

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 97 OF 2007

BETWEEN:

SONIL SPENCER

Claimant

v

COLIN BROWNE

Defendant

Appearances: Mr. Ronald Marks and Ms. Patricia Marks for the Claimant.
Mr. S. Williams for the Defendant

2010: February 3

2010: March 2

JUDGMENT

- [1] **THOM, J:** The Claimant and the Defendant reside at South Rivers in the State of Saint Vincent and the Grenadines. They have known each other for many years and are friends.
- [2] The Claimant works as a labourer and part of his duties include feeding pigs on a farm that is in close proximity to a farm owned by the Defendant. The Defendant is also the owner of a Mitsubishi pick-up truck, Registration No. T 3446.
- [3] On the 4th day of June 2004 while the Claimant was on the Defendant's pick-up truck there was a collision. The Claimant was thrown off the pick-up and as a result he suffered injuries.
- [4] The Claimant alleges that the collision was due to the negligence of the Defendant.

- [5] The Claimant claims inter alia special damages and general damages.
- [6] The Defendant in his defence alleges that the accident was due to a latent defect in his vehicle. He did not give the Claimant permission to travel on his vehicle and he was unaware that the Claimant had boarded the vehicle.
- [7] The Claimant testified and called no witnesses. The Defendant testified and he called one witness, Klinford Neverson.

EVIDENCE

- [8] The evidence of the Claimant is that on the 4th day of June 2004 he was on the public road at South Rivers in the vicinity of Ms. Andrews' shop waiting for some transportation to take him to his work site. He had with him two sacks of pig grower and some pig feed in a bucket. While he was there the Defendant drove up in his pick-up truck. He sought the Defendant's permission to board his pick-up truck and the Defendant agreed. He boarded the truck at the back with his pig feed. The conductor was also at the back of the vehicle. The back of the vehicle had manure and other materials. When the vehicle got to the foot of the mountain the conductor got off the vehicle and the Defendant continued his journey. When the Defendant reached in front of his shop he attempted to stop the vehicle. The vehicle did not stop. It rolled backwards and collided with a large stone. The Claimant was thrown off the vehicle and was injured.
- [9] Under cross-examination the Claimant denied that the Defendant refused to give him permission to board the vehicle. He also denied that he cursed the Defendant or that he jumped on to the Defendant's vehicle. He maintained that the Defendant permitted him to board the vehicle.
- [10] The Defendant in his testimony stated that on the 4th day of July 2004 he was traveling from Kingstown with manure in his pick-up. Klinford Neverson was sitting beside him in the passenger seat. When he got to South Rivers he stopped because some work was

being done on the road. The Claimant asked him to travel on his vehicle. He told the Claimant that the vehicle was filled with manure so he could not travel on the vehicle. The Claimant began to argue with both himself and Klinford Neverson. Klinford Neverson left the vehicle. When he got to his house and he applied his brakes the brakes failed and the vehicle started to roll backwards and struck a lamp pole. When he came out of the vehicle he saw the Defendant on the ground with an injury to his foot. His vehicle was serviced every three months by a man called Frankie.

[11] Under cross-examination, the Defendant maintained that he did not give the Claimant permission to travel on his vehicle because the vehicle was full. The pick-up had manure and feed. A tarpaulin was covering the manure and feed. Klinford Neverson traveled in the front passenger seat next to him. Before the accident, the vehicle was in good condition. He denied that the vehicle was carrying excess load. When the vehicle collided about two sacks of feed fell out the vehicle.

[12] Klinford Neverson in his testimony stated that he was traveling with the Defendant in the Defendant's pick-up when the Defendant stopped at South Rivers to allow some construction workers to clear the road for him to pass. The Claimant asked the Defendant to allow him to travel on his vehicle. The Defendant told the Claimant the vehicle was full so he could not give him a ride on his vehicle. The Claimant cursed the Defendant then went back and sat on a wall. He went into the shop and when he came out he did not see the Defendant's vehicle.

[13] Under cross-examination the witness testified that he went to Kingstown with the Defendant on the morning of the accident. They went to the Banana Association where they purchased manure. They then went to purchase feed in Sion Hill. He traveled on the back of the pick-up from the Banana Association to Sion Hill then to South Rivers. He was at the back of the pick-up when the Defendant stopped by Ms. Andrews' shop at South Rivers. He did not see when the Defendant drove away from Ms. Andrews' shop. He did not see the Claimant with anything.

ISSUES

- [14] The issue to be determined by the Court is whether the injury suffered by the Claimant was as a result of the Defendant's negligence.

SUBMISSIONS

- [15] Learned Counsel for the Claimant submitted that it is clear from the evidence the accident would not have occurred if the Defendant was not negligent.

- [16] The mere statement of the Defendant that the brakes failed and that his vehicle was serviced every three months is not sufficient to rebut the presumption of negligence. Learned Counsel referred the Court to the Text **Commonwealth in the Caribbean Tort Law** by Gilbert Kodilinye 2nd Edition p. 124 where the case of **Brown v Brown** No. 13 of 1967 (WIAS Appellate Court St. Vincent Circuit) is analyzed. In that case St. Bernard J. in dealing with the defence of latent defect stated:

“... the mere statement “I had no brakes” is a neutral event equally consistent with negligence or due 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. If the statement, “I applied brakes, no brakes” was a defence, then all a motorist would have to do to escape damages for his negligence would be to say, “I had no 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 ...

The mere statement, “I applied my brakes, no brakes” is not sufficient to displace the presumption of negligence on the part of the Respondent in this case. The statement, “I had no brakes” is equal to saying, “My tyre burst” or “I had a skid”. These statements are not defences in actions for negligence and do not, in our view, rebut the presumption of negligence.”

- [17] Learned Counsel also referred the Court to the cases of **Granger v Murphy** 1975 Court of Appeal of The Bahamas No. 11 of 1974, and **Henderson v Henry Jenkins and Sons** (1970) A.C. 280. In **Henderson**, a lorry owned by the First Respondent was descending a hill when the brakes failed and the lorry struck a post office driver who died as a result of the injuries he sustained. The House of Lords 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 care to do so. They were required to lead evidence to show that they did so, this they failed to do.

- [18] A similar approach was adopted in the case of **Granger v Murphy**. In that case the Appellant's vehicle ran into the back of the Respondent's car which was in a stationary position at an intersection. The Appellant alleged the accident was due to failure of his brakes. Georges J.A. in dealing with the Appellant's submission on latent defect said:

"He has led no precise evidence establishing exactly what part of the braking mechanism failed or the cause for such failure. He had lead no evidence detailing the type of inspection carried out in the periodic maintenance services of which he testified. One is left therefore, in doubt as to precisely what was the defect which caused the brakes to fail and similarly one cannot tell whether failure to discover the defect may not have been due to obviously faulty maintenance procedures."

- [19] The Defendant made no written submissions.

FINDINGS OF FACTS

- [20] Having seen the witnesses and having heard their evidence I believe the evidence of the Claimant. The Defendant's testimony was contradicted by his witness, Klinford Neverson. The Defendant's explanation why he did not give his friend who he knew for many years and who grew up in the same area permission to travel on his pick-up with him was the pick-up was full. In his words, "... not even a bird could rest there." He testified further that Klinford Neverson was sitting next to him in the passenger's seat. This evidence was contradicted by Klinford Neverson who confirmed the Claimant's testimony that Klinford Neverson traveled at the back of the pick-up. Further, the Defendant testified that the Claimant jumped on the bumper of his vehicle. I find it unlikely that the Claimant would have been able to travel on the bumper of the vehicle with two sacks of pig grower and a bucket of pig feed. I believe the Claimant's testimony that he asked the Defendant who he knew very well to travel on his pick-up and the Defendant agreed. He put his pig feed in the back of the Defendant's vehicle and he went into the back of the vehicle and he was there when the collision occurred.

THE LAW

[21] I agree that the applicable law is as submitted by Learned Counsel for the Claimant in the cases referred to above.

APPLICATION OF THE LAW TO THE FACTS

[22] In this case the Claimant was traveling at the back of the Defendant's pick-up with the Defendant's approval when the pick-up rolled down a hill and collided with a large stone. The Claimant was thrown off the vehicle and was injured. I find this to be prima facie evidence of negligence on the part of the Defendant. The burden therefore was on the Defendant to show on a balance of probabilities that the collision was not due to any negligence on his part. Lord Pearson in Henderson v Henry Jenkins and Sons explained this burden as follows:

"...the decision in this appeal turns on what is sometimes called "the evidential burden of proof" which is to be distinguished from the formal (or legal or technical) burden of proof. Passages which bear on this distinction will be found in Esso Petroleum Co. Ltd. v Southport Corporation (1953) 2 AER 1204 at 1212; ... and in Barkway v South Wales Transport Co Ltd. (1950) 1 AER 392 ...For the purposes of the present case the distinction can be simply stated in this way. 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. I have some doubts whether it is strictly correct to use the expression "burden of proof" with this meaning, as there is a risk of it being confused with the formal burden of proof, but it is a familiar and convenient usage."

[23] In the present case the Defendant did not lead any evidence to show what caused the brakes to fail whether it was a latent defect of some other cause which reasonable care could not have discovered and prevented. Also no evidence was lead of a competent mechanic who inspected the vehicle after the accident who provided expert testimony of the condition of the vehicle. The only evidence is the evidence of the Defendant who stated in paragraph 7 of his witness statement as follows:

“I continued to go drive my pick-up to go home. When I reach home I mash the brakes of the pick-up and the brakes failed and the vehicle start to roll backwards down the hill and struck a lamp pole.”

The person Frankie who serviced the vehicle was not called as a witness. There was no evidence of the nature of the maintenance which the vehicle received during the periodical service. The only evidence is the evidence of the Defendant in paragraph 10 of his witness statement which reads as follows:

“10. I service my pick-up every three months. A guy called Frankie usually service my pick-up.”

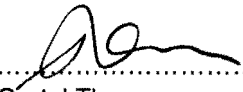
[24] This case is very similar to the case of **Granger v Murphy**. As in **Granger** the Defendant has lead no evidence establishing what part of the braking system failed or caused the failure. He has led no evidence detailing the type of maintenance inspection that was done by the guy called Frankie during the periodic servicing of the pick-up. It cannot therefore be determined what caused the brakes to fail, also whether failure to discover the defect may not have been due to obviously faulty maintenance procedures.

[25] In view of the above, I find that the Defendant has failed to provide adequate evidence to displace the prima facie inference of negligence. I find that the Claimant has proved on a balance of probabilities that the accident was caused by the Defendant's negligence.

[26] Judgment is entered for the Claimant.

[27] It is ordered that:

- (a) The Defendant shall pay the Claimant damages for the injury sustained as a result of the accident, the said damages to be assessed on application to be made by the Claimant within three months.
- (b) Costs to be prescribed costs in accordance with Part 65.6.


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Gertel Thom
HIGH COURT JUDGE