



[2018] JMSC. Civ.102

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2007HCV00991**

<b>BETWEEN</b>	<b>KEISHA HENRY</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>SANDALS OCHO RIOS LIMITED</b>	<b>DEFENDANT</b>

**IN OPEN COURT**

Mr. Aon Stewart instructed by Knight, Junor & Samuels for the Claimant

Mr. Charles Piper QC., and Ms Petal Brown instructed by CE Piper & Associates for the Defendant

Heard: June 29 and 30, 2017, January 29, February 6, March 23, May 1 and 11, and July 13, 2018

**Negligence – Employer’s Liability- Occupiers’ Liability - Safe system of work – Defendant’s Witness statement admitted as hearsay pursuant to Section 31E (4) of the Evidence (Amendment) Act- Credibility of witness**

**LINDO, J.**

[1] The Claimant, Keisha Henry, (Ms Henry) was a Pastry Chef employed to the Defendant, a limited liability company duly registered under the Laws of Jamaica and having its registered office at 3 Haughton Avenue, Kingston 10.

[2] Ms Henry claims that she sustained injuries on or about March 6, 2001, while she was working as a Pastry Cook on the Defendant’s property at Sandals Ocho Rios Beaches Villa and Resort Ocho Rios, in Saint Ann, in the course of her employment.

- [3] As her employer, the Defendant met some of her medical expenses and she was initially seen by the Defendant's nurse and a doctor and was later seen also by Dr Mansingh at the instance of the Defendant.
- [4] On March 3, 2005 her services were terminated by way of a letter which stated, *inter alia*, "you will be made medically redundant effective March 03, 2005". On March 1, 2007, Ms Henry brought an action claiming damages for personal injuries she claimed she sustained as a result of the incident on March 6, 2001.
- [5] By her Second Amended Claim Form and her Third Amended Particulars of Claim filed on August 26, 2016, she alleges that the defendant failed to provide and to maintain a safe work environment and that "by reason of the defendant's negligence, and general breach of duty, and breach of duties under section 3 of the Occupiers' Liability Act, and other statute, the Claimant sustained injuries and has suffered and continues to suffer loss and incurred expense".
- [6] She claims that she slipped while taking a tray of pastries from the Pantry to the Pastry Shop, as the floor was wet, and that she sustained injuries, particularly to her lumbar spine, resulting in 8% impairment of the whole person.
- [7] Her particulars of negligence/breach of statutory duty are stated as follows:
- a) *Causing or permitting water and/or other slippery substance to be present on the staircase*
  - b) *Causing or permitting the staircase and/ or floor traversed by the Claimant in the course of her duties to be used when the staircase and or floor traversed by the claimant in the course of her duties was wet and or slippery and the same consequently was a danger and a trap to any person using it*
  - c) *Failing to place any or adequate sign and/ or barrier to indicate the hazard created by the wet and slippery staircase and/ or floor traversed by the claimant in the course of her duties*
  - d) *Failing to cause the staircase and /or floor traversed by the claimant in the course of her duties to be kept in a dry condition*
  - e) *Failing to institute and enforce any adequate system for cleaning and housekeeping of the staircase and/ or floor traversed by the claimant in the course of her duties, whereby the wet and slippery state of the staircase and or floor traversed by the claimant in the course of her duties could be detected and cleaned up before the incident so that it could be dried*

- f) *Failing to provide and/or maintain any or any adequate lighting on the staircase and to provide and/or maintain lighting apparatus on the wall above the steps*
- g) *Failing to provide alternative lighting*
- h) *Failing to provide and maintain safe means of access to the pastry shop and to keep it safe*
- i) *Failing to provide an alternative means of access to the pastry shop*
- j) *Failing to line the staircase and/ or floor traversed by the claimant in the course of her duties with adequate material to prevent any person from falling thereon*
- k) *Failing to provide safe means of transporting pastries from the pantry to the pastry shop*
- l) *Failing to take any, or any reasonable care to see that the claimant would be reasonably safe in using the said premises*
- m) *Exposing the claimant, while she was engaged in the course of her employment to a risk of damage from slipping of which they knew or ought to have known*
- n) *Failing to take any or any adequate or effective precautions to ensure that liquid substance was not present or caused to remain thereby exposing the claimant to a risk they knew or ought to have known*

**[8]** The Particulars of Injuries are stated as follows:

- a) *History of twisting injury right ankle March 2001, L5 –S1 with right AL5 root compressed*
- b) *Impairment due to Lumber disc prolapsed*
- c) *Impairment due to right L5 root radiculopathy*
- d) *8% Impairment of the whole person.*

**[9]** Ms Henry states that the injuries, loss and damages were occasioned by virtue of the negligence and breach of duty and /or breach of statutory duty on the part of the Defendant its servants and /or agents. She claims “damages, handicap on the labour market, special damages in the sum of \$447,140.00 and continuing, interest, costs and attorney’s costs...”

## **The Defence**

**[10]** On December 31, 2008, the Defendant filed a defence in which it denies negligence, specifically denies that there was water or slippery substance on the staircase and also denies that there were no adequate barriers, signs or lighting thereon. The Defendant states that the stairs are protected by hand rails, the area is well lit, is made of non-slip material and there is a sign which states “Please watch your step”, to alert persons. The Defendant also rejects the Ms Henry’s contention that there is no safe alternative means of transporting the

pastry and states that there is a lift to transport items from the Pantry to the Pastry and Butcher Shops, and it is accessed from the top of the said staircase. The Defendant also states that Ms Henry's fall was caused by her having "rang her foot" and that in the circumstances, her fall was caused or contributed to by her negligence.

[11] The trial of this matter commenced on June 29, 2017. For various reasons, including the fact that certain applications were made prior to, on that date, and subsequently, the trial was not completed until February 6, 2018, at which time Counsel for the parties were requested to file closing submissions and authorities.

### **The Claimant's Case**

[12] At the commencement of the trial, Ms Henry's witness statement dated May 27, 2016, was admitted as her evidence- in- chief after certain portions were ordered struck out as hearsay.

[13] Her evidence is that at the time of the incident she had been working with the Defendant "since about late 2000" and that depending on which shift she was on, she was required to transport by foot, prepared pastries from the Pastry Shop to other restaurant kitchens on the property.

[14] She states further that on March 6, 2001, she was making her way to the Pastry shop from the main kitchen "and intended to use the staircase..." and that as she approached the staircase and before she had reached the railing, she had a tray of pastries in her left hand and "before stepping down on the first step, I slipped, my foot went down on the first step, and I twisted my right ankle. While trying to catch my balance to avoid falling,...I bumped the lower part of the right side of my back on the railing staircase...I had not yet held on to the railing..."

[15] She says she felt a sticking pain and thought it would have worn off so she continued to do her duties "by heading to the pastry shop" and about "5 to 10 minutes later, the sticking pain started to get worse, ...started to limp...". She

states that she was assisted to the Nurse's Station where she was examined and treated by Dr. Lodian Wright and that she gave a statement.

**[16]** Ms Henry's evidence also is that she made visits to a number of doctors, including an orthopaedic surgeon, had to undergo sessions of physiotherapy and that she received steroid injections and "would get at least five days sick leave after each injection". She states further that she was referred to the Defendant's doctor, Dr Mansingh, who also treated her and sent her to do a MRI.

**[17]** She also states that she got pregnant in January 2003 and that the pain she was having continued "until about the 6<sup>th</sup> month of my pregnancy when surprisingly the pain reduced". She then states that the pain was unbearable and she had to apply for maternity and her vacation leave at the same time and that she had a normal delivery and when she went back to work she was still having pain and did intense physiotherapy and acupuncture. She adds that four years after the incident she was still seeing Dr Mansingh, that she travelled by taxi to him and the defendant paid. She also states that she did a radiology test which was paid for by the Defendant and that about a month after that she was given the letter dated March 3, 2005.

**[18]** In amplifying her evidence-in-chief, Ms Henry stated that the wet floor caused her to slip and that tiles were on the top step approaching the staircase. She indicated that she could identify the metal frame with electrical cords, stated that the staircase was steep and that there were no tiles, except for the top. She identified a number of documents including photographs of the immediate area she described, and these were tendered and admitted in evidence.

**[19]** Under cross examination by Mr. Piper, QC, she indicated that she "thinks" she commenced working with Sandals in October 2000 and agreed that she would have been there between 4 and 5 months at the time she had the accident. She stated that she worked 6 days per week at Sandals, and during those days she had to use the stairway daily. When asked how many times, she said, "maybe 5 – 6, maybe more".

- [20] She agreed that she had uniform, including 'heavy shoes', which she said can correctly be described as industrial boots. She said that immediately beside the stairs on which she said she fell, there was a 'lift' which "takes you up and down".
- [21] Ms Henry said she could not recall if there was a sign beside the lift which states 'please watch your step', and after being shown Exhibits Z, AA and BB, she identified the stairway and white tiles on the wall, indicated that the tile at the top of stairs was burgundy in colour, and said that the column into which the rails for the stairs are embedded is white and was tiled.
- [22] She agreed that when she fell she went to the Nurse's Station and that in accordance with the 'Rules' she was required to give a statement of what occurred and she did so. She said she was not able to recall "word for word" what she had put in the statement. Ms Henry admitted to having used the lift "maybe once per week, when needed" and indicated she needed it for transporting baking tin sheets from the bakery to the Pastry Shop. She said it was not the first time she had transported pastry on her left shoulder from the Bakery to the Pastry Shop and indicated that she used it "may be once per month". She admitted that at the time she was descending the stairs she was not holding onto the hand rails, and agreed that the hand rails start at the top of the stairs. She disagreed that her right hand was free, stating that she used her right hand to balance the tray. When confronted with her evidence where she stated that she had the tray of pastry in one hand, she said that was accurate. She then stated that she did not say she was 'balancing the tray with her right hand'.
- [23] In further response to Queen's Counsel, Mr Piper, she said that when she slipped and fell she was on the "second trodding- step" and when asked if it was the "second rung of the stairs", she agreed. She said she did not tell the doctor or nurse how she fell and denied the suggestion that on March 6, 2001 there was no water at, or in the vicinity of the stairs on which she fell. She said she saw water on the stairs when she approached it, but continued her normal duties as

“it was always there”. She said that she did not bring it to the attention of anyone and that she regarded it as being a danger. When asked if she went into it regardless, she said, “I am always in it”

[24] Ms Henry agreed that other employees used the stairway, and also that she had stated that the floors are mopped from time to time. She however said that she could not say how frequently. She indicated that it would be wrong to say she had not commenced going down the stairs when she slipped, and then stated that it was not the case that she had stepped from the 1<sup>st</sup> to the 2<sup>nd</sup> rung.

[25] In seeking to clarify her evidence in relation to where on the stairs she slipped, when shown Ex BB, (a photograph of the staircase) she pointed to the top section, (which I understand to indicate that she was at the top of the staircase, in the process of going down). In further response to her Counsel, she indicated that when she said she was ‘always in it’, she meant that water was always on the floor.

[26] Ms Henry did not call any witnesses.

### **The Defendant’s Evidence**

[27] The Defendant’s evidence is contained in the witness statement of Philbert Shurriah which was admitted as hearsay after an application was made and granted for same to be admitted. The court found that the requirements of Section 31 E (4) (a) of the **Evidence (Amendment) Act** had been met, (the witness having died). The witness statement was dated September 18, 2007 and filed on August 16, 2016.

[28] The evidence contained in the witness statement is as follows:

- 1. My name is Philbert Shurriah. I live at 4 Buckfield Road, Ocho Rios in the parish of Saint Ann and I am an Executive Sous Chef. I am employed to Sandals Ocho Rios Limited the owner and operator of Sandals Grande Ocho Rios Hotel at Ocho Rios in St. Ann. I have been employed to Sandals Group since*

October, 2000. I have been at Sandals Ocho Rios later Sandals Grande Ocho Rios Hotel for all of that time.

2. My position as Executive Sous Chef involves complete supervision of the kitchen by me including staff supervision and overseeing food preparation.
3. Ms. Keisha Henry was an employee of the Hotel before I was employed there. She was a Pastry Cook doing production of pastry on the instructions of her Pastry Chef. This would mean that she would sometimes have to transport pastry. She would move pastry from the Pastry Shop to the lift. The lift was about 24 – 30 ft from the Pastry Shop. After the completion of service she may have to move pastry from the main Kitchen back to the Pastry Shop. There is a pastry trolley that would be used to pack the pastry on and push it to the pantry doorway. It would then be moved from the Pantry doorway to the pastry shop. That is the only place that you would be moving pastry from the Kitchen area to take to the Pastry Shop.
4. At about 10:30a.m. after breakfast, 2:30p.m. after lunch and 9:30p.m. after dinner you would be moving pastry from the doorway of the Pantry to the lift to take them to the pastry shop. There would be no reason to be taking a tray of pastry from the Pantry or from the Main Kitchen area to the Pastry Shop outside of those times and not at 6:00p.m. when Ms. Henry says she was doing so.
5. The Pastry Shop was downstairs of the Main Kitchen. To get the Pastry downstairs the distance to the lift is about 4 to 6 feet and they would take the pastry from the Trolley, put them on the lift and the lift would take them downstairs. If there was one tray only they would still put in the lift. The lift was specifically for the purpose of transporting food up and down. I do not frequently see staff using the stairs to transport food because the lift is for that purpose. However, occasionally a member of staff would use the stairs if they have a small platter or a



*plate with food but we discourage them from doing so because of the fact that the lift is there specifically for the purpose.*

- 6. If she was taking one tray of pastry from the Pastry Shop to the Main Kitchen and used the staircase it had a concrete barrier to the right side to prevent someone from falling to the right and on top of the concrete barrier is metal handrail. There is a sign in large bold letters on the wall beside the staircase saying "Please watch your step". If the sanitation department are washing the stairs they would put signs saying slippery when wet at the top of the stairs and at the bottom. In addition, those steps are only washed after working hours. The sanitation people come in at 11:00p.m. and work until 7:00a.m. during which time they would wash the floors and the like.*
- 7. I was not at the Hotel when it is said that Ms. Henry fell down the stairs. I was not at work that day. I heard about the incident. I do not know anyone who witnessed the incident or was there at the time of the incident.*
- 8. Normally if someone falls and spills a tray of pastry it would have to be documented so that the loss could be accounted for. Generally, any one of the Chefs on duty would do so. The Chef who was there at the time, Mr. Mark DeKrines has left. He was at Shaw Park Hotel the last time I saw him. I have not seen him for about 5 to 6 months now so I do not know if he is still there.*
- 9. The area of the staircase is well lit. The staircase is not normally wet. There is a floor cleaner or floor runner in the kitchen for the purpose of keeping the floors clean and dry. Once someone spills anything he/she cleans it up. If someone spills something in the area of the staircase it is their duty to place something there warning of the danger and then to arrange for the floor cleaner/runner to come and clean up. The floor cleaner or his relief is always in the kitchen. It is therefore unlikely for the stairs to be*

*in the condition that she alleges the stairs to have been.*

*10. She got pregnant after the incident but did not complain much about her back during that time. However, during that time she was given light duties like taking temperature logs of the food in the buffet and that type of things. She did not have to lift anything. This did not change after she returned to work.*

*I, Philbert Shurriah, hereby certify that I believe that the statements of fact in this my witness statement are true.*

*Dated the 18<sup>th</sup> day of September, 2007”*

**[29]** The only evidence before the court is that of the claimant as contained in her evidence-in-chief and as elicited in cross examination, and the hearsay evidence of Philbert Shurriah, as contained in the foregoing witness statement, to the extent that I afford it any weight.

**[30]** I must therefore point out at this stage that I agree that the assessment of the weight to be given to the witness statement of Philbert Shurriah, “depends on all the circumstances from which inferences can reasonably be drawn as to its accuracy or otherwise”.

### **The Submissions**

**[31]** In written submissions filed on May 1, 2018, Counsel for the Defendant set out the background to the claim, examined the parties’ evidence in support of their respective positions and stated the law on the issue of liability.

**[32]** He submitted that great weight ought to be given to the evidence contained in the witness statement of Philbert Shurriah, “given its nature and content and his obvious knowledge of the process”

- [33] In examining the evidence of the Claimant, Counsel contrasted it with aspects of her pleadings and pointed to “material contradictions” which he submitted ought properly to “negatively impact” on the Claimant’s credibility.
- [34] Counsel pointed out that the Claimant’s unreliability as to how and when the incident occurred assists only to demonstrate that there was an incident resulting in her twisted ankle and not the cause of it. He pointed out that no part of her contradictory pleadings or evidence explains why she sustained injury except the statement she gave to the Defendant’s nurse shortly after the incident and noted that in cross examination, she accepted that her memory is best immediately after something happens. He therefore expressed the view that her statement to the nurse is the only credible evidence of her injury.
- [35] Counsel for the Claimant in his written submissions filed on May 11, 2018, also set out the factual background to the case, identified the issues he found to be determined and examined the law with regard to negligence, Occupiers’ Liability and Employers’ Liability in relation to the evidence presented in the case.
- [36] Counsel questioned whether there being a sign at the stairway stating “Please watch your step”, would be sufficient for the court to infer that the Defendant was not negligent or had discharged its common duty of care. He submitted that such an inference ought not to be drawn
- [37] He noted that the Defendant’s case, seeking to rebut the Claimant’s contentions would primarily be based on the untested evidence as the Defendant’s evidence was admitted as hearsay. He examined the evidence and pointed out, *inter alia*, that if the court accepts that the Defendant had a duty to ensure that if something is spilled, a warning of the danger would be placed there and the “floor runner” would clean it up, “there is no evidence of any such discharge of a duty...”. Counsel added that if the court accepts that the area of the step was wet, further measures ought to have been taken and there is no evidence before the court from either the Claimant or the Defendant that on the date of the incident any

signs were in the vicinity of the steps “which the defendant can be in no position to dispute was wet...”

- [38] Counsel also submitted that if the court accepts that the area in the vicinity of the step was wet, and the Claimant proceeded there nonetheless, that would not mean the Defendant is absolved from responsibility. He then expressed the view that the system in place for the Claimant to conduct her job was insufficient, having regard to known hazards “ie wet and slippery floor” and also said that the Defendant has failed to rebut, by credible evidence, that the area in the vicinity of the step and also the step, were always wet.

### **The Issues**

- [39] I find that on the statements of case and the evidence presented, it falls to be determined whether the Defendant owed a duty of care to the Claimant and, if so, whether there was a breach of that duty resulting in damages and whether this was foreseeable; whether the Defendant is in breach of its statutory duty of care under the Occupiers’ Liability Act and whether the Claimant contributed to the accident by her negligence. The court would then have to examine the nature and extent of the Claimant’s injuries and assess the quantum of damages, if any, to be awarded to her.

### **The Law**

- [40] It is well established that an employer has a duty to have reasonable care for the safety of its employees. In **Davie v New Merton Board Mills Ltd.**, [1959] 1 All ER 340, the common law duty of care owed by an employer to an employee is stated to be to take reasonable care for their safety. This includes provision of competent staff, provision of adequate plant and equipment and provision of a safe place and a safe system of work and adequate supervision. The failure to fulfil this duty may amount to negligence on the part of the employer.
- [41] A safe system of work includes the way in which it is intended that the work shall be carried out, the giving of adequate instructions and the taking of precautions

for the safety of workers. Where there is a duty to provide a safe system of work, this duty is not discharged by merely providing it. The employer must take reasonable steps to ensure that it is carried out and this involves providing instructions in the system as well as some measure of supervision.

- [42] The case of **Speed v Thomas Swift & Co.**, [1943] KB 557 provides support for the proposition that part of an employer's duty in providing a safe system of work is to provide supervision. At page 567, Lord Greene said:

*“the duty to supervise workmen includes a duty to take steps to ensure that any necessary item of safety equipment is used by them. In devising a system of work, an employer must take into account the fact that workmen are often careless as to their own safety. Thus in addition to supervising the workmen, the employer should organize a system which itself reduces the risk of injury from the workmen's foreseeable carelessness”*

- [43] A defendant will be said to have breached his duty of care if his conduct falls below the standard required by law. This normal standard is said to be that of a reasonable and prudent man. (See **Blyth v Birmingham Waterworks Ltd.**, (1856) 11 Ex. Ch. 781)

- [44] Under the **Occupiers' Liability Act**, an occupier of premises owes a common duty of care to all his visitors. Section 3(2) provides as follows:

*“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 purpose for which he is invited or permitted by the occupier to be there”*

This duty extends to an employee who enters the employer's premises under a contract of employment.

- [45] The Claimant has the burden to prove on a balance of probabilities that the Defendant owed her a duty, breached its duty and the breach resulted in damage to her. The Defendant, having alleged contributory negligence on the part of the

Claimant, has the burden of proving, on a balance of probabilities, that it was the Claimant's negligence which contributed to her losses arising from the incident.

### **Application of law to facts**

- [46] There is no disputing that the Claimant was employed to the Defendant to carry out duties on its premises and at the time of the incident giving rise to this claim she was a Pastry Cook. Ms Henry was therefore a visitor within the meaning of the Occupiers' Liability Act and as such, I find that the Defendant owed a duty of care to her.
- [47] On the question of whether the Claimant fell and sustained injuries, as a result of negligence or any breach of duty on the part of the defendant, she pleaded extensively, various failures which she attributed to the Defendant. Her evidence to substantiate these averments I find were inconsistent and unconvincing.
- [48] There was no evidence as to where exactly there was water or any slippery substance, for that matter, as pleaded. Her evidence as to whether the incident took place on her way to the staircase or on the top of the staircase itself, is quite contradictory, as is her evidence as to whether she slipped and fell or "rang her right foot" and twisted her ankle, as well as the manner in which she held the tray she claims she was carrying at the time of the incident.
- [49] Additionally, her evidence, in cross examination, that it would be wrong to say she had not commenced going down the stairs when she slipped, but later stated that it was not the case that she had stepped from the first to the second rung, and then pointed to the top of the staircase as being where she said she slipped, and where she said that the tray of pastries was in one hand and admitted in cross examination that it was accurate, but then said she was balancing the tray with her right hand and later denied having said so, are instances of the contradictions in her testimony which lead me to a finding that she was not absolutely clear as to how she fell, exactly where she fell, or, what caused her to fall and therefore brings her credibility into question.

- [50]** I therefore did not find the claimant to be a credible witness. I also reject as unreliable her evidence that water was always on the floor or that she was always in it.
- [51]** Having examined her statements of case against the background of the evidence presented to support her claim, I note that since the filing of the claim, she has made numerous adjustments to her pleadings. I agree with Queen’s Counsel that although the last pleading of each party is “that which determines the issues at trial, regard ought to be had to the development of these pleadings to assist with assessing the credibility...and the determining of those issues...”
- [52]** I have therefore analysed and assessed the particulars as stated in her amended particulars of claim in view of the evidence she led in support of her claim and in view of the fact that the evidence presented by the Defendant was not tested.
- [53]** It is the Claimant who has the burden of proving her case, on a balance of probabilities. She has come up woefully short in providing any, or any credible evidence to support her allegations that the Defendant failed to take any or any reasonable care to see that she would be reasonably safe in using the premises or that the Defendant exposed her to a risk of damage from slipping “of which they knew or ought to have known”. Neither has she provided any evidence to substantiate the other extensive failures attributed to the Defendant as outlined in her “particulars of negligence/breach of statutory duty”. In addition, she has also failed to provide any evidence as to any failure on the part of the Defendant to implement safety measures as she alleged, for example, where she pleaded that the Defendant failed to provide alternative means of access to the pastry shop.
- [54]** To the contrary, however, she gave evidence in cross examination that she was provided with shoes which she described as “industrial boots” and that there was a ‘lift to take things up and down’, which in my view points to a finding that the Defendant, in those instances, took reasonable care to see that she was reasonably safe in carrying out her job.

**[55]** This court finds that the Claimant's evidence on a whole was neither coherent or cogent. In her effort to prove her claim, the only credible evidence she led, in my view, is that contained in the statement given to the Nurse and although I accept that the Claimant injured her right ankle in the manner as outlined in the statement, she has not proved on a balance of probabilities that her injury was caused by any negligence or breach of duty on the part of the Defendant. Due to her general unreliability, I also do not believe her story that there was water or any slippery substance on the floor or on the steps which caused her to slip and fall.

**[56]** From my assessment of the Claimant's evidence I find that it is more believable that she fell because she "rang" her foot as she failed to exercise reasonable care in her approach to, or in descending the stairs. Further, I find that she assumed the risk of taking the stairs when there was a lift provided for that purpose and that she sustained injuries solely because of her own carelessness in failing to use the lift provided and having apparently, attempted to use the staircase, failed to use the handrails.

**[57]** An examination of the evidence of the Defendant's witness, which I approached with caution, as it was admitted as hearsay, shows that it is made up of generalized statements of what obtains or should obtain at the Defendant's premises, for example, that a system existed for dealing with spillage in the form of a "floor runner/ floor cleaner", which to my mind, do not take it to a level of a complete denial of the particular averments made by the Claimant. It provided no evidence to counter what the Claimant said happened on the day in question as he was not present. I find that this evidence could not be relied on by the court as a basis to determine the crucial issue of how the Claimant sustained the injuries she alleged. I have therefore not placed much weight on it.

**[58]** Mr Shurriah was not working at the premises when Ms Henry started working there so he could not provide any evidence to show whether she had been given instructions as to how she should carry out her duties and whether, in fact, she



was an employee who had been 'discouraged' from using the stairs to transport pastry.

### **Contributory Negligence**

[59] For the sake of completeness, I will now address the issue of contributory negligence raised on the Defendant's case.

[60] The Defendant having specifically pleaded contributory negligence on the part of the Claimant had a duty to provide evidence from which this court can accept, on a balance of probabilities that the injury of which the Claimant complains resulted from the particular risk to which she exposed herself by virtue of her own negligence.

[61] The Defendant has asserted that Ms Henry's fall "was caused or contributed to by her negligence". It therefore had a duty to lead evidence to support that allegation.

[62] In **Nance v British Columbia Electric Railway Co. Ltd.**, [1951] AC 601, the court said in relation to the defence of contributory negligence that:

*"all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury"*

[63] Applying that principle to the facts of this case, I find that the evidence provided by the Defendant has not shown that the injuries complained of by Ms Henry were as a result of an accident caused or contributed to by any negligence on her part while she was carrying out her duties as an employee of the Defendant on the Defendant's premises.

[64] I agree that the only credible evidence in relation to the fact that an incident took place is the report made by the Ms Henry to the Nurse, on the day in question. The Defendant's witness not having been present and witnessed the incident,

cannot assist the court as to what happened and has therefore not provided any evidence from which the court can find, on a balance of probabilities that the Claimant was contributorily negligent.

**[65]** As the court has found on the entirety of the evidence, that the claimant has not made out a case against the Defendant, it is unnecessary to address the issue of any injuries alleged to have been sustained by the her or any damages that she has claimed.

### **Conclusion and Disposition**

**[66]** This court is of the view that the significant material contradictions in the evidence of the Claimant both in her evidence in chief and as elicited on cross examination, have negatively impacted her credibility. The inconsistencies are material to the issues in the case and I find that she has failed to prove on a balance of probabilities that the injury she claims to have sustained was caused by any breach of duty on the part of the Defendant and she has therefore not shown that the Defendant has been negligent or has breached its statutory duty or its common law duty of care to her.

**[67]** There will therefore be judgment for the Defendant with costs to be agreed or taxed.