[2015] JMSC Civ. 256

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 03214

BETWEEN	**PAMELA MINOR**	**CLAIMANT**
A N D	**SANDALS RESORT INTERNATIONAL LTD. (t/a Beaches Negril Resort and Spa)**	**1st DEFENDANT**
A N D	**REAL RESORTS LTD.**	**2ND DEFENDANT**
A N D	**BEACHES MANAGEMENT LTD.**	**3RD DEFENDANT**

Nigel Jones & Jason Jones instructed by Nigel Jones and Company for the Claimant

Charles Piper, Q.C and Wayne Piper instructed by Charles Piper and Associates for the Defendants

Heard: **March 7, 8 & 27, 2012, February 5, 6 & 7, 2013 & December 18, 2015**

BREACH OF STATUTORY DUTY – OCCUPIER'S LIABILITY – NEGLIGENCE – CONTRACT – SLIP AND FALL ON WET STAIRWAY AT HOTEL RESORT – WHETHER WET STAIRWAY CONSTITUTED AN UNUSUAL DANGER – DEFINITION OF 'OCCUPIER' – WHETHER DEFENDANTS WERE JOINT OCCUPIERS OF HOTEL RESORT – RES IPSA LOQUITUR

ANDERSON, K. J

[1] The Claimant's claim is for damages, interest and costs pursuant to what is termed as occupier's liability/breach of statutory duty, or alternatively, damages for negligence or breach of contract.

[2] The Claimant has contended, in her statement of case, that on September 7, 2006, while she was a guest at the Beaches Negril Resort and Spa, (hereinafter referred to as, 'the hotel resort'), she fell on a wet, cracked stairway, while she was descending it. She further alleged that the crack in the stairway, was unnoticed by her and that the stairway was narrow and made with concrete and that it led from the defendants' premises. As a consequence of having so fallen on that stairway, the claimant suffered pain, injury, loss and damage and incurred expense.

[3] The claimant's statement of case had made it clear that the claimant is relying on the doctrine of, '*res ipsa loquitur'*, i.e that the facts speaks for themselves, in proof of her claim, to whatever extent that doctrine may be applicable. The claimant's lead counsel though, informed the trial judge during his oral closing submissions, that he was no longer relying on the *res ipsa loquitur* doctrine, since the cause of the accident was known. This court though, is of the considered opinion that for another reason than that which the claimant's counsel has relied on for that purpose, that the doctrine cannot properly be relied upon. This court will, further on in these reasons, examine that more closely.

[4] The claimant has alleged that each of the defendants are liable to her, on the basis that they jointly operate and/or own and/or carry out management functions in respect of the hotel resort.

[5] For its part, the 1st defendant has contended, in their Second Amended Defence that, it was neither the owner, nor the operator of the said hotel resort, at the material time. It is instead, the 1st defendant's contention, that the hotel resort was owned by the 2nd defendant and operated by the 3rd defendant, as a lessee of the 2nd defendant, at

the material time. Accordingly, the 1st defendant has denied that the claimant was its visitor, or that they were negligent, or in breach of any statutory duty of care.

[6] The 2nd defendant denies having been the operator of the hotel resort, at the material time. It was instead, the owner of that property on which the hotel resort is situated and thus, is the owner of that hotel resort, but at the material time, had leased same to the 3rd defendant, as a result of which, it is their contention, that at the material time, it was the 3rd defendant that was the sole occupier and operator of the hotel resort.

[7] Accordingly, the 2nd defendant has denied that, at the material time, the claimant was one of its visitors and has denied that it breached any statutory duty, as also, that they were negligent.

[8] The 3rd defendant has, for its part, accepted that at the material time, it was the lessee and operator of the hotel resort, having leased same from the 2nd defendant, who is the owner thereof.

[9] The 3rd defendant admits that the claimant had slipped and fallen, while descending a stairway at the hotel resort which it then occupied and operated and that, at the material time, the claimant was its 'visitor.' The 3rd defendant though has entirely sought to refute the foundation of the claimant's claim for damages for breach of statutory duty and in the alternative, negligence, by asserting that the claimant's fall was caused or contributed to, by her own negligence.

[10] It has been noted by this court that the claimant's claim against the defendants for damages for breach of contract, was made in her statement of case, without any supporting allegations whatsoever, such as, particulars of the alleged breach. Those particulars are required to be specifically averred by any party who alleges breach of contract, in that party's statement of case.

[11] Indeed also, the terms of the contract, as also, whether the contract was oral, or in writing, has not at all been alleged by the claimant. This court does not know whether it is an express or implied term of the contract that was allegedly breached by the defendants, or even, when that contract was entered into.

[12] In the circumstances, the claimant's breach of contract claim, against all of the defendants, must and does fail. It is a claim which is devoid of any flesh and indeed, is not even the equivalent of a full/complete skeleton. A defendant cannot and ought not to be expected to respond to a claim which is even less than a complete skeleton, in terms of its particularization. Accordingly, neither of the defendants responded in any way other than to have set out a bare denial of same, consisting of the words – *'Except as has been specifically admitted herein, we deny each allegation that has been made in the Further Amended Particulars of Claim…'* (See para. 16 of defence of 3rd defendant/para. 12 of Amended Defence of 2nd defendant/para. 12 of 2nd Amended Defence of 1st defendant.

[13] A bare denial of particulars of claim, would ordinarily be inappropriate and inadequate. In circumstances though, where the claimant's claim for damages for breach of contract had not been particularized, the defendants could hardly be expected to have done more than responded with a bare denial. The claimant's claim for damages for breach of contract, cannot, in the circumstance, properly be determined by this court, as having been proven. Judgment on that claim is awarded in favour of the defendants.

[14] The claimant provided written and oral evidence to the trial court. While being cross-examined by lead defence counsel – Mr. Charles Piper Q.C., the claimant stated that the place where she checked in, was Beaches Negril Resort & Spa and that she does not know who owned that property, or who operated that hotel. Indeed, in her evidence-in-chief, whilst she did refer to 'the defendants' premises' and the defendants' stairway' and 'the defendants' beach' and 'the defendants' hotel,' she did not at all, in her evidence-in-chief, or during her oral testimony, provide any evidence to the court,

which could even have remotely served to support what was her case, which was that at the material time, the hotel resort was being jointly operated by the three (3) defendants. The burden of proof rested on the claimant to prove that assertion of hers, on a balance of probabilities. She wholly failed to do so.

[15] By consent of the parties, there was admitted into evidence at trial and marked as Exhibit 18, a title related to the property on which the hotel resort is situated. That title is registered at Volume 1266, Folio 194 of the Register Book of Titles. That title clearly shows that the owner of the property on which the hotel resort is situated, is in fact – Real Resorts Ltd. – as the 2nd defendant had accepted in its statement of case and also, as the other defendants had contended in their respective statements of case.

[16] There also was exhibited, by consent of the parties during the trial, a lease agreement which was referred to in para. 2 of the witness statement of defence witness Mr. Dimitri Singh, attorney-at-law. That lease agreement was entered into on January 7, 1997, between the landlord – **Real Resorts Ltd. (the 2nd defendant) and the tenant – Beaches Management Ltd. (the 3rd defendant)**. The property leased, as per that lease agreement, is the said property which is registered at Volume 1266 Folio 194 of the Register Book of Titles, together with all buildings, structures and amenities erected thereon. The term of that lease agreement, was ten (10) years, with an option to renew for five (5) years. The hotel is named in the lease agreement, as 'Beaches Negril.' All of that detail, wholly supports the defendants' respective assertions, as made in response to the claimants' claim, this particularly as regards the owner of the property on which the hotel resort was being operated when the claimant was injured in a fall, on September 7, 2006, then having been the 2nd defendant and the operator of that hotel resort and occupier of that hotel resort, then having been the 3rd defendant.

[17] Mr. Singh testified, while he was being cross-examined, about various and sundry matters concerning the relationships between the defendants, both as at the time of his testimony and as at the time when the claimant got injured at the hotel resort. His testimony in that regard, suffice it to state, did not at all assist the claimant in proof

of her contention that on September 7, 2006 – that being the date when the claimant was injured while she was a guest at the hotel resort, all of the defendants were joint operators of same, or indeed, even in proving that any entity other than the 3rd defendant was then the sole operator of same, or that any entity other than the 2nd defendant, was then the sole owner of the real estate on which the hotel resort was situated.

[18] **Section 3 of the Occupier's Liability Act of Jamaica,** which is the equivalent of the **Occupier's Liability Act of England 1969**, sets out the duty owned by an occupier of premises to all of his/its 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. That duty is, in that Act, at **Section 3 (2)**, referred to 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 purposes for which he is invited or permitted by the occupier to be there.' That duty is, in that Act, referred to as the 'common duty of care.' **Section 3 (4**) of that Act, provides that, '*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.'*

[19] **Section 3 (3) of the said Act**, provides that:

> *'The circumstances relevant for the present purposes 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 appreciated and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.'*

Section 3 (5) provides that:

> '*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.'*

Section 3 (7) provides that:

> *'The common duty of care does not impose on any occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question as to whether a risk was so accepted is to be decided on the same principles as in other cases in which one person owes a duty of care to another).'*

[20] The question must be asked and answered at this stage – who is an 'occupier' for the purposes of the obligations as referred to, in respect of an, 'occupier' under the Occupier's Liability Act? That question must be answered, since that answer will impact the claimant's claim against each of the defendants, which, in part, has been founded on an alleged breach on their part, of their statutory duty, pursuant to the **Occupier's Liability Act**. Neither **Jamaica's Occupier's Liability Act**, nor the **English equivalent Occupier's Liability Act (1957)** has defined the term 'occupier.'

[21] In the text, Clerk & Lindsell on Torts, 16th ed. at para 13 – 06, the definition of the term – 'occupier' as used in the **Occupier's Liability Act**, is given by the authors, as being: 'a person who has a sufficient degree of control over premises to put him under a duty of care towards those who come lawfully onto the premises.' That definition was similarly applied in **Wheat v E. Lacon & Co Ltd.** – [1966] 1 Q.B. 335, by England's Court of Appeal, when they held that, 'occupation' for the purposes of the **Occupier's Liability Act**, 1957, was synonymous with control and that the occupier was the person who had the immediate control and supervision of the premises and the power of permitting or prohibiting the entry of other persons.

[22] In the Jamaican Court of Appeal case – **Adele Shtern and Villa Mora Cottages Ltd. and Monica Cummings** – Supreme Court Civil Appeal No. 126/2009, it was

concluded by the entire panel of judges who adjudicated upon that case, although there was dissent between Phillips J.A (who provided the dissenting judgment) and the other Justices of Appeal – Panton P. and Morrison J.A (as he then was), on other issues, that the 2nd respondent, who was the owner of the property on which the hotel which was operated by the 1st respondent, was situated, was not an 'occupier' for the purposes of the **Occupier's Liability Act of Jamaica**. Upon the further appeal of that case to the Privy Council, that court agreed with Jamaica's Court of Appeal, on the occupation issue and expressly applied the **Wheat and E. Lacon and Co. Ltd.** case *(op. cit.),* in its reasons. See: **Adele Shtern v Monica Cummings** – [2014] UKPC 18/Privy Council Appeal No. 0021 of 2013.

[23] In that case, the basic facts were that the appellant, on February 15, 1996 was a paying guest at the Villa Mora Hotel and Cottages. That hotel was then operated by the 1st respondent on land owned by the 2nd respondent. The appellant's case at trial was that, during her stay at the hotel, she was permitted by Mr. Keith Black, the then manager of the hotel, to use a refrigerator located in the office of the hotel, for the purpose of storing her items, since there was no refrigerator in her room. On February 15, 1996, as she attempted to open the door of that refrigerator, she received a severe electrical shock, as a result of which, she further alleged she sustained severe injuries and suffered loss and damage. The appellant claimed that the said accident and her consequential loss, injuries and damage were caused by the negligence of the 1st respondent – the hotel operator and/or the 2nd respondent – the owner of the premises on which the hotel was situated. The appellant also placed reliance on the common duty of care owed by an occupier of premises, to visitors, under the provisions of the **Occupier's Liability Act**.

[24] At trial, judgment was given in favour of the respondents. On appeal by the appellant, the principal issue which arose on the appeal was whether the learned trial judge was correct in her conclusion that the appellant failed to prove, on a balance of probabilities, that the respondents were in breach of a duty of care to her, whether under the general law (common law), or under the **Act (Occupier's Liability Act)**. A

subsidiary issue, which the trial judge did not find it necessary to address, in view of her conclusion on the principal issue, was whether the 2nd respondent, (owner of premises) was an 'occupier' for the purposes of liability under the Act.

[25] Our Court of Appeal unanimously concluded that the 2nd respondent was not an 'occupier' of the hotel as they did not have sufficient control over the operation of same, to designate them as such. The 2nd respondent played no role in the management of the hotel, although, there was evidence that the 2nd respondent did have access to the hotel for certain limited purposes.

[26] This court readily accepts, as indeed was stated by Phillips, J.A in her judgment in the Court of Appeal, which was a dissenting one with respect to other pertinent conclusions of that court in that case, that there can be more than one occupier of premises at any given moment in time, but this court does not accept the claimant's contention that at the material time, for the purposes of this claim, the hotel resort was occupied by either the 1st or the 2nd defendant, of both of them, jointly. The 1st and 2nd defendants did not play any part, at the time when the claimant was injured as alleged, in the operation of the hotel resort where that injury occurred. In the circumstances, judgment will be awarded, on this claim, on that basis alone, in favour of the 1st and 2nd defendants on the claim for damages for breach of statutory duty.

[27] With respect to the claimant's claim against the 1st and 2nd defendants for damages for negligence, it is apparent, from the evidence led at trial, that the 1st and 2nd defendants did not, as at the time when the claimant was injured, do anything, or fail to do anything, which caused the claimant to have been injured and thereby suffered loss and damage. The claimant was required to prove, on a balance of probabilities, if she wished to succeed on her claim against each of the defendants, for damages for negligence, each of the following elements:

i) The existence in law of a duty of care situation, i.e one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question, on the class of

person to which the claimant belongs, by the class of person to which the defendants belongs, is actionable; and

ii) Breach of that duty of care by the defendant; and

iii) A causal connection between the defendant's careless conduct and the ensuing damage/loss; and

iv) That the particular kind of damage to the particular claimant, is not so unforeseeable, as to be too remote. See: Clerk & Lindsell on Torts, 19th ed., at para 8-04.

[28] Since, at the material time, the 1st and 2nd defendants had no control over the management and/or operation of the hotel resort, it cannot be that any negligence on their part, caused the claimant to have fallen on a staircase at that hotel resort, while she was descending it, on September 7, 2006.

[29] Furthermore, it is this court's conclusion, that even at common law, for the purposes of the law of negligence, the 1st and 2nd defendants did not, at the material time, owe to the claimant any duty of care, to have acted reasonably in seeking to prevent her from suffering any injury while descending any stairway at the hotel resort at the material time, while the claimant was then a guest, at that hotel resort. This court has, in having reached that conclusion, applied the test for determining the circumstances in which a duty of care arises, which was applied by Morrison, J.A. (as he then was), in the **Adele Shtern** case (*op.cit*.) at para. 49, that being as was set out in the leading modern case on this point – **Caparo Industries plc. v Dickman** – [1990] 1 All ER 568, at 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 characterized 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 of a duty of a given scope upon the one party for the benefit of the others.'*

[30] Thus, as was stated by Phillips, J.A., on this aspect, which she agreed on with Panton P. and Morrison, J.A., in the Adele Shtern case, at para. 96 – *'…she (the 2nd defendant) did not appear to have had sufficient degree of control over the premises at the material time so as to put her under a duty of care towards the appellant.'*

[31] The claimant was initially relying on, '*res ipsa loquitur*,' in proof of her claim. That quoted phrase, is, as was stated by Ld. Griffiths in **Ng Chun Pui v Lee Chuen Tat** – [1988] RTR 298, at 300, 'no more than the use of a latin maxim to describe a state of the evidence from which it is proper to draw an inference of negligence. As such, even where that evidentiary principle as laid down by that latin maxim is applicable, the operation of that rule, does not displace or lessen the claimant's burden of proving negligence. What it does do, when operative, is that it will enable the claimant to establish a *prima facie* case against a defendant, in respect of a claim for damages for negligence, based upon the mere occurrence of the accident/incident, which forms the subject – matter of that claim.

[32] The *'res ipsa loquitur'* maxim, it should be noted though, has no applicability in circumstances wherein the accident/incident of which complaint is being made by a claimant against a defendant in a negligence claim, could have normally happened, without any negligence on the defendant's part.

[33] Equally, that latin maxim is inapplicable in circumstances wherein there is evidence led as part and parcel of the claimant's case, as to why or how the occurrence/incident/accident, took place.

[34] Thirdly, that latin maxim is inapplicable in circumstances wherein the thing that inflicted the injury, loss and or damage, was not under the sole management or control of the defendant, or of someone for whom he is responsible, or who he has a right to control.

[35] There are thus, three conditions which must all be satisfied, in order for the said evidentiary principle as embodied in that brief latin maxim. These three (3) conditions were conveniently set out in the seminal case of **Scott v London and St. Katherine Docks Co.** – [1865] 3 H & C. 596, at 601, as being:

i) The occurrence is such that it would not have happened without negligence; and

ii) The thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible, or whom he has a right to control; and

iii) There must be no evidence as to why or how the occurrence took place.

[36] In his claim, the *res ipsa loquitur* was expressed in the claimant's statement of case, as being relied on, in proof of her claim. As it is an evidentiary principle though, it need not have been specifically referred to at all, in the claimant's statement of case, in order for it to have been relied on, provided that each of the aforementioned conditionalities for its applicability, have been met. The latin maxim is a convenient and brief means of summarizing the evidentiary principle, which is that the circumstances surrounding the claimant's claim, in a claim for damages for negligence, raise a *prima facie* case of negligence against that defendant, so as to call for a rebuttal from the defendant, without the claimant having had to allege, much less prove, any specific act or omission of the defendant. The claimant merely proves a result, not any particular act or omission producing the result.

[37] In the final analysis in this claim, since the hotel resort was not operated by the 1st or 2nd defendants, or by anyone over whom they had any control whatsoever, as at the time of the accident and also, since there was no evidence led at trial as to who built the stairway on the hotel resort, which is where the relevant accident occurred, or even as to when the same was built, the evidentiary principle as summarized by the latin maxim which, when interpreted means – 'The facts speaks for themselves', has no applicability whatsoever, in assisting the claimant to prove her claim against either the 1st or the 2nd defendant.

[38] As far as the 3rd defendant and the applicability or otherwise of the maxim, to the claim against them, for damages for breach of statutory duty or negligence, is concerned, there is no doubt that at the material time, the hotel resort was under their control. It is though, the considered view of this court that a slip, or trip and fall accident can and will, in fact, often in all likelihood, happen on a stairway, without there being any negligence on the part of the party who has control over the use and day-to-day care of that stairway. In common experience, falls down wet stairways, occur fairly often. It would be entirely different if it had been the stairway, or a stair on that stairway, that had itself collapsed and thereby caused injury, loss and/or damage. This claim arises from a circumstance therefore, which cannot properly give rise to the application of the said evidentiary rule/principle. It would perhaps, have been different, if there had been a slip and fall accident while the claiming was walking alone on an apparently flat surface, such as a regular floor and that floor was then dry. In the circumstances, this court will, in these reasons, make no further reference to that evidentiary principle, as being applicable to the present case.

[39] In the final analysis as far as the 1st and 2nd defendants are concerned therefore, the claim against each of them has been entirely unproven and judgment on this claim is awarded in their favour and the costs of the claim are awarded to them, with such costs to be taxed, if not sooner agreed.

[40] This court will next go on to consider the claimant's claim against the 3rd defendant for damages for breach of statutory duty and in the alternative, for damages for negligence.

[41] It has already been accepted by this court, for the purposes of this claim, that the 3rd defendant did owe to the claimant a duty of care, both by virtue of statute – the **Occupier's Liability Act** – that being in terms of the 3rd defendant having, at the material time, been an 'occupier' and the claimant having then been a 'visitor' at the hotel resort and also at common law, *vis-a-vis* the tort of negligence.

[42] By statute, the 3rd defendant owed to the claimant, a common duty of care, overall, to take such care as was reasonable to enable the claimant to safely use the hotel's resort premises, for the purpose (s) that the visitor was invited to be at that hotel resort. For the purposes of the tort of negligence, the 3rd defendant owed a duty to the claimant to take reasonable care to similarly safeguard the claimant from any loss, injury and/or damage, while using the hotel resort for the purposes which the 3rd defendant would have both known and/or could reasonably have expected.

[43] The issue in this case, which is now left to be decided on by this court, is in reality, the same for the tort of breach of statutory duty, as it is for the tort of negligence, which are the claims being pursued by the claimant, in the alternative, against the 3rd defendant. It is whether the 3rd defendant breached that duty of care and whether such breach, if it did occur, caused the claimant to suffer injuries, loss and/or damage as she has alleged. That issue is to be decided by careful consideration of all of the pertinent circumstances of this particular case, including but not limited to, the expectation that as an adult, the claimant would be more careful than a child and that as a visitor to the hotel resort she would be expected to have taken reasonable steps to have safeguarded herself from injury/harm, while utilizing that premises for her purposes while she was a visitor there.

[44] Additionally, if there was any unusual danger associated with the use of the relevant stairway, the 3rd defendant would be expected by law, to have taken reasonable steps to mitigate, if not altogether eliminate the risk associated with that unusual danger, becoming a reality which ultimately resulted in injury, loss and/or damage to the claimant.

[45] Overall, the 3rd defendant, would have been expected to have taken reasonable steps to have protected any visitor to the hotel resort, such as the claimant was, from any injury, loss and/or damage being caused to her, arising from her expected usage of and manner of usage of the facilities offered by the hotel resort, such as for instance, a stairway on that hotel resort. In that respect, it would have been expected by the law,

that the 3rd defendant would have measured the risks against what was needed to at least mitigate or eliminate those risks altogether and that they would have acted reasonably in determining what should and/or should not be done, in response to those risks and would have acted accordingly. See: **Latimer v A.E.C Ltd.** – [1953] AC 643.

[46] This court is addressing the law as regards the duty owed by the 3rd defendant to the claimant at the material time, whether there was a breach of duty and whether that breach of duty result in the claimant's alleged injury, loss and/or damage, both in terms of the claim for damages for breach of statutory duty, as well as the claim for damages for negligence, collectively, not only because it is convenient in terms of brevity to do so, but also because, the claimant has, through her counsel, at least to some extent, done so, by having set out the same particulars of both alleged breaches of law, together. This is, in the particular circumstances of this case, the correct legal approach, because the duty owed is one and the same, as regards both torts and in addition, this court will apply the same legal considerations to both torts, in determining whether, on a balance of probabilities, the claimant's claim has been proven.

[47] In the case – **Elita Flickenger (window of the deceased Robert Flickenger) and David Preble (T/As XTABI RESORT CLUB and COTTAGES) and XTABI RESORT LTD.** – Suit No. CL. 1997/F013, the basic underlying facts were that the claimant's husband, who was an American tourist that had visited Jamaica in February, 1995, had drowned while snorkelling off the Negril coast, while then a guest at XTABI resort . His widow pursued a claim for damages against the hotel resort and, in respect of that claim, His Lordship Roy Anderson, J. considered that claim as being one for damages for breach of statutory duty under **Jamaica's Occupier's Liability Act** and one for damages for negligence. His Lordship opined, at para. 59 of the judgment which he rendered, that*, '...it is apparent, by its terms, that the duty of care owed to a visitor under the Act is no higher than the duty owed at common law. The terms of section 3 of the statute make it clear that in considering whether the duty has been observed, all the circumstances of the case must be looked at.'* I respectfully, agree

entirely, with that opinion of my brother judge. See also in that respect, a similar view as expressed in the Clerk and Lindsell on Tort text, 16th ed., at para. 13-02.

[48] In this claim, the defendant, it should be noted, has relied on that which they allege, was the negligence of the claimant having either caused or contributed to, her injury, loss and/or damage. That in essence, constitutes the main thrust of the 3rd defendant's defence to this claim. The 3rd defendant has accepted in its defence though, that the claimant did slip and fall while descending a stairway at the resort and they have not made it an issue in their defence, or in response to the claimant's evidence at trial, that the said fall occurred on September 7, 2006. Accordingly, this court has taken it that those averments of the claimant, have all been accepted by the 3rd defendant. The 3rd defendant has also expressed accepted in their defence, that at the material time, the claimant was a visitor to the hotel resort.

[49] The 3rd defendant has specifically alleged that the claimant's fall was caused or contributed to, by her own negligence, in the following respects:

> *'a) Failing to have any or any sufficient regard for her safety;*
>
> *b) Failing to have any or any sufficient regard to the warning signs on the stairway informing users of the stairway that it was wet and requesting that they exercise caution when using same;*
>
> *c) Traversing the said stairway in a manner that was unsafe;*
>
> *d) Neglecting or refusing to hold into the handrails that were provided for use by persons traversing the stairway;*
>
> *e) Neglecting or refusing to take any or any adequate precaution to avoid falling as she did'*

[50] On the other hand the claimant has alleged that the defendants' negligence and breach of statutory duty caused her injuries and that they were negligent and in breach

of their statutory duty, in each of the following respects, which she particularized in para. 9 of her Further Amended Particulars of Claim:

> *'a) Failing to remove the water from the steps;*
>
> *b) Failing to repair the cracked step;*
>
> *c) Failed to provide the claimant with a dry surface upon which she could walk;*
>
> *d) Failed to provide the claimant with alterative exit to the premises in circumstances where the steps were wet, narrow and cracked;*
>
> *e) Failed to cordon off or otherwise hinder access to the lobby area and to the wet, narrow, cracked concrete stairway;*
>
> *f) Failed to warm the claimant of the wet and crack steps;*
>
> *g) Failed to heed to the fact that the environment was not conducive to a photo shoot;*
>
> *h) Failed to heed to the fact that the lobby area was crowded and contained huge puddles of water and so the claimant had no option but to follow instructions to descend the stairway;*
>
> *i) Failed to engage and maintain a staff complement and managers who heeded to the fact that items (a) and (b) could cause their visitors harm;*
>
> *j) Failed in all the circumstances to discharge the common duty of care in breach of section 3 of the Occupier's Liability Act.*
>
> *k) Failing to engage the service of competent and appropriate service men to repair the relevant step.'*

[51] The 3rd defendant has also denied that it was negligent, or that it breached the common duty of care, or the statutory duty, whether as alleged by the claimant, or at all. The 3rd defendant has also, in its defence, specifically contended that the doctrine of *res ipsa loquitur* is of no relevance. They have contended, in their defence, that the area in

which the claimant fell, was heavily used and traversed by guests, staff and visitors to the hotel resort and that no one, other than the claimant, has fallen thereon, 'in the manner alleged by the claimant.'

[52] There is an issue that was made, both in the respective parties' statements of case and during evidence led at trial, by the parties, as to an alleged crack in the stairway. The respective parties' cases, on that particular aspect, will be addressed collectively, hereafter, solely for the sake of convenience and ease of understanding. In the final analysis, it is the 3rd defendant's defence to this claim, that at all material times, it took reasonable care to ensure that the claimant was safe while using the hotel resort.

[53] As regards the alleged crack in the stairway and what, if anything, that may have had to do with the claimant having fallen while descending the stairway, it ought firstly, to be noted that several particulars of negligence and breach of statutory duty, relate to same, in particular – (b), (d), (e), (f) and (k), as set out earlier in these reasons.

[54] The claimant has specifically alleged, in her statement of case, that the accident was caused by the defendants' negligence and breach of statutory duty, in that they respectively failed to do any or all of the things particularized as set out earlier. Accordingly, the claimant began her claim with the contention that she fell on the stairway because, at the material time, that stairway was wet, narrow and cracked and, amongst other acts of negligence and breaches of statutory duty, the defendants failed to exercise due care for the claimant's safety while using the hotel resort for one of its intended purposes, while then a visitor there, in having failed to, 'cordon off,' or otherwise hinder access to the lobby area and the wet, narrow, cracked concrete stairway and also, 'failed to warn the claimant of the wet and cracked steps' and failed also, 'to engage the service of competent and appropriate service men to repair the relevant step.' This court has analyzed and assessed each of the stated particulars, based on all of the evidence that was led in support of and in opposition to this claim and will hereafter set out, in summary, its pertinent conclusions as regards that assessment and analysis to the extent that any particular allegation is not addressed in

these reasons, it is because this court has formed the view that such allegation is unmeritorious and need not be specifically addressed herein.

[55] Before doing so though, this court believes it to be necessary to set out other pertinent aspects of the particulars of the claimant's claim, as were respectively set out in paras. 6-8 and 10 of the Claimant's Further Amended Particulars of Claim. They are as follows:

> *'The claimant and her family were taking part in a Sesame Street Photo Shoot organized by the defendants when the claimant slipped and fell while cautiously descending a flight of stairs leading from the defendants' premises.' (para. 6)*
>
> *'The claimant fell on the wet cracked stairway and fell a few steps down to the bottom of the stairway.' (para. 7)*
>
> *'The said stairway was wet, narrow, had a crack which was not noticed by the claimant and was made with concrete.' (para. 8)*
>
> *'By reason of the matters aforesaid, the claimant has suffered pain, injury, loss, damage and incurred expense.'*

[56] For its part, the 3rd defendant, in response to the aforementioned allegations as specified, apart from having specifically alleged that the said fall on the stairway was caused or contributed to, by the claimant's own negligence, has also contended, in their defence, that *'...save and except that the claimant slipped and fell when descending a stairway at the said resort, paras. 6 to 9 of the Further Amended Particulars of Claim, the particulars thereto and the reliance on the doctrine of res ipsa loquitur are denied because, in the case of the other allegations, they are false and in the case of the said doctrine, same is of no relevance.'* (para. 9 of defence of the 3rd defendant)

[57] Paragraph 9 of the 3rd defendant's defence, as it was in fact worded therefore, had contended that the allegation of the relevant stairway having been wet and cracked at the material time, was being denied, as that allegation was, 'false.' That seems to have been a drafting oversight, as far as the wet stairway, as had been alleged by the

claimant was concerned, because both in the evidence led at trial, as well as the particulars of negligence which the 3rd defendant had alleged in relation to the claimant, it was apparent, that not only the 3rd defendant, but also, the other defendants did not in fact dispute that at the material time, the stairway was wet. Thus, in para. 10 (b) of the alleged particulars of the claimant's negligence – as specifically averred by the 3rd defendant, the following was stated: '*Failing to have any or any sufficient regard to the warning signs on the stairway informing users of the stairway that it was wet and requesting that they exercise caution when using same.'*

[58] What was though, specifically denied by all of the defendants – who, it should be noted, were all represented by the same counsel, is that at the material time, the stairway on which the claimant had fallen on the relevant occasion, was cracked and that said cracked stairway was either the cause, or at least, a partial cause, of her injuries, loss and/or damage, arising from her having fallen in the stairway.

[59] This court believes that it ought to be readily recognized that the issue as to what caused the claimant to have slipped and fallen down the stairway, at the material time, is an important issue for this court to resolve, if it can properly do so, based on the evidence that was adduced at trial, considered of course, at all times, in the context of the respective parties' statements of case.

[60] That is no doubt, what led to the 3rd defendant having set out the following, in paras. 13 & 14 of their defence: 'If which is denied there was the alleged or any crack in the stairway, this defendant says that same did not present the alleged or any danger to the claimant and did not cause or contribute to the claimant's fall. Accordingly, this defendant says that it was not under the alleged or any duty to act in relation to the said alleged cracked, whether as alleged in para. 9 of the Further Amended Particulars of Claim or at all.' (para. 13) *'Further, this defendant says that, at all material times, it took reasonable care to ensure that the claimant was safe while using the said lands and that if, which is denied, the claimant's fall was caused or contributed to by the alleged or any crack in or along the stairway, the danger created thereby was not known*

to this defendant and could not reasonably have been known to it to enable it to taken the alleged, or any action to avoid the claimant's fall.'

[61] In addition, it is worthy of repetition that the 3rd defendant has, in its defence, averred as follows: '*We say that the area in which the claimant fell was heavily used and traversed by guests, staff and visitors to the resort and that no one, other than the claimant has fallen thereon in the manner alleged by the claimant.'*

The Evidence at Trial

[62] With respect to the evidence led in support of the claimant's case at trial, it was only the claimant who provided oral testimony in addition to her written evidence to the court. Other than that, she is relying on various written documents which were admitted into evidence at trial, by consent of the parties, as well as two (2) expert reports, from two (2) doctors who treated her after the relevant accident had occurred, namely: Dr. Jacqueline Chambers and Dr. Edward Decter. In addition, she is also by consensus, relying on various photographs which were admitted into evidence at trial.

[63] It should be noted that whilst there is contained in Dr. Decter's expert report, what was allegedly reported to him by his then patient – the claimant, as to the cause of the injury suffered by the claimant, this court has not at all taken into account that evidence as provided in Dr. Decter's expert report, as proving the truth of its contents, since, in order for this court to have properly been able to have so considered same, the claimant would have, by virtue of the provisions of **section 31E of the Evidence Act**, had to have given notice of intention to rely on same as hearsay evidence and there would have had to have been no objection to same, put forward by the defendants, or at the very least, by the 3rd defendant. That though, was not done by the claimant. As such, that aspect of the doctors' expert report, was admitted as original evidence.

[64] The most pertinent aspects of the claimant's evidence-in-chief, in terms of what she says led up to the relevant accident having occurred, can be summarized as follows: In or about 2006, she and her family decided to visit Jamaica. A Sesame

Street Photo Shoot was scheduled to take place at the Beaches Negril Resort and Spa in Jamaica, which the claimant decided to attend. On or about September 7 (not September 6 – she corrected that misstatement in her witness statement, while she was providing oral evidence to the court), 2006, while on the defendants' beach, she noticed that the weather became overcast. As a result, she collected her daughter from the Kid's Camp which was being held in close proximity and returned to the hotel. The Sesame Street Photo Shoot event was to take place later that afternoon and as a result, she and her daughter were invited to return to the lobby area on the defendants' premises, after the rain had subsided, since, upon her subsequent return to the hotel resort, after she had collected her daughter from the Kid's Camp, heavy rain fell for in excess of forty-five (45) minutes. After the rain had subsided, the claimant proceeded to the lobby area of the defendants' premises. She then noticed that the walkway leading to the lobby, had several puddles of water and no warning signs. The lobby area itself, also had puddles of water and there were no warning signs, advising persons to exercise caution. The claimant further testified though, that she proceeded in a cautious and careful manner. Whilst in the lobby she and the other guests were told to stand and wait for the Sesame Street characters. According to her, 'the defendant advised us to clear the lobby area and move to the left side of the said lobby.' She did not provide any evidence as to which of the defendants so advised her, but this court has nonetheless, accepted that quoted bit of evidence and drawn the reasonable inference that it was the 3rd defendant that had, through its servant or agent, so advised her.

[65] It was also her testimony, that it was whilst she was in the process of then walking out of the lobby area and 'cautiously descending a flight of stairs,' that she slipped and fell and suffered injuries.

[66] She further alleged in her testimony, that there was a crack in the defendants' stairway at the material time and the stairway was also wet. The said stairway was narrow, made of concrete and the crack in the stairway was not noticeable to her at the

time of the accident. She fell on the wet stairway and fell a few steps down to the bottom of the stairway.

[67] The medical evidence led in support of her claim, has established to the requisite standard of proof, that as a consequence of that accident, the claimant suffered a fracture of her right ankle and has thus, been left with a permanent partial disability of 15% of her right ankle.

[68] In amplification of her witness statement, the clamant, while still being examined-in-chief, testified that she was not alone while walking through the lobby. She was then walking along with her sister and her daughter and while walking through the lobby, the rain had already stopped falling. When asked by her lead counsel, to comment on whether she was given the option of using the stairs or a ramp, her evidence was that she does not recall a ramp and that she did not recall one Mr. Courtney Reid – who later testified as a defence witness, having told her anything about ramp usage.

[69] While being cross-examined, the claimant testified that she was wearing rubber-soled sandals on September 7, 2006 – the day when she was injured at the hotel resort. Also, she did notice one handrail that was positioned in the middle of the stairway in the lobby area. She further then testified that as she progressed through the lobby area and down the stairway, she was aware of the need to be cautious. When asked though, by cross-examining counsel, whether she had at any time, held on to the handrail that was on the stair, her answer was – 'No.' Equally significantly also, when the claimant was asked by cross-examining counsel, as to whether she would describe the stairs that took her in and out of the lobby, as, narrow,' her answer was – 'No.'

[70] Further on in her cross-examination testimony, it became apparent to this court, that the very foundation of the claimant's case was patently cracked and in truth, left in tatters. She was shown photos which she had taken of the relevant stairway on September 8, 2006 and she accepted that one of those photos which had been entered into evidence at trial as Exhibit 11B, showed the section of the stairway on which she

had fallen and that, that photo showed the same stairway, with marble tiles. The claimant it must now be recalled, had not at all mentioned that those stairs were encased by marble tiles, while giving her evidence-in-chief. This court thus, had to ask itself the questions – Why did she not mention that important detail, at all, in her evidence-in-chief? Could it be because she had something to hide, in that she would know that if the court knew the stairway was encased with marble tiles, that surface would then have been more slippery when wet, than if it were merely a concrete surface? If so, why would she (the claimant) have wanted to hide or not disclose that important detail?

[71] It is this court's considered opinion that she did not wish to disclose same, because she recognized that the disclosure of same to this court, would have caused her to have appeared to be more careless than it would otherwise have been perceived, bearing in mind that, as she has conceded, she was not utilizing the benefit of the handrail for the stairway, at the material time. Undoubtedly, the primary purpose of the handrail on a stairway, as every adult of reason would be reasonably expected by others, to have known, would be to provide additional stability and support to anyone who is ascending or descending that stairway, because, one would be expected to hold on to that handrail, with at least one hand.

[72] Furthermore, it is also this court's considered opinion that to descend a stairway that is encased with marble tiles, without holding on to the handrail which is positioned in the middle of the stairway is not actually the equivalent of being, 'careful.' To the contrary, it is the equivalent of being entirely careless or carefree about the possible danger while descending that stairway, which simple common-sense should reveal to any adult of reason, is likely an even more, 'dangerous' or perhaps the more appropriate term, is 'risky' endeavour, than that of ascending stairs, since when descending, the risk is that you could fall down several stairs, whereas, while ascending, even if you slip, it is highly unlikely, that you would thereby fall down several stairs.

[73] Interestingly, also, it was revealed during cross-examination of the claimant, that the claimant had provided an incident report to Breaches, Negril, on September 7, 2006 and that she had told someone that she saw a crack on the stairway on which she had fallen, on September 8, 2006 – that having been one day after her unfortunate accident had occurred.

[74] When pressed about the, 'crack' which she had, by then, referred to, time and time again, both in her evidence-in-chief and in her statement of case, during cross-examination, the claimant testified, while looking at photos that she had taken of the stairway, on September 8, 2006 and which photos had been admitted into evidence as Exhibit 11A –D, that the 'crack' that she had seen was depicted by lines in between tiles that were encasing that stairway and that those lines were the seams at which the tiles came together – what was depicted there, being, two tiles on each step, joined together, sideways, across that wide stairway – even wide after having been divided in half, by the stairway's railing.

[75] To this court's mind therefore, there was no 'crack' in or on any aspect of the stairway that the claimant had descended, shortly before she fell while walking down the steps. There was no 'unusual danger' posed to the claimant while she was descending those steps. The seams where the tiles are joined are readily visible if one were to look closely at the steps, but in any event, the claimant has wholly failed to prove that it was as a result of any crack on that stairway, that she fell, while descending it. The claimant has wholly failed to prove what caused her to have slipped and fell while she descended the steps of the stairway, without then, as was no doubt required for her own safety, having held on to the handrail, which undoubtedly, could easily have been utilized by her, if she had chosen to do so. In the absence of it having been proven that it was either the negligent actions of the 3rd defendant, or their breach of statutory duty, as specifically alleged by the claimant, which resulted in her having been injured, the claimant has failed to prove her claim.

[76] This court is of the view that, on a balance of probabilities, the claimant fell down the stairway at the hotel resort, solely because of her own carelessness in having failed to use the provided and easily accessible handrail for that stairway. Even if this court were to be wrong in having reached that conclusion though, the claimant still, would have failed to prove her claim. With the *res ipsa loquitur* evidentiary rule having not been able to assist her, it was incumbent on her, to have proven to this court, on a balance of probabilities, that, it was the 3rd defendant's negligence, or breach of statutory duty, which was the cause of her injury, loss and damage.

[77] In assessing causation, this court has applied the, 'but for' test, which asks: Would the damage of which the claimant complains, have occurred, but for the negligence, or other wrongdoing of the defendants? See: Clerk and Lindsell on Tort, 20th ed. (2010), at para. 2-09, where the learned authors state, after having set out the question as referred to immediately above, the following in the same para. '…or to put it more accurately, can the claimant adduce evidence to show that it is more likely than not, more that 50% probable that 'but for' the defendant's wrongdoing the relevant damage would not have occurred.' In other words, if the damage would have occurred in any event, the defendant's conduct is not a 'but for' cause. See: **Barnett v Chelsea and Kensington Hospital Management Committee** – [1969] 1Q.B. 428.

[78] It is this court's conclusion, that not only has causation not been proven, but also, that the claimant has failed to prove that there was any negligence and/or breach of statutory duty as alleged, committed by the 3rd defendant, or any of the defendants, for that matter.

[79] A few final points need now be addressed, which is as to whether the claimant should have been permitted to use the relevant stairway at all, at the relevant time, this especially since, at that time, the surface would have been both wet and slippery.

[80] The law addresses that issue by not taking a paternalist approach to risks which are inherent in the activities which persons freely choose to undertake on land occupied

by someone. An occupier is thus, not under a duty to provide protection against dangers which are obvious: See: **Tomlinson v Congleton Borough Council and ors**. – [2003] UK HL 47, as was applied by Justice Roy Anderson in the **Flickenger** case *(op.cit.),* at paras. 61- 63. Furthermore, it is this court's considered opinion, that the legal principles in that particular respect, as was set out in the **Tomlinson** case *(op.cit.)*, apply mutatis mutandis, to the law of negligence and a claim which is founded thereon.

[81] There was an issue made during the trial of this claim, as to whether or not there were any warning signs placed in prominent positions, so as to adequately warn persons of the danger in using that stairway at the material time. This court has not found it necessary to decide on that particular issue, which was a heavily disputed one at trial, since, it is apparent to this court, from the claimant's own evidence, that she recognized the risk inherent in her use of the stairway, at the material time, which is why, according to her, she proceeded, 'cautiously' down the stairway.

[82] This court is of the view that the claimant may in fact have, at the time when the accident occurred, been of the view that she was then proceeding, 'cautiously' down the stairway, but in truth and in fact, she certainly was not then so doing. Even if though, she had not then recognized the risks inherent in her use of that stairway at that time, the law would expect that, as a reasonable person, she ought to have recognized those risks and taken appropriate measures to protect herself from those risks becoming a reality. That though, regrettably, she did not do.

[83] This court has not felt it necessary to refer to the evidence of the two (2) defence witnesses in respect of this claim, namely: Dimitri Singh, attorney-at-law and Courtney Reid, who was, at the material time, the Bell Captain/Front House Supervisor and who was then responsible for ensuring that the lobby and the 'great room' were then well kept. Suffice it to state that except as regards whether signs were positioned as stated by Mr. Reid, prior to the occurrence of the claimant's unfortunate accident – that being an issue in respect of which, this court has drawn no conclusion, this court had

determined that their evidence was in all respects truthful, whereas, on the other hand, as regards the claimant's evidence, this court has concluded that her evidence was untruthful and/or significantly exaggerated, in certain material respects.

[84] This court though, nonetheless, sympathizes with the claimant, in respect of the injury and loss which she has suffered arising from the incident which forms the subject – matter of this claim. This court though, does not and cannot adjudicate upon claims, based on sympathy, but rather, does so, based on law and evidence. In that respect, the claimant has failed to prove her claim against all of the defendants.

[85] The wet stairway, was not in and of itself, an 'unusual danger.' The reliance by the claimant's counsel, and in particular, her lead counsel – Mr. Nigel Jones, on two (2) cases, in his oral closing submission, these being the cases of: **Wayne Ann Holdings Ltd. and Sandra Morgan** – 2011JMCA Civ. 44 or Supreme Court Civil Appeal No. 73/2009 and **Victoria Mutual Building Society (V.M.B.S.) v Berry** – Supreme Court Civil Appeal No. 54/2007, was entirely misplaced.

[86] If something spills on the floor of a supermarket, which floor would otherwise be entirely dry and would ordinarily be expected to be ordinarily, completely safe to walk on, that spill would then create an unusual danger to customers of that supermarket. It would be an unusual danger to those customers, because, if they did not know or see that spill, or that wet floor, they would not ordinarily have expected their walking along that floor to be of any unusual risk. That is an entirely different situation from the present one. That though, was the situation in the **Wayne Ann Holdings** case *(op.cit.).*

[87] It is entirely different from the present situation, because, in the present situation, there had been continuous rain for 45 minutes and the claimant was fully aware of that. She had seen the puddles in the lobby and therefore, she would have been aware of that. She also would have been aware that she then had on slippers with a rubber sole and that the stairway had on tiles which could cause her to slip and fall, as the stairway was then wet. She was therefore, not then confronted with an unusual danger, but

rather, a typical or usual and obvious danger, which is why, according to her, she proceeded ‘cautiously’, down the stairway.

[88] The **V.M.B.S. and Berry** case concerned a situation which was dissimilar to the present one, in that, in that case, the stairway on which the claimant had fallen, was considered by the Court of Appeal as having constituted an unusual danger, because the inference could reasonably have been drawn by the trial Judge, in the particular circumstances of that particular case, that the said stairway, was of poor construction and needed to have been replaced, which is why, in that case, the appellant had carried out a remodeling exercise after the respondent/claimant’s fall. That case therefore, has to be confined to it own particular facts. See: paras. 28 & 30 of the judgment of Harris, J.A. in the **V.M.B.S** case *(op.cit.)* as to why, on the facts of that case, the stairway constituted an unusual danger. The facts of the **V.M.B.S and Berry** case, and as regards the stairway in the present case, are entirely dissimilar. Accordingly, it is this court’s firm view, that there is no evidence to suggest, much less, sufficient to enable this court to properly conclude, that the relevant stairway, for the purposes of the present case, when wet, constituted an unusual danger.

Judgment Order

1. The defendants are awarded judgment on this claim, with costs of the claim being awarded to them and such costs stall be taxed if not sooner agreed.

2. The defendants shall file and serve this order.

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Hon. K. Anderson, J.