapleton damages for the injuries she sustained and her loss to be assessed on application by the claimant to be made on or before April 22, 2015.

⁴² *Letang v. Ottawa Ry.* [1926] A.G. 725 at 731.