THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

CLAIM NO.: 182 OF 2003

BETWEEN:

MAXINE GUMBS

Claimant

v

HEADLEY BROWNE
ANDY DUNCAN

Defendants

Appearances:
Ms. Roxanne Knights for the Claimant
Mr. Olin Dennie for the Defendants

2004: May 18
June 2

JUDGMENT

[1] **BLENMAN, J**: This is a claim by Ms. Maxine Gumbs for damages in relation to injuries she sustained when the Toyota Hiace motor vehicle H 6587 in which she was a passenger ran off the road. The parties agreed that the trial would proceed on the issue of liability.

[2] At approximately 7:30 a.m. on the morning of 27th July 2001, Ms. Gumbs who lives at Green Hill in Saint Vincent and the Grenadines was a fare-paying passenger in motor vehicle No. H 6587 owned by Mr. Headey Browne and driven by his servant or agent Mr. Andy Duncan. There were other passengers in the vehicle on that morning. The motor vehicle was heading down Green Hill in Saint Vincent and the Grenadines when it ran off the road, in the vicinity of Veira's Apartments and ended up at the bottom of the embankment. Ms. Gumbs sustained injuries and was immediately taken to the Kingstown

Hospital where she was treated. Subsequently she traveled to Trinidad and Tobago for further medical treatment. She contends that she has suffered loss and damage and filed these proceedings against both Mr. Headley and Mr. Duncan.

[3] Ms. Gumbs alleges that the accident was caused due to the fact that Mr. Duncan drove the motor vehicle negligently, since he drove too fast and failed to steer or properly control the motor vehicle. He also failed to apply his brakes in time or at all or to steer the vehicle so as to avoid it from running off the road.

[4] Mr. Duncan and Mr. Browne while admitting that motor vehicle H 6587 ran off the road, denied that they were negligent as alleged by Ms. Gumbs or at all. They dispute that the accident occurred in the manner stated by Ms. Gumbs instead they assert that the accident was caused when the axle on the back wheel of the vehicle broke from the vehicle without warning thereby severing the stabilizing bar, even though the vehicle had been serviced regularly and despite the best efforts of Mr. Duncan to avoid the accident.

[5] Police Constable 222 Selwyn Jack visited the scene of the accident on the day in question with a view to investigating the accident. He took measurements and saw the motor vehicle which was at the bottom of the embankment but was unable to speak to either Ms. Gumbs or Mr. Duncan since they had been taken to the hospital.

[6] Ms. Gumbs and her witness Ms. Carmel Simmons testified in support of her claim.

[7] Ms. Gumbs stated that Mr. Duncan was driving the vehicle H 6587 at a moderate speed and she was in the right back seat. Another vehicle was parked on the left hand side of the road when motor vehicle H 6587 tried to pass the parked vehicle she felt the vehicle she was in shake, heard a sound and the driver who was traveling at a moderate speed tried to get back on his left side. When the van shook it seemed as if it had hit the parked vehicle, then it ran off the road and went over the embankment where it overturned several times, throwing her out in the process injuring her. She alleges that the accident was

caused due to the negligent driving of Mr. Duncan who was Mr. Headley's servant or agent.

[8] During cross-examination, Ms. Gumbs stated that there was no vehicle coming from the opposite side of the road. She felt the motor vehicle H 6587 shake when passing the parked car before it went back on its proper side of the road. She admitted that she did not see the motor vehicle hit the parked car but was adamant that she heard a loud sound and felt it shake when the van was passing the car. Neither did she see if the parked car was damaged and she was unable to say whether the entire motor vehicle H 6587 or only its front had passed when she heard the loud noise and felt it shake. She conceded that she was not observing the driver of the van, Mr. Duncan but she could say with certainty that he failed to steer the van properly since he ought to have stopped. He failed to apply brakes even after he had hit the car. She stated that Mr. Duncan failed to stop the vehicle when he should have.

[9] Ms. Carmel Simmons stated that she as well as Maxine Gumbs were traveling in the motor vehicle H 6587 which is right hand drive. She was seated in the left seat of the second row where the conductor normally sits since the driver had not collected the conductor. There were approximately six (6) other passengers in the van. There was a vehicle parked on the left hand side of the road and when motor vehicle H 6587 was about to overtake it, another vehicle approached from the opposite direction on the right hand side. The oncoming vehicle stopped to allow H 6587 to pass, while motor vehicle H 6587 was in the process of passing the packed vehicle she heard a very loud sound outside the van which sounded like two pieces of metal grinding together. Immediately after that the van H 6587 went over the embankment on the left hand side of the road and rolled over several times. Maxine Gumbs was injured and they were both taken to the Kingstown Hospital.

[10] During cross-examination Ms. Simmons said that the vehicle H 6587 was traveling at a moderate speed. She saw the oncoming vehicle which was a jeep stop and motor vehicle H 6587 was in the process of passing the parked car on its left when based on the noise she heard she was sure that the van and the parked car collided. Shortly after that the van

went over on to the left hand side of the road and over the embankment. She candidly stated that she could not say what the driver was doing at that stage and was not in a position to see whether the parked car was damaged.

[11] Police Constable 222 Jack provided the court with evidence. He stated that based on the report of an accident he visited the scene at Green Hill where he saw motor vehicle H 6587. He later visited the Hospital where he spoke to Mr. Andy Duncan as to the cause of the accident. On the 2nd day of August 2001 he revisited the scene of the accident and took measurements. He observed that motor vehicle H 6587 was extensively damaged. Ms. Gumbs was not present when he took the measurements. During cross-examination he said that Mr. Duncan told him that he experienced a mechanical problem but that he did not cause the van to be examined.

[12] Mr. Headley Browne who lives at Green Hill in Saint Vincent and the Grenadines stated that he is the owner of motor vehicle H 6587 which is a Toyota Hiace and that Mr. Duncan was his servant or agent since he paid him to drive the vehicle. He regularly caused the vehicle to be serviced by Mr. Lennox Jack who is a motor mechanic and resides at Redemption Village. In fact, every three weeks, Mr. Jack would service the vehicle and in so doing would change the brake pads, check the oil and do general service. However, Mr. Jack never told him that the rear wheel axle was experiencing a difficulty and in fact about one week before the 27th July 2001, the date on which his vehicle ran off the road, he had caused his vehicle to be serviced.

[13] Mr. Andy Duncan, the driver to the motor vehicle also lives at Green Hill. He stated that on the 27th July 2001 he left home at approximately 7 a.m. driving motor vehicle H 6587 up Green Hill, which is narrow. He saw two motor vehicles on the left hand side of the road going up Green Hill (in the area of Veira's Apartments). At the same time another vehicle was approaching from the opposite direction when he heard a loud noise coming from underneath the passenger van. He heard a sound, the motor vehicle H 6587 on its own suddenly turned to the left side of the road and even though he applied his foot brakes it nevertheless went over the embankment nearby. He confirmed that the motor vehicle H

6587 was serviced regularly by Mr. Jack and in fact had only been serviced one week before. Subsequently, all of the passengers were taken to the hospital.

[14] Mr. Duncan denied that he was driving fast; in fact, he exercised all reasonable care and skill to avoid the vehicle from going over the bank. After the accident, he discovered that it was caused by the breaking off of the rear wheel axle of the vehicle which caused the stablishing part of the vehicle to sever. He maintained that he did not collide with the parked car.

[15] Ms. Gumbs and her witness gave different versions from that of Mr. Browne and Mr. Duncan as to how the accident happened.

[16] In a civil action for negligence the burden lies on Ms. Gumbs to establish on a balance of probabilities that Mr. Browne and Mr. Duncan were negligent in causing the accident and occasioning loss and damage to her. Mr. Browne and Mr. Duncan owed a duty to Ms. Gumbs as a fare-paying passenger in the van H 6587 not to expose her to injury.

[17] Examining the evidence as a whole, I am more persuaded by the evidence of Ms. Gumbs and her witness Ms. Carmen Simmons than that of Mr. Headley Browne and Mr. Duncan. Ms. Simmons was very forthright honest and is a very credible witness. Ms. Simmons is a straightforward witness who has no interest to serve. She gave her evidence very objectively and did not seek to embellish her evidence. She was very helpful to the court in supporting Ms. Gumbs' claim.

[18] I therefore find that when Mr. Duncan was about to pass the parked car he collided with the car on the narrow road and in an effort to get back on his left and proper side he maneuvered the motor vehicle without due care causing it to lean over the left side of the road eventually ending up at the bottom of the embankment. I do not however find that he was driving fast, based on the evidence. It is very plausible that when Ms. Gumbs stated that Mr. Duncan failed to stop the vehicle and should have is a correct assessment of what happened.

[19] It is clear to me that even if Mr. Duncan heard the loud sound coming from underneath the vehicle, as he sought to persuade me, he should have stopped the vehicle. Any prudent driver would have brought the vehicle to an immediate halt. He failed to do so and was negligent.

[20] The facts as I have found them are indicative, without more, of Mr. Andy Duncan's negligence. I am not persuaded from his evidence that he took the necessary steps to prevent the vehicle from going over the embankment. He said he used his foot brakes, even if he is to be believed, the question to be answered is why didn't he use his handbrakes also?

[21] Mr. Olin Dennie learned counsel submitted that there is no evidence that Mr. Duncan was negligent rather the evidence supports his assertion that the rear axle of motor vehicle broke without warning causing it to run off the road even though the vehicle had been properly serviced and maintained. He very helpfully referred me to the statement of Lord Pearson in ***Henderson v Henry E. Jenkins & Sons [1969] 3 ALL ER 756*** when he said (at page 766) and I quote:

> "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 formal 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.

[22] Mr. Dennie also relied on ***Mapp v Dowding Estates 91978) 32 WIR 89*** in support of his submission that the defendants have provided sufficient evidence to the Court to rebut the presumption of negligence.

[23] Learned Counsel Ms. Roxanne Knights submitted that the law is clear that if an accident is due to a latent defect which is not discoverable by reasonable care, there is no negligence. However, the onus is on Mr. Headley and Mr. Duncan to prove that the defect, if at all, could not have been discovered by them with reasonable skill and care and inspection on their part. The defence is not available where the defect could have been discovered had reasonable prudence been exercised. She relied ***on Pearce v Round Oak Steel Work Ltd cited in Bingham & Berryman's Motor Claims cases, 11th Ed.; 2000 at paragraph 13.25*** in support of her proposition. In the same text at para. 13.26 in ***Henderson v Henry E. Jenkins & Sons and Evans***, a lorry driver applied brakes but they failed to operate which resulted in a man being struck by a lorry and killed. The widow sued the lorry owners who denied liability on the ground that the brake failure was due to a latent defect not discoverable by reasonable care on their part. The Defendants called expert evidence that the corrosion, which resulted in the brakes failing to operate was unusual and unexplained. The House of Lords found that the Defendants had not discharged the burden of proof, which lay on them of showing that they had taken all reasonable care and that despite this the defect remained hidden.

[24] Ms. Knights further submitted that Mr. Browne and Mr. Duncan led no expert evidence in relation to the defect in order to persuade me that it was latent defect which caused the accident. Mr. Duncan merely stated that he discovered that the accident was caused by the broken rear axle and as a consequence the stablishing bar of the vehicle also broke off. He does not indicate to the Court how he came to "discover" this. Mr. Lennox Jack who serviced the vehicle regularly was not called to testify.

[25] Ms. Knights next submitted that the absence of any expert evidence is fatal to Mr. Browne and Mr. Duncan's case. She asserts that the onus is on the defendants to prove that the vehicle had a latent defect and they have failed to do so.

[26] Mr. Gilbert Kodilinye in Caribbean Tort Law 2nd Edition at page 109 states:

> "The burden of proving negligence always lies on the plaintiff but where the cause of the accident is unknown he may be assisted by the doctrine of res ipsa loquitur (the facts speak for themselves).

[27] Mr. Kodilinye further states that the best known definition: of res ipsa loquitur is that propounded by **Erle CJ in Scott v London and St. Katherine Docks Co**:

> "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

I am in entire agreement with Mr. Gilbert Kodilinye.

[28] On the question of latent defect in ***Browne v Browne (1967) High Court (Appellate Jurisdiction), West Indies Associated States, St. Vincent Circuit, No. 13 of 1967*** (unreported), the respondent was driving his taxi with the appellant as a passenger. On reaching a steep hill, the respondent lost control. The vehicle mounted a bank and the appellant was injured. The respondent's defence was that the brakes had failed owing to a latent defect. It was held that the respondent had failed to displace the presumption of negligence raised against him.

St. Bernard J stated

> In our view, 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" were 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 negligence 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.

[29] A clear illustration of the same principle is seen in ***Ramdhan Singh Ltd v Panchoo (1975) High Court, Trinidad and Tobago, No. 764 of 1976*** (unreported) the plaintiff's car was being driven on the proper side of the road when it was struck by the defendant's van,

which was traveling in the opposite direction. The defendant's defence was that the collision was caused by the sudden breaking of the main leaf of the right front spring assembly, which caused his vehicle to swerve across the road. The defendant sought to attribute this to a latent defect in the vehicle for which he was not responsible. It was held that the defendant had failed to rebut the presumption of negligence raised against him.

Hassanali J stated:

> "The defence of latent defect in a vehicle was considered in the House of Lords in Henderson v Henry E Jenkins and Sons. In the instant case, the van was about six to seven years old on the day of the accident. The defendant had bought it about four months before. It had been examined and passed for licensing some four months before 26th May 1969 – that it was in good working condition does not provide an "adequate answer" in this case. The defendant is not a mechanic, as he himself testified. Nor is it enough that he never had reason to suspect any latent defect. Further, the fact that the van was "passed for inspection" a mere two or three weeks before 26th May 1969 does not rebut the inference of negligence raised against the defendant. Mr. Charles himself testified that an examination of a vehicle for licensing purposes is not an adequate inspection for the proper maintenance of a vehicle. Indeed he might, he testified, without any fault on his part, fail to observe a cracked or otherwise defective main spring in the course of such an inspection (for licensing purposes) if, as sometimes happened, the spring was covered with a layer of grease. At all events, for the like reason, the effects of a defect in the spring due to wear and tear may not be noticed on such inspection.

Later Hassanali J stated:

> "Finally, it is to be observed that there has been no evidence of any examination of the vehicle – for its maintenance – or of the form or method of maintenance, if any, practiced in respect of the van from the time of its purchase, when it was already six years old. Nor has there been any evidence of the history of the vehicle prior to the accident or since its purchase by the defendant relating to the nature of the driving to which it was subjected to, of the loads it carried or of the roads over which it traveled. The defendant has failed to discharge the onus placed upon him in this case and the plaintiff succeeds in his claim in negligence."

[30] I am in entire and respectful agreement with the views of St. Bernard J in ***Browne v Browne*** and Hassanali J in ***Ramdhan Singh Ltd v Panchoo***..

[31] Accordingly, I am not satisfied that Mr. Headley Browne and Mr. Andy Duncan have rebutted the presumption that they have been negligent by simply asserting that "I discovered after the accident that the said accident was caused by the rear wheel axle of

the vehicle suddenly breaking off as a consequence of which the stablishing bar of the vehicle also broke off."

[32] The fact that the motor vehicle H 6587 ran off the road is prima facie evidence of negligence. I am of the view that Mr. Browne and Duncan have failed to discharge the evidential burden placed on them to rebut the presumption that they were negligent.

[33] Ms. Gumbs has proved her claim against Mr. Browne and Mr. Duncan and I am satisfied that Mr. Headley Browne and Mr. Andy Duncan were negligent and responsible for the accident. There will be judgment for Ms. Maxine Gumbs against Mr. Headley Browne and Mr. Andy Duncan to be assessed if not agreed together with costs.

[34] I commend both learned counsel for their industry.

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Louise Esther Blenman
HIGH COURT JUDGE