[2019] JMSC Civ 106

IN THE SUPREME COURT OF JUDIC ATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015 HCV 00187

BETWEEN	**SHONIQUE CLARKE**	**CLAIMANT**
AND	**OMAR PALMER**	**1ST DEFENDANT**
AND	**ACCENT MARKETING JAMAICA LIMITED**	**2ND DEFENDANT**

IN CHAMBERS

Miss Petrina Williams instructed by Zavia Mayne & Co for the claimant/respondent

The first defendant in person

Mr. Jahmar Clarke instructed by Myers, Fletcher & Gordon for the second defendant/applicant

September 21 and October 19, 2018, February 4 and May 24, 2019

Civil Procedure-Application to disallow amendment of defence after mediation- Civil Procedure Rules, 2002, Part 20

Summary judgment- Civil Procedure Rules, 2002, Part 15

SIMMONS J

[1] By way of Notice of Application for Court Orders filed on June 22, 2017, the second defendant, Accent Marketing Jamaica Limited, applied to the court seeking the following orders: -

(i) The court disallow the amendments to the pleadings made by the first defendant filed on July 27, 2015;

(ii) Summary judgment for the second defendant against the claimant;

(iii) Costs of the application to the second defendant to be taxed if not agreed.

[2] The grounds on which the second defendant relies are stated to be as follows: -

(i) That the amendment was made in furtherance of discussions at mediation that was held on June 22, 2015;

(ii) the effect of the amendments, if allowed to stand, would create a new defence to be presented, distinctly different from that which was pleaded on April 9, 2015;

(iii) the amendment was not made in good faith but made to meet the evidential difficulties faced by the claimant and the first defendant;

(iv) the amendment did not arise as a result of a mistake or carelessness;

(v) the amendment creates an injustice to the second defendant;

(vi) if the amendment is disallowed the claimant has no real prospect of success against the second defendant in accordance with rule 15.2 of the **Civil Procedure Rules, 2002**.

[3] The application is supported by the affidavit of Kareen Mair, the Human Resources Manager of the second defendant.

BACKGROUND

[4] The claimant, Miss Shonique Clarke and the first defendant, Mr. Omar Palmer were employees of the second defendant. According to the claimant, on or about January 28, 2011 whilst executing her duties as a Customer Care Representative, the first defendant, in an attempt to gain her attention, caused and/or permitted her to fall from a chair on which she was seated. As a result, she sustained injuries. She initiated proceedings against both the first defendant and the second defendant. The claim against

the defendants for "*damages for breach of its common law duty to care, Negligence and/or breach of Statutory Duty and/or common law duty to care*."

THE PARTICULARS OF CLAIM

[5] In the Particulars of Claim, the claimant repeats the averment in the claim form that the first defendant caused and or permitted her to fall from a chair. The particulars of negligence are stated to be as follows: -

> *"(i) Failing to provide a safe place for its employees.*
>
> *(ii) Failing to take reasonable care in all the circumstances to carry out its business in such a manner so as not to expose the Claimant and other employees to reasonably foreseeable risks.*
>
> *(iii) Failing to take such care as in all the circumstances was reasonable to see the Claimant would be reasonably safe while working.*
>
> *(iv) Failing to provide a safe system of work.*
>
> *(v) Failing to modify, remedy and/or improve a system of work which was manifestly unsafe and likely at all material times to (sic-words omitted)*
>
> *(vi) Causing and/or permitting the Claimant to fall from a chair.*
>
> *(vii) Inviting and/or permitting the Claimant to sit on a chair which was manifestly unsafe.*
>
> *(viii) Injuring the claimant."*

[6] The claimant's particulars of injuries and special damages are also outlined but need not be recited for the purposes of this application.

THE FIRST DEFENDANT'S DEFENCE

[7] The first defendant's defence was filed on April 09, 2015. It states that on or about January 21, 2011, the claimant and the first defendant whilst at work were engaged in a playful interaction, during which, the claimant wilfully and forcefully used her body to pull away the chair on which she was seated, causing her to fall from her chair.

[8] The first defendant asserts that the accident was not caused by any negligence on his part. Further or alternatively, he states that the accident was wholly caused or was contributed to by the negligence of the claimant.

[9] The particulars of negligence of the claimant are outlined as follows: -

> *"(a) failing to keep any or any sufficient regard for her own safety by participating in the act of pulling the chair back and forth;*
>
> *(b) in the circumstances failing to take any or any sufficient care for her own safety;*
>
> *(c) failing to stop so as to avoid the accident;*
>
> *(d) causing and/or permitting herself to fall from the chair;*
>
> *(e) injuring herself;*
>
> *(f) res ipsa loquitor"*

[10] An amended defence was filed on July 27, 2015.

THE SECOND DEFENDANT'S DEFENCE

[11] The second defendant's defence was filed on March 5, 2015. The company admits that the first defendant was its employee at the material time. He ceased employment with the second defendant since 2011.

[12] It states that on or about January 26, 2011, the claimant reported that the first defendant had played a prank on her by pulling the chair from under her as she was in the process of sitting. It also states that, if the first defendant was attempting to gain the

claimant's attention, it was for personal reasons and was not connected in any way to the functions that he had been employed to perform. The first defendant was not acting in the course of his employment at the time of the alleged incident and was quite literally on a frolic of his own.

[13] It further states that the second defendant does not encourage or condone practical jokes or horseplay at the office.

[14] The second defendant avers that it did not breach any duties owed to the claimant and states that the actions of the first defendant were not foreseeable. It also states that the claimant's chair was not defective in any way.

[15] It further states, in the alternative, that the claimant contributed to her injuries by engaging in practical jokes with the first defendant.

[16] The second defendant also avers that the first defendant at the time, accepted responsibility for his actions and agreed to pay or contribute to the claimant's medical bills.

REPLY TO DEFENCE

[17] The claimant filed a reply to defence on March 17, 2015. In the first paragraph the claimant states that she joins issue with the first defendant on its defence.

[18] The claimant asserts that on the material day the first defendant, while trying to resolve a customer's complaint, sought her assistance. She pointed to her headset to indicate that she was engaged with a customer. The first defendant having not understood her signal, held on to the chair on which she was seated and caused her to fall.

[19] She states that she was not engaged in any practical jokes and/or horse playing activities with the first defendant and that the incident was reported to the second defendant in a reasonable time.

THE SECOND DEFENDANT'S/ APPLICANT'S SUBMISSIONS

[20] Mr. Clarke submitted that the amendment should be disallowed. He then outlined the chronology of events and stated that it was only after it was pointed out at the mediation that the first defendant had admitted to "playful interaction" with the claimant that the defence was amended to omit those words. He argued that it is improper for a party to amend their statement of case in those circumstances. It was also submitted that the amendment represents a radical shift in the first defendant's defence.

[21] In this regard, he relied on ***Moo Young and another v Chong and others*** (2000) 59 W.I.R. 369 in which the court stated that an amendment would not be permitted if it is *"in conflict with and contrary to a specific allegation of fact previously made".*[1]

[22] Where the application for summary judgment is concerned, Mr. Clarke submitted that there is nothing in the pleadings which ground the causes of action for occupiers' liability, employer's liability or negligence.

[23] With respect to occupier's liability, reference was made to ***Errol Hanna v University of the West Indies*** (unreported), Supreme Court, Jamaica, Claim No. C.L. 2000/H-104, judgment delivered 19 October 2004, in which Daye J said: -

> *"The purpose of the Occupier's Liability Act was to provide 'New rules and institute a "common duty of care" by the occupier to all visitors be they invitees or licensee'…Under section 3(2) of the Act the "common duty of care" is defined as:*
>
> > *"the duty to take such care as in all the circumstances of the case is **reasonable** to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there."*[2]

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[1] Page 381 j
[2] Page 18

[24] After emphasising the word ‘reasonable’ in the foregoing extract, Mr. Clarke stated that an occupier is only liable for, firstly, the dangerous physical condition of the premises and secondly, for the dangers arising from things done or omitted to be done on the premises by himself or others for whose conduct he is under a common law liability. Counsel submitted that in the instant case, there was no threat posed by virtue of the condition of the premises nor were there any dangers arising from things done or omitted to be done on the premises by the second defendant or others for whose conduct the second defendant is under a common law liability. Mr. Clarke also argued that the actions of the first defendant were outside the scope of his employment and do not create an inherent danger that arose from things done on the premises and was not reasonably foreseeable by the second defendant. In the circumstances, it was submitted that a claim for breach of the **Occupiers’ Liability Act** is bound to fail.

[25] In respect of negligence, Mr. Clarke submitted that the second defendant did not breach the duty of care owed to the claimant through the acts of the first defendant. He indicated that it would have to be demonstrated that the first defendant was acting as its servant and/or agent at the time of the incident. Counsel argued that although the first defendant was at the material time an employee of the second defendant, the tort that was allegedly committed was not so closely connected with the nature of his employment that it would be fair and just to hold his employers vicariously liable. Reference was made to ***Clinton Bernard v Attorney General*** [2004] UKPC 47 in support of that submission.

[26] Counsel also pointed out that the first defendant himself, in his pleadings, noted that the claimant participated in the pulling back and forth of the chair. Mr. Clarke submitted that ‘to participate’ means to take part in and implies that both parties took part in the pulling back and forth of the chair; this activity, he submitted, was in no way linked to the second defendant or the functions which the first defendant was employed to execute. The claimant and the first defendant were service representatives who were given desks and chairs to conduct teleconferences and nothing else.

[27] Mr. Clarke stated that the first defendant’s actions were not only outside the scope of his employment but also against company policy. In this regard, he indicated that both

employees signed and acknowledged the safety statement of the company's code of conduct that expressly states: -

> *"…conduct that may create an uncomfortable situation or hostile work environment, such as inappropriate comments, jokes or physical contact, may be forms of workplace harassment, even where such actions are not intended to have that effect."*

[28] He submitted that in that context, the behaviour of the first defendant cannot be attributed to the second defendant as his employer.

[29] In addition, it was submitted that the second defendant could not have reasonably foreseen that the first defendant, who had no history of practical jokes or complaints ever being lodged against him for tomfoolery, would have acted in a manner to satisfy a claim in negligence. Reference was made to ***Overseas Tankship (UK) Ltd v Miller Steamship Co Pty, The Wagon Mound (No 2)*** [1967] 1 AC 617 in support of that submission. Mr. Clarke argued that there can be no liability in negligence unless the damage was of a kind which was foreseeable.

[30] It was also submitted that it could not have been reasonably foreseeable that, whatever interaction took place between the claimant and the first defendant, it would have, as the claimant puts it, '*caused or permit the accident*'. Counsel argued that the second defendant could not have reasonably protected the claimant against this kind of injury. He stated that the duty of care is a reasonable duty and not an absolute one and that once the second defendant can show that it discharged its duty to the claimant, no liability can arise. Counsel also indicated that the second defendant had several supervisors assigned to the floor on which the alleged incident occurred and discharged its duty to provide a safe place of work, safe system of work, competent staff of men and adequate plant and equipment; therefore, no liability can arise in negligence for the employer.

[31] In light of the foregoing, Mr. Clarke urged the court to find that the claimant has no real prospect of succeeding against the second defendant and to grant summary judgment in its favour.

THE CLAIMANT'S/ RESPONDENT'S SUBMISSIONS

[32] In respect of whether the first defendant's amendment should be disallowed, Miss Williams brought the court's attention to rule 20.2 (2) of the **Civil Procedure Rules**, **2002** (**CPR**). She stated that the second defendant had failed to comply with the rules and the amendment should be allowed to stand as it was made merely to clarify an issue in dispute.

[33] With regard to the summary judgment application, Miss Williams submitted that where there are contradictory pleadings, any attempt to evaluate the facts in issue would result in an exercise similar to that of a trial. Reference was made to the well-known case of ***Swain v Hillman*** [2001] 1 All ER 91 as authority for the position that the proper disposal of an issue under Part 15 of the **CPR** does not involve the judge conducting a mini-trial. Counsel also referred to ***DYC Fishing Limited v The Owners of MV Devin & Brice*** (unreported), Supreme Court, Jamaica, Claim No. 2010 A 00002, judgment delivered 8 October 2010, and ***First Financial Caribbean Trust Company Ltd v Delroy Howell et al*** (unreported), Supreme Court, Jamaica, Claim No. 2010 CD 00086, judgment delivered 5 May 2011, which outline the approach that should be taken when considering summary judgment applications.

[34] Counsel also directed the court's attention to the headnote in ***Bolton Pharmaceutical Co 100 Ltd v Doncaster Pharmaceuticals Group Ltd and others*** [2006] ALL ER (D) 389 (May) where it was stated that: -

> *"In handling all applications for summary judgment, the court's duty was to keep considerations of procedural justice in proper perspective. Appropriate procedures had to be used for the disposal of cases, otherwise there was a serious risk of injustice. The court should exercise caution in granting summary judgment in certain kinds of case, particularly where there were conflicts of facts on relevant issues which had to be resolved before a judgment could be given. A mini-trial on the facts conducted under CPR 24 without having gone through the normal pre-trial procedures had to be avoided, as it ran a real risk of producing summary injustice. The court should also hesitate about making a final decision without a*

> *trial where, even though there was no obvious conflict of fact at the time of the application, reasonable grounds existed for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case."*

[35] She contended that the second defendant has placed the issue of agency in dispute based on its defence and that issue cannot be resolved by looking at affidavits. Miss Williams submitted that in order to prove her case, the claimant must establish that the first defendant was acting as the agent of the second defendant. She pointed out that the first defendant, in his defence, admitted that he was acting as the servant and/or agent of the second defendant. Counsel stated that in light of the second defendant's averment that at the time of the incident the first defendant was not acting as its servant or agent, the issue of agency becomes a question of fact to be decided on the totality of the evidence. She submitted that the second defendant has to rebut the presumption of agency and this can only be done by cross-examination. She argued that if the assertion of agency is to be rebutted, it must be based on the court's assessment of the evidence after hearing and observing the witnesses.

[36] Miss Williams then cited the case of ***Cecilia Laird v Ayana Critchlow and Kinda Venner*** [2012] JMSC Civil 157 where it was stated as follows: -

> *"33. …The claimant has pleaded that the first defendant was either the servant or agent of the second defendant. It is on that basis that she seeks to establish liability in respect of Miss Venner. The latter defendant has denied the existence of any such relationship and has filed affidavit evidence in support of that assertion…*
>
> *36. Counsel, Mr. Henry in my view raised an important point when he said that the issue of agency must be resolved by an assessment of the evidence and the application of the relevant law. Such an assessment in my view must be based on an examination of the testimony as well as the demeanour of the witnesses. Their credibility is central to the determination of fault in respect of the accident and the question of agency. I am also of the view that it cannot be said at this stage, that it is inevitable that the issue of agency will be*

determined in favour of the second defendant. These are matters which ought to be determined by a tribunal of fact."

[37] She therefore asked the court to refuse the application for summary judgment.

DISCUSSION

Whether the amendment should be disallowed?

[38] Part 20 of the **CPR** makes provision for amendments to statements of case. Rule 20.1 provides as follows: -

*"**Amendments to statements of case without permission***

A party may amend a statement of case at any time before the case management conference without the court's permission unless the amendment is one to which either-

(a) rule 19.4 (special provisions about changing parties after the end of the relevant limitation period); or

(b) rule 20.6 (amendments to statements of case after the end of a relevant limitation period),

applies."

[39] The claim form was filed on January 14, 2015 and the first defendant filed a defence on April 9, 2015; an amended defence was subsequently filed on July 27, 2015. Given the time that the amendment in question was made, the permission of the court was not required.

[40] Rule 20.2 reads as follows:

*"**Power of court to disallow amendments made without permission***

(1) Where a party has amended a statement of case where permission is not required, the court may disallow the amendment with or without an application.

(2) A party may apply to the court for an order under paragraph (1)-

(a) at the case management conference; or

(b) within 14 days of service of the amended statement of case on that party."

[41] The rules, however, do not indicate factors that the court should consider in assessing applications for an order that an amendment should be disallowed. It is therefore left to the discretion of the court bearing in mind the overriding objective of dealing with cases justly. It is however, my view, that the principles relating to the consideration of applications for permission to amend a party's statement of case are useful in the determination of this issue.

[42] In the 12th edition of the text **A Practical Approach to Civil Procedure** by Stuart Sime, the learned author states: -

> *"Changes in the parties' knowledge of a case as it progresses and straightforward drafting errors make it necessary on occasion to make amendments to their statements of case. The underlying principle is that all amendments should be made which are necessary to ensure that the real question in controversy between the parties is determined, provided such amendments can be made without causing injustice to any other party."*[3]

[43] This principle has also been a common thread in the relevant case law. In ***Ketteman and others v Hansel Properties Ltd and others*** [1987] A.C. 189, at page 220, Lord Griffiths stated the following: -

> *"Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear upon the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. …Furthermore to allow an amendment before a trial begins is quite*

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[3] Page 217

> *different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence."*

[44] In ***Gladstone Allen v Donald Allen*** [2014] JMSC Civ 220, Harris J, in her consideration of an application to amend the claimant's statement of case made during closing submissions stated: -

> *"22. Mr. Thomas has relied on the authority of **Charlesworth v. Relay Roads Ltd** [2000] 1 WLR 230 to support his application. In that case it was held that the court had the jurisdiction to amend pleadings between judgment and the drawing up of the order, even if it involved a new argument being put forward and further evidence being adduced.*
>
> *23. In the **Charlesworth case** Neuberger J stated the applicable principles that were to be considered when an application to amend pleadings was being sought. These are:*
>
> *(i) Whether granting the amendment will be prejudicial to the other side*
>
> *(ii) Whether there would be no injustice caused to the other side*
>
> *(iii) Whether the other side would be taken by surprise*
>
> *(iv) How great a change is made in the issues by the proposed amendments"*

[45] Paragraph four (4) of the defence filed on April 9, 2015 reads: -

> *"Paragraph 4 of the Particulars of Claim is denied and the 1st Defendant will say that on or about the 21st day of January 2011, the Claimant and the 1st Defendant were in the lawful execution of their duties at the 2nd Defendant's institution. **The 1st Defendant will further say that at the material time, the Claimant was engaged in a playful interaction whilst the 1st Defendant was seated at his workstation which was in close proximity to the Claimant's workstation**. The First Defendant will further say that on the third occasion of their interaction, the Claimant wilfully and forcefully used*

> *her body to pull away the chair on which she was seated, causing her to fall from her chair."*
>
> [My emphasis]

[46] Paragraph four (4) of the amended defence filed on July 27, 2015 states as follows:-

> *"Paragraph 4 of the Particulars of Claim is denied and the 1st Defendant will say that on or about the 21st day of January 2011, the Claimant and the 1st Defendant were in the lawful execution of their duties at the 2nd Defendant's institution.* ***The 1st Defendant will further say that at the material time, he was seated at his workstation which was in close proximity to the claimant's workstation. At the time the 1st Defendant and the 2nd Defendant were engaged in an interaction and on the third occasion of their interaction,*** *the Claimant wilfully and forcefully used her body to pull away the chair on which she was seated, causing her to fall from her chair."*
>
> [My emphasis]

[47] It will be seen that paragraph four of the amended defence no longer contains the words *"playful interaction"*. In ***Moo Young and another v Geoffrey Chong and others*** (supra), Harrison JA said: -

> *"After evidence in support of the statement of claim was heard, and particularly the evidence of Yvet Chang, a chartered accountant of the firm of Ernst and Young, Chartered accountants, the 1st and 2nd respondents sought and obtained the said amendments, the subject of this appeal…*[4]
>
> *These amendments in paragraphs 34 & 34A to 34H, likewise amount to a radical change of posture and allegation of fact and would present a new case to the prejudice of the appellants…*[5]

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[4] Page 373e
[5] Page 380j

> *A significant guiding principle was enunciated in **Rondel v Worsley** [1967] 3 ALL E.R. 993 by Lord Pearce who at page 1017 said of the court's approach to amendments:*
>
> > *"Where there appears to be good faith and a genuine case the court will allow extensive amendments almost up to the twelfth hour in order that the substance of a matter may be fairly tried. But when a party changes his story to meet difficulties, that fact is one of the matters to be taken into account."*
>
> *An amendment should not be made if it is in conflict with and contrary to a specific allegation of fact previously made. For example in the instant case, the amendments relative to the ownership of funds which financed the purchases, the source of such funds and the consequential beneficial interest of the properties concerned are distinctly adverse to the former pleadings of the respondents, and cannot qualify as careless or negligent omissions justifying the amendments…*[6]
>
> *It is my view, that there exists in the amendments, an absence of good faith, which will not serve to determine the real controversy between the parties."*[7]

[48] In ***Moo Young and another v Geoffrey Chong and others*** (supra) Harrison JA considered section 259 of the **Judicature (Civil Procedure Code) Law** which provided as follows: -

> *"The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."*[8]

[49] In seeking to do justice between the parties the court in my view, would also need to consider the timing of the amendment and if there has been delay, the reason for the

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[6] Page 381h
[7] Page 382e
[8] Page 374

delay. A late amendment has the potential to cause prejudice to the other party. The extent of the amendment and its impact on the proceedings would also need to be considered. In the 11th edition of the text **Civil Litigation**[9] by Craig Osborne, the following appears: -

> *"12.6.4 The court's approach to amendment generally*
>
> *…It will also be borne in mind that because a statement of case must be verified by a statement of truth, a party who wishes to amend by deleting one version and inserting another entirely different one, as opposed to merely introducing new material, would clearly have some explaining to do…"*[10]

[50] It might be imagined that when a party is served with a claim form and particulars, that party, in the preparation of its defence, ought to have a fairly comprehensive factual picture of how the incident in question occurred.

[51] Statements of case, that is, claim form, particulars of claim, defence and reply are verified by a statement of truth and it is important for a party to state honestly what he believes the facts to be and not to indulge in what used to be called 'the sporting theory of justice'.[11]

[52] The exclusion of the words "playful interaction" at first blush, appears to be significant. Those words clearly raise the issue of whether the first defendant was on a frolic. The timing of the amendment also raises the issue of whether this is an instance of the first defendant changing his story to meet difficulties that have arisen in the case.[12] However, the cases demonstrate that amendments may be done at any stage of the proceedings if necessary to do justice between the parties.

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[9] Legal Practice Course Guides 2003-2004
[10] Page 196
[11] See the text '**Civil Litigation**' by Craig Osbourne, page 193
[12] See paragraphs 7-10 of the affidavit of Ms. Kareen Mair

[53] In this matter the application to disallow the amendment was made some twenty-three months (23) after the service of the amended defence. However, whilst it may be tempting to describe this period as a protracted delay, the **CPR** states that the application may be made at the case management conference or within fourteen (14) days of service of the amended statement of case. The present application was filed before the case management conference.

[54] I have also considered the substance of the amendment. The removal of the word *"playful"* from the first defendant's defence does not in my view change the general nature of the defence. The first defendant's amended defence still avers that the claimant's injuries were caused by her own action of pulling away her chair. Additionally, when one bears in mind the views expressed by McCalla J (as she then was) in ***Bernard v The Attorney General*** (unreported), Supreme Court, Jamaica, Claim No. C.L. 1991/B023, judgment delivered 09 June 2000, the fact that there may have been 'playful interaction' does not necessarily mean that the second defendant would escape liability. In that case, the court found that the state was liable for the unlawful shooting of the plaintiff by a police officer although his actions *"did not fall within any of his prescribed duties".* On appeal to the Privy Council, Lord Steyn stated that the issue of whether an employer is vicariously liable for the act of an employee is dependent on whether the tort was so closely connected with his employment that it would be just and fair for him to be held responsible.

[55] Bearing in mind the foregoing, it seems to me that timing of the amendment may be relevant where the credibility of the first defendant is being assessed should the matter proceed to a trial. Additionally, I have borne in mind the fact that there has been no amendment of the particulars of negligence of the claimant in the first defendant's amended defence.[13]

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[13] See paragraph 109 of this judgment

[56] In the circumstances, it is my view that the second defendant will suffer no prejudice if the amended defence is allowed to stand.

THE APPLICATION FOR SUMMARY JUDGMENT

[57] Rule 15.2 of the **CPR** outlines the circumstances in which the court may grant summary judgment. The rule states as follows: -

> *"Grounds for summary judgment*
>
> *15.2 The court may give summary judgment on the claim or on a particular issue if it considers that-*
>
> *(a) the claimant has no real prospect of succeeding on the claim or the issue; or*
>
> *(b) the defendant has no real prospect of successfully defending the claim or the issue."*

[58] In ***Island Car Rental Ltd (Montego Bay) v Headley Lindo*** [2015] JMCA App 2, Brooks JA made some very useful comments in respect of applications for summary judgment.[14] He stated as follows: -

> *"[19] In considering whether Island's proposed appeal would have a real chance of success, it is necessary to examine some of the principles regarding applications for summary judgment. The major principles relevant to this case are:*
>
> *a. Applications for summary judgment are governed by part 15 of the Civil Procedure Rules 2002 (as amended) (CPR). Rule 15.2 of the CPR states:*
>
> > *'15.2 The court **may** give summary judgment on the claim or on a particular issue if it considers that-*

[14] See also the text, **Civil Procedure**, 2012, Volume 1 (The White Book) at paragraph 24.2.3

> *a.* ***the claimant has no real prospect of succeeding on the claim or the issue****; or*
>
> *b. the defendant has no real prospect of successfully defending the claim or the issue*
>
> *(Rule 26.3 gives the court power to strike out the whole or part of (sic) statement of case if it discloses no reasonable ground for bringing or defending the claim)" (Emphasis supplied)*

Rule 15.6 confirms the fact that the court considering an application for summary judgment has a discretion in whether or not to grant the application. Paragraph (1) of the rule states, in part, that "[o]n hearing an application for summary judgment of the court ***may****..." (emphasis supplied)*

b. In applications for summary judgment "the overall burden of proof rests upon the [applicant] to establish that there are grounds for his belief that the respondent has no real prospect of success" (see ***ED&F Man Liquid Products Ltd v Patel and Another*** *[2003] EWCA Civ 472; [2003] CPLR 384 at paragraph 9). It is true that the comment was not made in a case dealing with summary judgment, but the principle that an applicant for summary judgment must be required to do more than assert that the respondent "has no real prospect of succeeding on the claim or issue", is supported by rule 15.5(1) which requires the applicant to "file affidavit evidence in support of the application". That evidence must necessarily address the claim or issue, on which the applicant seeks its relief. Support for the principle that the burden of proof, at the stage of summary judgment, rests on the applicant, may be found in the decision of this court in* ***ASE Metals NV v Exclusive Holiday****. The court, at paragraph [14] of the judgment endorsed the principle as set out in* ***ED & F Man****.*

c. Summary judgment is not usually granted in negligence claims. In Blackstone's Civil Practice 2012, at paragraph 34.18, the learned editors opine that:

> *"Although there is nothing in principle preventing a claimant from applying for summary judgment in claims seeking damages for negligence, such cases invariably involve*

> *disputed factual issues, so it is rare for a court to find that there is no real prospect once liability is denied..The question of whether a duty of care is owed has to be decided in the light of all the facts and evidence (**Caparo Industries plc v Dickman** [1990] 2 AC 605; **Capital and Counties plc v Hamshire County Council** [1997] QB 1004)."*

*d. "Where there are significant differences between the parties so far as the factual issues are concerned, the court is in no position to conduct a mini trial" of the issues (see **ED& F Man** at paragraph 10).*

*e. In considering an application for summary judgment, the court must also bear in mind that granting summary judgment is a serious step. The words of Judge LJ in **Swain v Hillman** [2001] 1 All ER 91 are to be considered. He said, in part, at page 96:*

> *"To give summary judgment against a litigant on papers without permitting him to advance his case before the hearing is a serious step."*

[59] I must also point out that in ***Sagicor Bank Jamaica Ltd v Taylor-Wright*** [2018] UKPC 12, the Privy Council considered summary judgment applications. Lord Briggs stated as follows: -

> *"16. Part 15 of the CPR provides, in Jamaica as in England and Wales, a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court's resources, all militate in favour of summary determination if a trial is unnecessary.*
>
> *17. There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will*

generally be nothing more than an unnecessary waste of time and expense.

…

19. The court will, of course, primarily be guided by the parties' statements of case, and its perception of what the claim is will be derived from those of the claimant. This is confirmed by Part 8.9 which (so far as is relevant) provides as follows:

> *'(1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies. …*
>
> *(3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.'*

Para.8.9A further provides: "The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."

20. Nonetheless the court is not, on a summary judgment application, confined to the parties' statements of case. Provision is made by Part 15.5 for both (or all) parties to file evidence, and Part 15.4(2) acknowledges that a summary judgment application may be heard and determined before a defendant has filed a defence. Further, it is common ground that the requirement for a claimant to plead facts or allegations upon which it wishes to rely may be satisfied by pleading them in a reply, not merely in particulars of claim..."

Does the claimant have a real prospect of succeeding on the claim?

[60] The claimant's claim against the second defendant is grounded in negligence and occupiers' liability. I will first consider whether the claimant has a real prospect of succeeding on the latter ground.

Occupiers' Liability

[61] An occupier of premises owes a duty of care to ensure that all visitors are reasonably safe whilst on those premises. In ***Devon Harris v E & R Hardware Ltd*** [2016] JMSC Civ. 228, Jackson-Haisley J said: -

> *"40. Occupier's Liability, on the other hand is governed by section 3 of the Occupier's Liability Act which sets out the extent of an occupier's ordinary duty and provides as follows:*
>
> > *1. An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.*
> >
> > *2. The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*
> >
> > *3. The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing- (a) an occupier must be prepared for children to be less careful than adults; (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.*
> >
> > *4. In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.*
> >
> > *5. Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability,*

> *unless in all the circumstances it was enough to enable the visitor to be reasonably safe.*
>
> *41. The Occupier's Liability Act imposes on an occupier of premises a duty of care to all his lawful visitors, which is to take such care to see that a visitor is reasonably safe in using the premises for the purpose for which he was invited. From an assessment of the case law it does appear that the duty owed in respect of both torts [negligence and occupiers' liability] is essentially the same and so I will apply the same considerations in assessing this case. What is also evident is the fact that ultimately it is a question of fact for a judge to determine based on an overview of the relevant evidence. It is a mixed question of fact and law and it is for the Court to consider whether the injury caused was reasonably foreseeable and whether it is in the view of this Court fair and reasonable to impose a duty of care."*

[62] In the 22nd edition of the text **Clerk and Lindsell on Torts**, the learned editors stated the following on pages 856 – 857 at paragraphs 12-03 – 12-04: -

> "***(a) Scope of the 1957 Act***
>
> ***Scope of occupier's liability: "occupancy duty" and "activity duty"*** *The common law of occupier's liability, with its distinctions between licensees, invitees, trespassers and the like, was limited in application to dangers due to the state of the premises, sometimes known as "occupancy duties". By contrast, where a danger arose from activities on land, such as shooting or driving vehicles, rather than from the state of the land itself, any duty arising ("activity duty") was governed by the general rules of negligence, in which issues such as the status of the claimant were largely irrelevant.*
>
> *The Act is not entirely clear on this point, s.1(1) providing that the rules in it:*
>
> > *"Shall have effect in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them."*

> *It could be argued that these words are wide enough for the Act to apply to all injuries on land due to the negligence of the occupier, thus erasing the common law distinction. But while there may of course be statutory liability for dangers in the state of the land due to activities on it, it now seems clear that the specific reference to the "state of the premises" limits the effect of the Act to occupancy duties. As Lord Hoffman has observed, the mere fact that a person may get into danger on a given piece of land is not itself a peril due to the state of the premises, and even if the occupier's acts or omissions may concurrently affect his safety this does not widen the ambit of the subsection. Furthermore, this seems right in principle; if A's activity hurts B, the regime governing it should be the same whether or not B happens to have been on A's land at the time. Thus injuries due to the occupier shooting a person on his land, inadequately controlling thugs in a nightclub, failing to teach a visitor to use sports equipment, or failing to ensure safe working conditions for a contractor, have been held to fall outside the occupier's liability regime and within that of general negligence."*

[63] In ***Rose Hall Development Ltd v Wesley Robinson and Jamaica Public Service Co Ltd***[15] (1984) 21 JLR 76, Campbell JA considered the principles applicable to the 1969 **Occupiers' Liability Act**. The facts in that case are that on February 21, 1971, a very serious accident occurred on a private roadway leading to the Rose Hall Great House in Montego Bay in the parish of Saint James. Mr. Wesley Robinson was seriously injured as a result of the accident.

[64] At the time, Mr. Robinson was employed to Mr. George Moore of Savanna-la-Mar in the parish of Westmoreland, to draw marl from Montego Bay and deposit it on a private roadway situated on the property of Rose Hall Development Ltd (Rose Hall). On February 21, 1971 while he was tipping the marl from the tipper truck on to roadway, the raised body of the tipper came into contact with overhead high tension electric power lines

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[15] See also ***Errol Hanna v University of the West Indies*** (unreported), Supreme Court, Jamaica, Claim No. C.L. 2000/H-104, judgment delivered 19 October 2004

owned by the Jamaica Public Service Company Limited (JPS). Mr. Robinson, who was in the cab of the tipper truck was severely burnt.

[65] He sued Rose Hall and JPS claiming damages for the alleged breach of their statutory duty under section 3 of the **Occupiers' Liability Act** or alternatively, for negligence on their part or on the part of their servants or agents.

[66] The trial judge found each of the defendants and the plaintiff equally responsible and apportioned their contribution as twenty-five percent (25%) each. The defendants appealed and the plaintiff cross-appealed on the finding of contributory negligence and the quantum of damages. The Court of Appeal held, among other things, that the main purpose of the **Occupiers' Liability Act** was to provide new rules and institute a common duty of care by the occupier to all visitors and the first defendant/appellant having no control or authority over the electric lines were not in breach of its occupancy duties.

[67] Campbell JA (Ag), at page 92, said: -

> *"Mr. Williams referred us to Charlesworth on Negligence (5th edition) paragraphs 333-336 at pages 218-221 where the distinguished author gave an exposition on the Occupier's Liability Act 1957 (U.K.) in relation to which our Occupier's Liability Act is in pari materia. The principles extracted from these paragraphs may be stated briefly as follows:*
>
> *(a) Only the occupier of premises has the statutory duty of care, under the Occupier's Liability Act, to his visitors be they invitees or licensees.*
>
> *(b) Two or more persons may be in occupation of premises at the same time, each on a separate and independent basis…In such circumstances each occupier owes independently of the other, the statutory duty of care under the Act.*
>
> *(c) The duty of care owed to visitors is the 'common duty of care' which is defined as a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. The relevant*

> *circumstances for the purpose of this duty of care include the degree of care and want of care which would ordinarily be looked for in the visitor…*
>
> *(d) The duty of care owed to visitors by the occupier is in relation to dangers due to the physical state of the premises or to things done or omitted to be done by himself and others for whose conduct he is under a common law liability.*
>
> *(e) The occupier may be held not to be under any duty of care to a visitor due to the fact that the danger to which the visitor is exposed on the premises is one which he by virtue of his calling will appreciate and guard against as special risks incident to his said calling, provided the occupier leaves him free to guard himself against the same.*
>
> *(f) Where the danger has been created by an independent contractor who had done work on the premises, the occupier is not liable to a visitor who is injured thereby, unless he knew of the danger so created. He would have discharged his duty under the Act once he had satisfied himself of the independent contractor's competence."*

[68] Campbell JA later stated following: -

> *"As I pointed out above, an occupier is only liable for firstly the dangerous physical condition of the premises, i.e. its static condition, and secondly for dangers arising from things done or omitted to be done on the premises by himself and others for whose conduct he is under a common law liability."*[16]

[69] The judgment of Campbell JA can be contrasted with the aforementioned extract from **Clerk & Lindsell on Torts**.

[70] The claimant, in her pleadings, referred to 'a chair which was manifestly unsafe.' However, the facts, as pleaded, indicate that the incident occurred as a result of an 'interaction' between the claimant and the first defendant. The claimant alleges that the

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[16] Page 93

first defendant held on to the chair causing her to fall and the first defendant alleges that the claimant negligently participated in the act of pulling the chair back and forth.

[71] In my judgment, the injuries the claimant allegedly sustained cannot be regarded as arising from the dangerous physical condition of the premises of the second defendant. Additionally, I am of the view that the words "*dangers due to the state of premises or to things done or omitted to be done on them,*" as framed, do not appertain to injuries allegedly sustained from falling from a chair as a result of the actions of a co-worker.

[72] I am therefore of the view that the claimant has no real prospect of succeeding on this issue.

Negligence

[73] In ***Adele Shtern v Villa Mora Cottages and Monica Cummings*** [2012] JMCA Civ 20 Morrison JA (as he then was) said: -

> *"49. The requirements of the tort of negligence are, as Mr Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused (see Clerk & Lindsell on Torts, 19th edn, para. 8-04). The test of whether a duty of care exists in a particular case is, as it is formulated by Lord Bridge of Harwich, after a full review of the authorities, in the leading modern case of* ***Caparo Industries plc v Dickman*** *[1990] 1 All ER 568, 573-574:*
>
> > *"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."*

[74] As aforementioned, the claimant has pleaded negligence on the part of the first defendant and the second defendant. Given the relationship of employer/employee that existed between the claimant and the first and second defendants, it seems to me that the negligence alleged on the part of the second defendant is intertwined with the issue of employer's liability. One of the requirements of the tort of negligence is whether a duty of care exists. A duty of care refers to the circumstances and relationships giving rise to an obligation upon a defendant to take proper care to avoid causing some form of foreseeable harm to the claimant in all the circumstances of the case in question.

[75] In the text **Clerk & Lindsell on Torts** (supra), on page 542 at paragraph 8-150, it is written: -

> *"The duty question is concerned with the general nature of the relationship between the parties and asks whether there should be a duty of care in that kind of relationship. The scope of any duty may be described by reference to the circumstances of the relationship."*

[76] Chapter 13 of the text, which addresses employer's liability, has the following introduction: -

> *"This chapter is concerned with an employer's liability to its employees. Liability arises under the torts of negligence and breach of statutory duty but separate treatment of employers is justified by the distinctive nature of the applicable negligence principles and the particular importance of liability for breach of statutory duty."*[17]

[77] On page 906 of the text, it is stated as follows: -

> *"2. LIABILITY FOR BREACH OF PERSONAL DUTY OF CARE*
>
> *(a)* ***Nature of the employer's duty***
>
> *…As Lord Hoffman stated* ***in White v Chief Constable of South Yorkshire Police****: "The liability of an employer to his own employees*

[17] Page 903, paragraph13-01

> *for negligence…is not a separate tort with its own rules. It is an aspect of the general law of negligence."*[18]

[78] In the employer/employee context, the question of whether a duty of care is owed has been answered time and time again in the affirmative. It is now well accepted that an employer has a duty to take reasonable care for the safety of his employees.[19]

Breach of duty

[79] In the text **Clerk & Lindsell on Torts** (supra) it is noted that: -

> *"A defendant will be regarded as in breach of a duty of care if his conduct falls below the standard required by law. The standard normally set is that of a reasonable and prudent man. In the often cited words of Baron Alderson:*
>
> > *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do."*
>
> *The key notion of reasonableness provides the law with a flexible test, capable of being adapted to the circumstances of each case…"*[20]

[80] The claimant has alleged that the second defendant breached its duty of care by:

(i) failing to provide a safe place for its employees;

(ii) failing to take reasonable care in all the circumstances to carry out its business in such a manner so as not to expose the claimant and other employees to reasonably foreseeable risks;

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[18] See also ***Oscar Clarke v Attorney General of Jamaica*** [2016] JMSC Civ. 65
[19] See the 12th edition of '**Munkman on Employer's Liability**' by John Hendy and Michael Ford, page 69
[20] Page 541, paragraph 8-149

(iii) failing to take such care as in all the circumstances was reasonable to see that the claimant would be reasonably safe while working;

(iv) failing to provide a safe system of work;

(v) failing to modify, remedy and/or improve a system of work which was manifestly unsafe and likely at all material times to (sic);

(vi) inviting and or permitting the claimant to sit on a chair that was manifestly unsafe.

[81] The second defendant, in its defence, contends that it did not breach any duties owed to the claimant. It states that the actions of the first defendant were not foreseeable and it further contended that the chair was not defective in any way.

[82] In the text **Clerk & Lindsell on Torts** (supra) the aspects of the employer's personal duty are outlined. On page 915, the following appears: -

> *"The duty is often explained under four heads: the provision of safe staff; safe equipment; safe place of work; and a safe system of work. These heads provide a useful framework for analysing the duty but it should be remembered that they are part and parcel of one duty within the law of negligence. To use the words of Lord MacDermott, they "are not absolute in nature. They lie within, and exemplify, the broader duty of taking reasonable care for the safety of his workmen which rests on every employer." So an employer cannot escape liability simply because it may be difficult to assign his conduct to one of the four heads. The key question is whether it was in breach of the duty of care".*[21]

[83] On page 919, it is written: -

> *"**Safe place of work and access to it** There is a duty to see that a reasonably safe place of work is provided and maintained. The place*

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[21] Para. 13-13

> *of employment should be as safe as the exercise of reasonable care and skill permits; it is not enough for the employer to show that the danger on the premises was known and fully understood by the employee. On the other hand, there will be no liability if there is no real risk to employees acting with sufficient care. In considering whether the place of work is safe or not, regard must be paid to its nature. If it is a roof, scaffold or tunnel, the standard of safety to be applied is that of a reasonably prudent employer who provides a roof, scaffold or tunnel at which his men are to work. The failure to provide crawling boards for a risky operation on a roof and reliance solely on the experience of the workman was held to constitute negligence. A place which is safe in construction may become unsafe through some obstruction being placed on it or through the presence of something on the floor which makes it slippery. In such cases the test to be applied is whether a reasonable employer, in the circumstances of the case, would have caused or permitted the existence of the state of affairs complained of."*[22]

[84] In the particulars of claim, the claimant simply states that while she was executing her duties as a customer care representative, the first defendant, in an attempt to gain her attention caused and or permitted her to fall from a chair which she occupied. In the reply to the defence she provides more details. Her account is that the first defendant, while trying to resolve a customer's complaint sought her assistance (as well as the assistance of another co-worker, who was also located in close proximity to him); while indicating to the claimant, he turned his chair that was located behind her to be able to face her. The claimant having heard the first defendant calling her name and having observed his attempts to signal to her, pointed to her headset to indicate that she was engaged with a customer. The first defendant having not understood the signal given by the claimant held on to her chair causing her to fall from the chair.

[85] The first defendant's account is that he was seated at his workstation which is in close proximity to the claimant's workstation; at the time they were engaged in an

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[22] Para. 13-18

interaction and on the third occasion of their interaction, the claimant wilfully and forcefully used her body to pull away the chair on which she was seated, causing her to fall from her chair.

[86] The provision of a safe place of work concerns the employer's duty to take care to ensure that the premises where his employees are required to work are reasonably safe. The premises must be maintained in as safe a condition as reasonable care by a prudent employer can make them. In my view, the facts as pleaded do not point to a failure of the second defendant to provide a safe place of work.

[87] In the affidavit sworn to by Ms. Mair she stated that the second defendant provided swivel chairs that were in proper working condition and employed the use of cubicles to ensure the safety of its workers. It is further stated that the second defendant developed a comprehensive code of conduct that was given to each employee upon confirmation and the code of conduct prohibited playful behaviour. Ms. Mair averred that the claimant had never complained about the first defendant's behaviour and there was no history of horseplay or tomfoolery in the workplace on the part of either employee for the company to take action. It is further stated that several supervisors were assigned to the floor on which the alleged incident occurred.

[88] Again, in my judgment the pleadings do not suggest that the second defendant failed to take reasonable care to carry out its business in a manner so as not to expose employees to reasonably foreseeable risks or failed to take such care as was reasonable to see that the claimant would be reasonably safe while working. In respect of the pleadings which allege that the chair was manifestly unsafe, I have already addressed that issue in paragraph 71 of this judgment.

[89] In respect of the provision of safe system of work, the following appears on page 922 of **Clerk & Lindsell on Torts**: -

> *"**Safe system of work** This is an over-arching obligation, supporting and supplementing the other aspects of the personal duty. At its lowest, it requires appropriate instruction of the workforce as to the safe performance of the task. But with a task of any complexity, it*

> *requires the use of a safe system of work. This may involve the organisation of the work, the procedure to be followed in carrying it out, the sequence of the work, the taking of safety precautions and the stage at which they are to be taken, the numbers of workers to be employed and the parts to be taken by them, and the provision of any necessary supervision. It can, however, be applied to a single operation. In Winter v Cardiff RDC Lord Oaksey said that where "the mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions", or where it is "of a complicated or unusual character", a system should be prescribed, but "where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the…workman on the spot". When there is an obligation to prescribe a system, the obligation is "to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation." Thus, it is a question of fact whether a system should be prescribed, and in deciding this question regard must be had to the nature of the operation, and whether it is one which requires proper organisation and supervision in the interests of safety. When the operation is one regulated by statute or statutory regulations, compliance with those provisions is evidence, but not conclusive evidence, that the common law duty has been fulfilled because "the reasonable employer is entitled to assume prima facie, that the dangers which occur to a reasonable man have occurred to Parliament or the framers of the regulations", but in exceptional cases or where some special peril is anticipated the common law duty is not restricted by the statutory requirements. A safe system of work will often require that the employer has undertaken an adequate risk assessment."*[23]

[90] In ***Speed v Thomas Swift and Company, Limited*** [1943] K.B. 557, Lord Greene M.R said: -

> *"I do not venture to suggest a definition of what is meant by system, but it includes, in my opinion, or may include according to circumstances, such matters as the physical lay-out of the job the*

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[23] Para. 13-21

> *setting of the stage, so to speak the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet circumstances which arise. Such modifications or improvements appear to me equally to fall under the head of system.*
>
> *The examples which I have given are not intended in any way to be an exhaustive list. I give them merely to bring out the point that the safety of a system must be considered in relation to the particular circumstances of each particular job."*[24]

[91] Notably, the pleading failed to point specifically to the deficiency in the system of work which gave rise to the accident.[25] It is stated that the second defendant failed to modify, remedy and/or improve a system of work which was manifestly unsafe but no statements were made as to why the system of work was 'manifestly unsafe'. What falls short of a safe system may be difficult to define, and it may be often far from easy to say on which side of the line a particular case falls, but, broadly stated, the distinction seems to be between the practice and/or method adopted in carrying out the employer's business, of which the employer is presumed to be aware and the insufficiency of which he can guard against; and isolated/casual acts of the employees of which the employer is not presumed to be aware and which he cannot reasonably guard against.

[92] What is 'safe' is an objective question in the sense that safety must be judged by reference to what might reasonably be foreseen by a reasonable and prudent employer. The concept of what is safe is not absolute. Standards of safety are influenced by the opinion of the reasonable person and foreseeability of risk plays a part in the forming of that opinion.[26]

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[24] Pages 563 and 564
[25] See ***Nurse v Trinidad and Tobago Electricity Commission*** (unreported), High Court, Trinidad and Tobago, No S 3037 of 1993, judgment delivered 4 February 2000
[26] See ***Baker v Quantum Clothing Group*** [2011] UKSC 17 per Lord Dyson SCJ

[93] As stated above, when there is an obligation to prescribe a system, the obligation is to take reasonable steps to provide a system which will be reasonably safe, having regard *to the dangers necessarily inherent in the operation*. The claimant and the first defendant were employed as service representatives. They conducted teleconferences. Their employer had to have regard to the dangers necessarily inherent in the conduct of their work as service representatives.

[94] I am of the view that the claimant has no real prospect of succeeding on the issue that the second defendant failed to provide a safe system of work.

Vicarious Liability

[95] Vicarious liability has been described as *"a principle of strict liability"*.[27] The rational for this is that *"it is a liability for a tort committed by an employee not based on any fault of the employer".*[28] It has been said that the basis of liability of an employer for negligence in respect of injury suffered by his employee during the course of the employee's work is twofold: -

(a) he may be liable for breach of the personal duty of care which he owes to each employee;

(b) he may be vicariously liable for breach by one employee of the duty of care which that employee owes to his fellow employee.[29]

[96] In chapter 3 of the **Common Law Series: The Law of Tort**, the following appears:-

> *"The doctrine of vicarious liability is a rule of responsibility by which the defendant may be found liable for the torts of another, without proof of fault. As Lord Nicholls commented in Majrowski v Guy's and St Thomas' NHS Trust, it is 'at odds with the general approach of the common law … [where] a person is liable only for his own acts'.*

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[27] ***Bernard v The Attorney General of Jamaica*** [2004] UKPC 47 at para. 21
[28] ***Bernard v The Attorney General of Jamaica*** (supra) at para. 21
[29] See the 4th edition of the text '**Commonwealth Caribbean Tort Law**' by Gilbert Kodilinye, page 140

> *Nevertheless, vicarious liability is increasingly being used to ensure that victims face a solvent defendant and to provide incentives for greater victim protection. The commonest example of vicarious liability is that of the liability of an employer for torts committed by an employee in the course of his or her employment…*
>
> *Despite occasional judicial and academic support for the opposite view, it is now generally accepted that vicarious liability is different in kind from primary liability generated by the employer's own fault or other breach of duty…*
>
> *The essence of vicarious liability is that it is imposed on the employer without the need for fault on the employer's part – the employer is strictly liable as long as the elements needed for vicarious liability are present. Vicarious liability does not, however, replace the defaulting employee's primary liability for his own tort, so that the employer and the employee are jointly and severally liable for the employee's tort. In theory, the employer (and, by subrogation, his indemnity insurer) may claim an indemnity from the employee for any damages paid, on the basis of an implied term in the employment contract that the employee will take reasonable care when performing his duties or as joint tortfeasors under the Civil Liability (Contribution) Act 1978."*

[97] In the 12th edition of the text **Munkman on Employer's Liability** the following passage can be found on page 80: -

> *"An employer always remains liable in respect of his primary duty of care. He may equally be liable for the torts of his employees or of those under his control. This will typically arise in relation to a casual act of negligence, where it cannot be said that the system of work of the employer is unsafe. The distinction between casual acts of negligence and systemic failures, giving rise to breaches of primary duty, is often not straightforward."*[30]

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[30] See ***Nurse v Trinidad and Tobago Electricity Commission*** (unreported), High Court, Trinidad and Tobago, No S 3037 of 1993, judgment delivered 4 February 2000, where the defendant was liable both for failure to provide a safe system of working and vicariously liable for the failure of its foreman to supervise his crew (per Morean J)

[98] As previously stated, the claimant's pleaded case is grounded in negligence, and it is alleged that the first defendant caused injury to the claimant while acting as the servant and/or agent of the second defendant. In other words, the second defendant's liability for the first defendant's actions would arise out of the relationship between the parties.

[99] In ***Clinton Bernard v Attorney General*** (supra), the Privy Council adopted the approach used in ***Lister and another v Hesley Hall Ltd*** [2001] All ER (D) 37 (May), wherein it was held that the correct approach to determining whether the doctrine applied was to consider whether the employee's torts were so closely connected with his employment that it would be fair and just to hold his employers vicariously liable. Recently, the Jamaican Court of Appeal, in the case of ***Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence*** [2019] JMCA Civ 3 again endorsed these principles.[31]

[100] In ***Mohamud v Wm Morrison Supermarkets plc*** [2016] UKSC 11, the UK Supreme Court delivered a comprehensive judgment on the doctrine of vicarious liability. In this case the claimant contended that the test of vicarious liability should be broadened so as to turn, in the case of a tort committed by an employee, on whether a reasonable observer would have considered the employee to be acting in the capacity of a representative of the employer at the time of committing the tort. The Supreme Court held that the established test, which was to inquire as to the nature of the employee's job and then to ask whether there was sufficient connection between that job and the employee's wrongful conduct to make it right, as a matter of social justice, for the employer to be held liable, remained good without need of further refinement, albeit that it was imprecise and required the court to make an evaluative judgment in each case having regard to the circumstances.

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[31] See paragraphs 19, 20 and 21. See also ***Mechanical Services Company Limited v Clinton Ellis*** [2015] JMCA App 20, paragraph 26.

[101] Lord Toulson, after a helpful discourse on the topic of vicarious liability, said the following: -

> *"44 In the simplest terms, the court has to consider two matters. The first question is what functions or "field of activities" have been entrusted by the employer to the employee, or, in everyday language, what was the nature of his job. As has been emphasised in several cases, this question must be addressed broadly…*
>
> *45 Secondly, the court must decide whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice…"*

[102] In ***Leanne Wilson v Exel UK Ltd (trading as EXEL)*** (2010) S.C.L.R. 486, a Scottish case, the pursuer, who wore her hair in a ponytail, raised an action in the sheriff court for damages for injuries received in the course of an incident where a fellow employee, who was her supervisor, without warning grabbed her ponytail and pulled her head back as far as it could go while at the same time making a ribald remark. The incident took place by way of a prank perpetrated by the supervisor who, the pursuer averred, was in the habit of engaging in horseplay. The pursuer sought to hold the defenders vicariously liable for the loss and damage suffered by her as a result. The defenders argued that the action was irrelevant and the sheriff dismissed the action as irrelevant after a debate. The pursuer appealed to the Court of Session.

[103] It was held that it was clear from the pursuer's averments that the employee's action in pulling her ponytail was unconnected with his employment and it was not part of the defenders' business or the employee's employment to care for, look after or protect the pursuer in the manner which would have rendered the defenders vicariously liable. Equally, in pulling the pursuer's ponytail the employee was not purporting to do anything connected with his duties relating to health and safety or in relation to his supervision of the staff and in the circumstances; whether the case was determined by applying the general test of close connection and what was fair and just or the more specific criterion of whether what the employee did was within the scope of his employment, the pursuer's case was bound to fail.

[104] In ***Graham v Commercial Bodyworks Ltd*** [2015] EWCA Civ 47 a horrific incident occurred on June 11, 2009 at the defendants' bodywork repair shop in Graveley, Cambridgeshire when Mr. Peter Wilkinson, a friend and co-employee of Mr. Paul Graham, used a cigarette lighter in the vicinity of Mr Graham, whose overalls had been sprinkled with a highly inflammable thinning agent called "Gunwash". As a result, the overalls went up in flames; the fire started around Mr. Graham's midriff, moved quickly up to his shoulders and caused Mr. Graham very considerable injury.

[105] It was held that although the defendant employer had created a risk by requiring their employees to work with thinning agents, it was difficult to say that the creation of that risk had been sufficiently closely connected with Mr. Wilkinson's highly reckless act of splashing the thinner onto the claimant's overalls and then using a cigarette lighter in his vicinity. Further, it seemed that Mr. Wilkinson's conduct had been similar to that of the co-employees in cases like ***Leanne Wilson*** (supra) and that the present case, like them, fell within the group of cases in which it was inappropriate to impose vicarious liability. The real cause of the claimant's injuries had no doubt been the frolicsome, but reckless, conduct of Mr. Wilkinson, which could not be said to have occurred in the course of his employment.

[106] In ***Debbie Powell v Bulk Liquid Carriers Ltd, Osmond Pugh and Caribic Vacations*** Ltd [2013] JMCA Civ 38, Brooks JA, after discussing the law on vicarious liability, said: -

> *"63. As there is no dispute concerning Mr Ellis being employed to CVL, the essential question, as identified by the authorities, may be formulated in the instant case, thus:*
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> > *Was Mr Ellis' negligent driving so closely connected with his employment, that is, what was authorised or expected of him, that it would be fair and just to hold CVL vicariously responsible?"*

[107] In the instant case, the question may be formulated as follows: -

Was Mr. Palmer's act of holding onto the claimant's chair so closely connected with his employment, that is, what was authorised or expected of him, that it would be fair and just to hold Accent Marketing Jamaica Ltd vicariously responsible?

[108] Paragraph 3 of the Ms. Mair's affidavit indicates that the first and second defendants were employed as service representatives and they were both given a work station cubicle, each with a desk and a chair, to engage in various teleconferences on behalf of the second defendant.[32]

[109] In the claimant's reply it is stated that, before the incident occurred, the first defendant was trying to resolve a customer's complaint and sought her assistance in so doing. This is certainly important to the close connection test. However, in the evidence of the second defendant is that the *claimant* reported the incident as a practical joke that went wrong.[33] Additionally, the defendant himself, on his account, does not indicate that he was seeking assistance to resolve a complaint. In fact, the particulars of negligence in the defence suggests otherwise, as it states that the claimant '*failed to keep any or any sufficient regard for her own safety* ***by participating*** *in the act of pulling the chair back and forth*.' Those words suggest frolicsome and/or reckless conduct.

[110] Miss Williams relied on the case of ***Cecilia Laird*** (supra) in support of her submission that the issue of whether the first defendant was the agent of the second defendant was live and ought to be fully ventilated at trial. On the facts of this case, the second defendant has admitted that the first defendant was its employee and I think that the approach of Brooks JA in ***Debbie Powell*** (supra) is instructive. That approach is outlined in paragraph 106 of this judgment. Given the admission that the first defendant was the employee of the second defendant, the next step is to consider the ***Lister*** (supra) close connection test.

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[32] See also paragraph 2 of the second defendant's defence
[33] See also paragraph 4 of the second defendant's defence cf paragraph 4 of the claimant's reply to defence

[111] Before concluding, I wish to make a few more observations, in ***First Financial Caribbean Trust Company Ltd v Delroy Howell et al*** (unreported), Supreme Court, Jamaica, Claim No. 2010 CD 00086, judgment delivered 5 May 2011, Brooks J (as he then was) said: -

> *"Rule 15.2 has been considered by our Court of Appeal in Stewart and others v Samuels SCCA 02 of 2005 (delivered 18 November 2005). Two of the three judgments delivered therein, dealt with the standard to be met in accordance with that rule. P. Harrison JA (as he then was), at pages 6 – 7, stated:*
>
> > *"The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a "real prospect of success" not a "fanciful" one – Swain v Hillman [[2001] 1 All ER 91].* ***The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party****. "Real prospect of success" is a straightforward term that needs no refinement of meaning. The latter term should not therefore be equated to the "good and arguable" case concept as required to obtain the issue of an injunction. The "good and arguable case" or "a serious question to be tried" test, in the case of the grant of the injunction, is directed to a preliminary assessment of the party's contention in contrast to an ultimate result."*

[112] In ***Fletcher & Company Limited v Billy Craig Investments Ltd and Anor*** [2012] JMSC Civ 128, McDonald-Bishop J (as she then was) stated the following: -

> *22. In considering whether summary judgment ought to be granted on the claim, the court has to bear in mind that there must be a "real", as opposed to, a "fanciful", prospect of success of the claimant's case for the claim to stand. The test is not one of certainty and so the court is not required to form a view that the claim is bound to be dismissed at trial. The test requires that the court's attention is directed to the need to do an assessment of the claimant's case to determine its probable ultimate success or failure.*

> *23. In assessing whether the claim has a real prospect of success, it is, therefore, legitimate for me to form a provisional view of the outcome of the claim. However, I am not required, nor am I expected, to conduct a mini-trial on disputed facts which have not been tested and investigated on the merits. I am mindful that the object of the rule is not to permit a mini-trial of the issues but to enable cases which have no real prospect of success to be disposed of summarily. I have to look down the road, so to speak, to see what will happen at the trial and if the case is so weak that it has no real prospect of success, it should be stopped. It saves time and cost and would, in the end, prevent the court's resources being used up unnecessarily in the trial of weak cases that have no real prospect of success. This would go a far way in promoting the overriding objective."*

[113] According to the case law it is legitimate for me to form a provisional view of the outcome of the claim. At the trial the claimant will be required to lead evidence to show that the system adopted by the second defendant was unsafe and that the place of work was unsafe.[34] The claimant would also be required to prove that the actions of the first defendant caused her injuries. The claimant has filed no affidavit evidence in response to the second defendant's affidavit. I am to be primarily guided by the pleadings but I am not confined to them.

[114] I have borne in mind the fact that giving summary judgment against a litigant on papers without permitting him/her to advance his/her case before the hearing is a serious step. I have also borne in mind the judgment of Brooks JA in ***Island Car Rentals*** (supra) wherein he said: -

> *"c. Summary judgment is not usually granted in negligence claims. In Blackstone's Civil Practice 2012, at paragraph 34.18, the learned editors opine that:*
>
> > *"Although there is nothing in principle preventing a claimant from applying for summary judgment in claims seeking damages for negligence, such cases invariably involve*

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[34] See paragraph 52 of ***Oscar Clarke v Attorney General of Jamaica*** [2016] JMSC Civ 65.

> *disputed factual issues, so it is rare for a court to find that there is no real prospect once liability is denied..The question of whether a duty of care is owed has to be decided in the light of all the facts and evidence (**Caparo Industries plc v Dickman** [1990] 2 AC 605; **Capital and Counties plc v Hamshire County Council** [1997] QB 1004)."*

[115] The claimant has said that the first defendant held on to her chair and caused her injury. The first defendant has given a different account. Does the issue of the second defendant's liability require a trial? In this regard I am guided by the following passage in ***Sagicor Bank Jamaica Ltd v Taylor-Wright*** (supra): -

> *"There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense".*[35]

[116] Parties are bound by their pleadings. Paragraph 4 of the particulars of claim is conspicuously vague. The claimant having been served with the first defendant's defence appears to have had a eureka moment and pleaded in the reply, that the first defendant held on to her chair and caused her to fall. Nowhere does it say what it is that the first defendant did that caused the claimant to fall. The mere holding on to a chair, without more does not connote negligence or indeed a positive act which is likely to result in injury. The pleadings ought to contain sufficient detail in order for both defendants to be aware of what it is that the claimant is saying caused the incident which she says resulted in injury.

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[35] Paragraph 17

[117] In ***Sagicor Bank Jamaica Ltd v Taylor-Wright*** (supra) Lord Briggs said: -

> *"18. …The purpose of the rule in making provision for summary judgment about an issue rather than only about claims is to enable the court to confine and focus a necessary trial of the claim by giving summary judgment on particular issues which are relevant to the claim, but which do not themselves require a trial."*

[118] Given the claimant's failure to give an account of how the incident occurred, the issue of agency does not need to be resolved between the claimant and the second defendant. Her statement of case does not in my view, address the issue of causation. Indeed, the first defendant may also wish to have a more in depth look at the pleadings and seek legal advice on how to proceed.

[119] In the circumstances, I am of the view that the issue of whether the employer is vicariously liable (employer's secondary liability) is an appropriate one based on the facts of this case, to be disposed of by way of summary judgment.

CONCLUSION

[120] In light of the foregoing it is ordered as follows;

(1) The application to disallow the amendments to the pleadings of the first defendant filed on July 27th , 2015 is refused.

(2) Summary judgment is granted to the second defendant.

(3) Costs are awarded to the second defendant against the claimant, such costs to be taxed if not agreed.