

IN THE SUPREME COURT OF BELIZE, A. D. 2011

CLAIM NO. 771

	(RF & G INSURANCE CO. LTD.	CLAIMANT
	(
BETWEEN	(AND	
	(
	(HUBERT STAINE	DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

**Ms. Naima Barrow of Barrow and Co. for the Claimant
Mr. Philip Zuniga, S. C., for the Defendant**

J U D G M E N T

1. This is a Claim for indemnity of damages paid by the Claimant Company under an insurance policy for a vehicle damaged as a result of an accident involving the Defendant's son Jason Staine. RF & G Insurance had insured Jebco Construction/Bryan Mena on 24th October, 2008 and Jebco Construction/Bryan Mena had assigned by way of contract of insurance all its rights, and authorized RF & G Insurance to prosecute in its own name and for its own benefit any claim for indemnity of damages. The

Defendant's son Jason Staine is now deceased so this action is brought against the Defendant Hubert Staine pursuant to a preliminary finding of this court that the Claimant was legally entitled to do so under the terms of its insurance policy in keeping with the principle of subrogation. At the time of those preliminary arguments on the application to strike out claim on the basis that Hubert Staine was not a party to the Contract between Jebco and RF & G Insurance, a policy of insurance was provided to the court by RF & G Insurance containing the following conditions:

"1. This Policy and the Schedule shall be read together as one contract and any word or expression to which a specific meaning has been attached in any part of this Policy or of the Schedule shall bear such specific meaning wherever it may appear.

5. No admission offer promise or payment shall be made by or on behalf of the Insured without the written consent of the Company which shall be entitled if it so desires to take over and conduct in its name the defense or settlement of any claim or to prosecute in its name for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the court of any proceedings and in the settlement of any claim and the Insured shall give such information and assistance as the Company may require."

The Claimant's Evidence

2. At the trial, the Claimant called one witness Alberto Balderamos. Mr. Balderamos testified that he is the Claims Manager at RF & G Insurance Company Ltd. He said that he was informed that a 2008 Toyota Tundra Pick

Up Truck bearing Licence Plate Number BMP-C-00022 was insured against loss or damage up to \$130,000.00 in consideration for premiums paid by Jebco Construction/Bryan Mena. In his witness statement, Mr. Balderamos referred to a report he received from Mr. Mena that while Mena was driving from Belmopan to Belize City, a dump truck being driven at the time by one Jason Staine deceased and owned by Hubert Staine suffered a blow out around Mile 11 and collided into the left portion of Mena's truck causing damages. Mr. Balderamos testified that the Claimant and the insured agreed that the present market value of the Pickup Truck was \$120,084.00. RF & G Insurance Ltd. has received \$30,000 after selling the damaged Pick Up Truck and has incurred net expenses of \$90,757.75 as a result of the accident. The Defendant's insurance has paid the Claimant on account of the property damage. Mr. Balderamos therefore states that \$70,757.75 remains owing to RF & G Insurance.

Under cross-examination by Mr. Zuniga, SC, for the Defendant, Mr. Balderamos admitted that he did not see the accident, and he was not present at the time of the accident. He agreed with the suggestion that the statements he made that the deceased caused the collision and that the

deceased failed to keep any or any proper look out were statements not based on his own knowledge but based on a report from Bryan Mena.

The Defendant's Evidence

3. The Defendant called two witnesses. The first witness was the Defendant Hubert Staine. He stated he is the owner of an International Tracker Trailer bearing License Plate A2350, and the driver of that motor vehicle on the date of accident was his son Jason Staine.

He said that he was not present at the scene of the accident as he only heard about it. Mr. Staine said that he is 64 years old, he has been driving from he was 20 years old and he knows that if one suffers a blow out of a tire, one can lose control of the vehicle. He rejects the allegation that his son swerved because from his experience a blow out would be sudden and unexpected and all one can do is try to keep the vehicle on the road. He said that to his mind his son was not negligent, and this was just an unavoidable accident. He also disputes the amount claimed by RF & G Insurance and states that the value of that vehicle owned by Jebco Construction would be \$50,891.43.

Under cross-examination by Ms. Barrow for the Claimant the witness was asked if a tire blows is it possible that the vehicle swerves to its left or to its right. He replied at first that it depends on the condition of the road. When pressed further by Learned Counsel he said, *"You can't keep it straight because only one tire working ... it swerves"*. Mr. Staine was asked about the value of \$50,891 he had posited as the value of Toyota Tundra Truck and whether the sum of \$22,768.03 on a Customs Declaration Form shown to him represented additional fees that had to be paid on the truck upon importation. His answer was that he did not know.

The final witness for the Defence was Joseph Lopez. Mr. Lopez stated in his witness statement that he is a broker for the past 20 years. He said that on October 27th, 2008 he is the broker who prepared a Customs Declaration for Marvin Skeen who had imported a gold coloured 2008 Toyota Tundra with VIN Number 5TFDV58138X045773. He stated that Mr. Skeen declared the value to be BZ\$50,891.43 and he produced a copy of the customs declaration form Exhibit JL 1. The import duty was 10% of the value at \$5,089.15. The witness said that the value of the vehicle after depreciation of one year would be \$40,713.14.

He was cross examined by Ms. Barrow for the Claimant. He was asked whether a person who is importing a vehicle has to pay other fees in addition to the import duty, revenue replacement duty and other taxes to the government. The witness replied yes. He was asked to look at a customs declarations form and asked about whether the other fees amounted to a total of \$22,768.03. He agreed. He also agreed that all these additional taxes had to be paid by the person who bought the vehicle.

Upon re-examination by Mr. Zuniga, SC, for the Defendant, Mr. Lopez said that the amount of \$22,768.03 was paid by the importer as the final duty.

Issues

4. Was the accident caused by the negligence of the Defendant's son or by Bryan Mena? Was this an inevitable accident? Is the Claimant entitled to the sum claimed as reimbursement from the Defendant as damages?

Legal Submissions on behalf of the Claimant on the Issue of Negligence

5. Ms. Barrow submits on behalf of the Claimant that the accident was caused by the negligence of the Defendant's agent who was unable to control the dump truck after it suffered a blowout of one of the dump truck's tires on the day of the accident. She argues that the Claimant's sole witness

confirmed the report and evidence of a blow out of a tire on the Defendant's dump truck. In addition, the Defendant confirmed in his pleadings and in his witness statement the assertion that one of his dump truck's tires suffered a blow out on the day of the accident.

She goes on to argue that on a balance of probabilities it is more likely than not that that accident resulted from the negligence of the Defendant's agent who failed to control the dump truck after it suffered a blow out of one of the dump truck's tires on the day of the accident. The Defendant also admitted under cross examination that it is very likely that a blowout would have caused the truck to swerve. Ms. Barrow then submits that the agent of the Defendant was negligent in that he:

- (a) Failed to keep any or any proper lookout or to have any or any sufficient regard for other users of the same road;
- (b) Drove at excessive speed;
- (c) Failed to observe or heed the presence of the pick up truck;
- (d) Failed to stop, to slow down, to swerve or in any other way to manage or control the said Dump Truck to prevent the said collision;
- (e) Drove on to the wrong side of the road.

Legal Submissions on behalf of the Defendant on the Issue of Negligence

6. Mr. Zuniga, SC, on behalf of the Defendant argues that paragraphs 5, 6, 7, 8 and 9 of Alberto Balderamos' witness statement are clearly hearsay. He submits that Mr. Balderamos admitted under cross examination that around 10:00 a.m. on the 3rd day of July, 2009 he was at his office and that he neither saw the accident nor visited the scene. Since there is no evidence of what occurred, the Claimant has failed to establish paragraph 5 of its claim that *"The left front wheel of the dump truck suffered a blow out and the deceased swerved the dump truck on to the other side of the pick up"* and *"When the deceased swerved the dump truck on to the other side of the road and into the left side of the road, he caused the dump truck to collide into the left side of the pick up truck and the impact pushed the pickup truck off the road"*. Mr. Zuniga, SC, draws the court's attention to the fact that Mr. Balderamos said in paragraph 8 of his witness statement that he had been advised by the Claimant's attorney and verily believe that in the circumstances the collision on the 3rd July, 2009 was caused by the negligence of the deceased. The witness then goes on to recite the particulars of negligence. Mr. Zuniga, SC, submits that this is hearsay and opinion evidence which Mr. Balderamos was not qualified to give. No

evidence, neither direct nor circumstantial was brought to this Court concerning the time, date and manner of the accident. As there is no proof of the allegations, the claim fails.

Decision

7. I find that the Claimant has failed to establish that the accident was caused by the negligence of the deceased. There is no evidence before this court as to the manner in which the accident occurred. None of the particulars of negligence recited in the Statement of Claim has been established. All Mr. Balderamos or Mr. Hubert Staine can do is speculate as to what may have caused the accident. Neither witness was present at the scene and cannot assist the court in the determination as to who was negligent. I am at a loss as to why Bryan Mena, the driver of the Toyota Tundra at the time of the accident, was not called to testify on behalf of the Claimant as to the conditions of the road, the speed at which both vehicles were travelling, the number of other vehicles on the road at that time, the manner in which the deceased was driving, *inter alia*. The Claimant has failed to discharge its burden of proof. In light of this finding, there is no need to consider the issue of damages. The Claim is therefore dismissed. Costs awarded to the Defendant to be assessed or agreed.

Dated this 9th day of December, 2014

**Michelle Arana
Supreme Court Judge**