[2024] JMSC Civ.104

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO.2017HCV 00855

BETWEEN	**FRANKLIN RUTHERFORD**	**CLAIMANT**
AND	**RIU JAMAICOTEL LIMITED**	**DEFENDANT**

Mr Franklin Grenyion and Orane Nelson instructed by Franklin Grenyion & Co. for the claimant.

Mr Emile Leiba and Paulette Neil instructed by DunnCox for the defendant

Heard: July 5, 2023, and September 27, 2024

Negligence - Personal injury claim – Whether claimant should be permitted to amplify his witness statement under CPR 29.1 (a) – Whether claimant permitted to rely on documents not previously disclosed - Whether claimant has proven breach of duty under the Occupiers' Liability Act- Whether causal connection between injury and alleged breach of duty

IN OPEN COURT

CORAM: JARRETT, J

Introduction

[1] Franklin Rutherford ("the claimant") is a tennis player and coach. On January 7, 2015, he was a registered guest at Hotel Riu Montego Bay ("the hotel"), operated

by RIU Jamaicotel Limited ("the defendant"). He brings this claim against the defendant in negligence and/or occupier's liability, for personal injuries he allegedly sustained at the hotel on January 7, 2015, while sitting on a lounge chair on the beach.

The pleadings

The claim

[2] In Further Amended Particulars of Claim filed on January 10, 2022, the claimant alleges that sometime after 4 o'clock on the afternoon of January 7, 2015, while a registered guest at the hotel, he and his friend went for a walk along the beach. They stopped for a rest and: "sat on a lounge chair which collapsed with him on the ground." He sustained injuries to his buttocks, legs, lower shoulder, back and spinal areas from the waist down. His friend and a member of the hotel staff assisted him to the hotel's medical centre, where he received medical attention to relieve the pain he was experiencing. The claimant alleges that since the accident, he has been experiencing severe pain in the lower back and is unable to sleep comfortably at nights and to carry out his tennis activities and commitments. The further pleadings are that the fall and the resultant injuries were caused by the: "faulty lounge chair" provided by the defendant on its beach property.

[3] It is alleged that the claimant's injuries were because of the defendant's negligence and/or breach of occupiers' liability. The following are the pleaded particulars: -

> "a) Failing to take any due or adequate care for the safety of its guests and in particular the Claimant.
>
> b) Failing to provide and maintain a safe work leisure environment for its guests and in particular the Claimant.
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> c) Failing to put in place a proper system so as to direct and protect its guest in the event of injury or harm and in particular the Claimant.

d) Causing or permitting or requiring the claimant to venture into an environment that the Defendant knew or ought to have known of the dangerous conditions that exist.

e) Failing to adequately warn the Claimant about the (sic) associated with the lounge chair and that it would likely give way when sat on.

f) Failing to provide the Claimant with a safe and secure (sic) or otherwise to ensure the safety of him on the compound at all times.

g) Failing to provide a sturdy lounge chair for its guest and in particular, the Claimant.

h) Improperly (sic) and failing to provide proper lounge chair for the safety and use of its guest."

[4] The claimant claims special damages of $36,654,465.55, which includes cost of home care help of $768,000.00; transportation costs of $58,600.00; attorneys' costs of $250,000.00; medical expenses of $593,865.55 and loss of earnings of $34, 984,000.00.

The defence

[5] In its defence filed on May 30, 2017, the defendant alleges that it received a report on or about January 7, 2015, that the claimant fell off a beach chair (which is approximately 1 ft high), while he was sitting on the beach at the hotel. It denies the particulars of negligence and /or occupier's liability alleged in the claim and pleads a raft of safety measures that it has in place to ensure that all lawful visitors including the claimant are safe when using its premises. The defendant pleads in the alternative that the alleged accident was caused wholly or partially by the claimant in that he failed to exercise due care and attention, failed to exercise all reasonable caution in using the facilities and failed in the circumstances to take sufficient care for his own safety.

The evidence

Preliminary issues

[6] The only evidence before the court is that of the claimant. No witness statement was filed by the defendant. The claimant's supplemental witness statement filed on February 18, 2022, was allowed to stand as his evidence in chief. An objection was raised by Mr Leiba, counsel for the defendant, to the claimant's application under CPR 29.9(1)(a) to amplify his witness statement to describe the lounge chair he alleges collapsed and to say how it came to collapse. According to counsel Mr Nelson, who made the application on the claimant's behalf, the claimant was not seeking to introduce anything new, but would be giving more details on the chair, describing it and providing an explanation on how it collapsed. He argued that based on the pleadings, the claimant's case is that the chair collapsed because it was defective and that although the specific defect is not pleaded, it is alleged that the defendant failed to provide a chair that was "proper" and "sturdy". Mr Leiba submitted that it is objectionable, having filed a supplemental witness statement for which no objection was taken, in relation to an incident which took place over 8 years ago, the claimant now seeks, at trial, to further supplement his witness statement to describe the structure of the lounge chair and to say how it collapsed. He said that if the claimant is intending to give opinion on how the chair collapsed, that is strongly objectionable as opinion evidence is not allowed.

[7] I refused the application. Since the advent of the CPR, litigation is to be conducted with "cards face up on the table". The exchange of witness statements before trial is part of that objective. Among the purposes of exchanging witness statements is to enable the parties to know before trial what the remaining factual issues are, and to allow the opposing party to prepare for cross examination. The days of trial by ambush, when a witness' evidence is heard for the first time on direct examination at trial, are happily over. To allow the amplification in this case, would amount to an ambush, leaving the defendant unprepared to cross examine the claimant on the evidence he seeks to disclose for the first time at trial.

[8] This is a claim in which one of the issues to be determined is whether the defendant breached its duty of care owed to the claimant. The claimant ought to have known when he filed his claim and prepared his witness statement, that he needed to provide evidence that the lounge chair was defective and why it collapsed. The pleadings do not foreshadow any evidence to come which would explain what made the chair faulty and why it collapsed. Furthermore, the claimant could not give his opinion on why he believes the chair collapsed. He would need to know why it collapsed of his own knowledge, or bring an expert to speak to it. I therefore did not consider that counsel Mr Nelson had provided me with any good reason not to confine the evidence of the claimant to the contents of his supplemental witness statement on this issue. I did however allow an amplification to paragraph 12 to include a period of 15 to 20 minutes to describe what the claimant meant by the: "long period", during which he alleges he could not stand due to back pains.

[9] I also refused Mr Nelson's application to tender into evidence through the claimant documents which were not disclosed but which were included in a Notice of Intention to Tender Hearsay documents. Not only were these documents not included in a List of Documents but the Notice of Intention to Tender Hearsay documents did not comply with the provisions of section 31 E of the Evidence Act which requires that the reasons why the makers of the documents are unable to attend trial, be given. Furthermore, the defendant had filed a Counter - Notice requiring the makers of those documents to attend the trial to be called as witnesses.

[10] Counsel Mr Nelson urged me to allow him to make an oral application for relief from sanctions and for permission to file a List of Documents out of time. Although a List of Documents was filed by the claimant on October 28, 2021, it was hardly proper disclosure as it merely disclosed the pleadings and two medical reports. I was not prepared to accede to Mr Nelson's request. Applications under CPR 26.8 seeking relief from sanctions must be in writing and supported by affidavit evidence. The trial would have to be adjourned part heard to facilitate the claimant making such an application. By virtue of a case management conference order

made on October 13, 2021, standard disclosure ought to have been made by October 29, 2021. CPR 28.14 (1) makes it plain that a party who fails to make disclosure by the date ordered, may not rely on or produce any document not so disclosed. I determined that it would not be a judicious use of the court's time and resources to adjourn the trial to allow the claimant to make an application for relief from sanctions for failure to make disclosure. Mr Leiba submitted, that if any such application were to be granted, disclosure by the claimants may well lead to the defendant reframing its case and deciding to file witness statements and would ultimately be prejudicial to them. Had I granted Mr Nelson's request, an adjournment of the trial would result in delays. An adjourned trial date would not likely be before another three-or four-years' time. The parties would incur additional costs, and as submitted by Mr Leiba, the defendant would likely suffer prejudice. It is well that litigants and counsel remember that they fail to comply with the CPR and the court's orders at their peril.

The claimant's evidence

[11] The claimant says in his supplemental witness statement that he was born on January 27, 1965, and is a tennis player and coach by profession. On January 7, 2015, he checked in at the hotel as a registered guest with his friend Zena Dietrich. On that same day, they both went for a walk along the beach, and sometime after 4 pm they stopped to rest, and he decided to sit on a lounge chair. According to him, the chair collapsed with him, and he fell to the ground. He was unable to get up and was assisted by his friend and a staff member to the medical centre where he received medical attention. When he tried to get up, he felt pains in his buttocks, legs, lower shoulder, lower back and his spinal area from the waist down. At the medical centre he received medication to relieve the severe pain he was in. He was in constant pain especially in the lower back. The medication was not helping, his sleep was disrupted as he was tossing and turning. After the accident, he was unable to carry out his daily tennis activities and commitments. Normally he would play tennis up to 16 to 18 hours per day, but after the accident he is only ably to play for 2 to 4 hours per day, and this has affected him significantly.

[12] According to the claimant, he visited: “many” doctors but the medication prescribed gave him only limited relief. He was later informed that surgery will assist with the pains he is experiencing. It was discovered that he has a degenerative disc disease at L4L5 and L5s1 levels (with annular fissure at L51S1) with mild exit foraminal narrowing. Although he did approximately 20 physiotherapy sessions, the pain did not improve. It was recommended that he undergo surgery, since conservative management did not help. He avoids vigorous activities, but the back pains: “were consistent”. He is unable to stand or sit for long periods of 15 to 20 minutes and is unable to lift anything heavy. According to him, he is restricted from doing anything with his upper body. Most days he is coping with mild pain but as soon as he does physical activities the pain becomes excruciating. His sex life has been negatively affected due to the pains, and although his partner does not complain her attitude towards him has changed drastically. He has incurred medical expenses of $1,670, 465.00 and lost income of $34,984,000.00. Because of his inability to participate in physical activities, he is unable to play or coach tennis.

[13] On cross examination the claimant said while on the lounge chair his friend Zena Dietrich was to his right and other guests to his left and they were also lying on lounge chairs. He was lying on the lounge chair for about 15 minutes before it collapsed. He agreed that the lounge chair was on sand and that the distance between its height and the ground was no more than 1ft. He said that when the chair collapsed, it threw him off to his left side and he fell on his left shoulder. He agreed that his visit to Dr Akshai Mansingh on whose medical report he relies, was 14 months after the alleged incident. On re-examination he said the rest of his body was in the sand when he fell on his left shoulder.

Medical evidence

[14] By earlier orders made on January 23, 2023 by Master T Dickens (Ag), as she then was, Dr Akshai Mansingh (Dr Mansingh), a consultant orthopaedic surgeon and sports medicine physician, was appointed an expert witness for purposes of

the trial and the claimant was permitted to rely on his medical report dated April 23, 2016. There is an addendum to that report dated March 21, 2022, and in a letter dated March 19, 2023, are his answers to questions posed by the claimant's attorneys-at-law. Both the addendum and the answers form part of his medical report.

[15] Dr Mansingh said he first saw the claimant on March 18, 2016, at which time he complained of lower back pain for one year. He states that the claimant:

> "…reported onset of lower back pain immediately after falling off of a beach chair that gave way at a hotel on January 7, 2015. The pain radiated to both feet and there was accompanying back stiffness. Since then he has not been able to work as a professional tennis player. He denied having any back pain prior to this incident. He had not done any physiotherapy."

An MRI scan of the lumbosacral spine done on February 4, 2016, at the University Hospital of the West Indies (UHWI) revealed degenerative disc disease at L4L5 and L5S1 levels (with annular fissure at L5ISI) with mild exit foraminal narrowing. The claimant was diagnosed with prolapsed intervertebral discs at L4L5 and L5S1, medications were prescribed, and he was sent to do physiotherapy.

[16] The claimant was again seen by Dr Mansingh on April 22, 2016. Although he had started physiotherapy, his pain had not improved and he: "remained dysfunctional in his profession." He was referred to a neurosurgeon with a view to surgical intervention given the severity of his symptoms and given a whole person impairment disability rating of 15%. Other than the MRI results from the UHWI, Dr Mansingh said he had not seen any other investigative results relating to the claimant. When asked whether his diagnosis could have resulted from wear and tear due to the claimant's age or his occupation as a professional tennis player, Dr Mansingh said that while wear and tear is part of the aging process it can be exacerbated by activities such as playing tennis. He said the degenerative disc disease could have existed prior to the accident on January 7, 2015, but the fact

that the claimant had severe radicular pain immediately after the incident suggests to him that that is when the annular fissure tear occurred, causing protrusion of disc material onto the nerve resulting in his pain.

Analysis and discussion

[17] The claimant's pleaded case and the arguments advanced on his behalf at trial focused on an alleged breach by the defendant of the Occupier's Liability Act. The principles to be applied when considering whether there has been a breach of the Occupier's Liability Act, were set out by Campbell JA (Ag) in **Rose Hall Development Ltd v Wesley Robinson and Jamaica Public Service Co. Ltd (1984), 21 JLR 77.** This decision was brought to my attention and relied upon by Mr Nelson. Campbell JA (Ag), in his judgment at page 92 E to I, extracted the following principles from what he described as the "exposition" given by the learned authors of **Charlesworth on Negligence (5th Edition)** on the Occupier's Liability Act UK, which is in *pari materia* to our Occupier's Liability Act: -

> "a) Only the occupier of premises has the statutory duty, under the Occupier's Liability Act, to his visitors be they invitees or licensees.
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> b) Two or more persons may be in occupation or premises at the same time each on a separate and independent basis (see **Fisher v C.H.T. Limited (1966) 2 Q.B.475**, where it was held that the proprietor of a club as well as his manager of a restaurant on the club premises were the occupiers of the restaurant for the purposes of the Act). In such circumstances each occupier owes independently of the other, the statutory duty of care under the Act.
>
> c) The duty of care owed to visitors is the 'common duty of care" which is defined as a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the

premises for the purposes for which he is invited or permitted by the occupier to be there. The relevant circumstances for the purpose of this duty of care include the degree of care and want of care which would ordinarily be looked for in the visitor. Thus a stevedore will be expected to look for and guard against slipping on oily patches on a ship, as such an occupier would not be liable for his injury caused thereby.

d) The duty of care owed to visitors by the occupier is in relation to dangers due to the physical state of the premises or to things done or omitted to be done by himself and others for whose conduct he is under a common law liability.

e) The occupier may be held not to be under any duty of care to a visitor due to the fact that the danger to which the visitor is exposed on the premises is one which he by virtue of his calling will appreciate and guard against as special risks incident to his said calling, provided the occupier leaves him free to guard himself against the same.

f) Where the danger has been created by an independent contractor who had done work on the premises, the occupier is not liable to the visitor who is injured thereby, unless he knew of the danger so created. He would have discharged his duty under the Act once he had satisfied himself of the independent contractor's competence."

[18] There is no dispute between the parties that the claimant was a lawful visitor of the defendant's hotel. Based on the above principles, the duty the defendant owed to the claimant was to ensure that the claimant was reasonably safe in his use of the hotel and its facilities. It is also clear that the duty owed is in relation to dangers caused by the physical condition of the hotel premises and its facilities, or by the acts or omissions of the defendant, its servants and/or agents on the hotel premises or its facilities. Mr Nelson argued that the claimant's evidence that the lounge chair collapsed is unchallenged and ipso facto, the defendant is liable on

the claim. While I agree with him that the evidence is unchallenged, there is no evidence that the lounge chair in question was defective and therefore dangerous. The very principles outlined by Campbell JA in **Rose Hall Development Ltd v Wesley Robinson and Jamaica Public Service Co. Ltd ,** on which the claimant relies, make it clear that for an occupier to be found liable under the Occupier's Liability Act, there must be evidence of the dangerous physical conditions of its premises or of the dangers caused on the premises by its actions or omissions or those of its servants or agents. I agree with the submissions of Mr Leiba that to say the chair collapsed is merely a conclusion, but there is no evidence explaining or detailing why or how it collapsed.

[19] Mr Leiba also raised the question whether the chair collapsed at all. He said that there is no evidence corroborating the incident and that the claimant did not even call his friend Zena Dietrich to give evidence on his behalf. While these observations are indeed true, the fact is that there is no evidence from the defendant challenging the claimant's evidence that the chair collapsed. Just because the claimant's evidence has not been corroborated is not a sufficient basis for me to reject it. I am prepared to find that the lounge chair in question collapsed on January 7, 2015, and that the claimant fell from it onto the sand from a height of no more than one foot. Notwithstanding this finding however, the claimant has not given any evidence indicating that the chair was faulty and dangerous and detailing why or how it collapsed. I therefore find that the defendant has failed to establish that the defendant breached the duty of care owed to him. Based on this finding, it is strictly unnecessary for me to take the enquiry any further. However, if I am wrong, and the evidence is sufficient to establish a breach of duty on the part of the defendant, I will now go on to consider whether the claimant has established a causal connection between the defendant's breach of duty and the injury he allegedly suffered.

[20] I start by observing that Dr Mansingh's opinion of a causal connection between the claimant's fall and his diagnosis of a degenerative disease, is based solely on information he received from the claimant. He says as much in his report. But what

is remarkable about the evidence is that the claimant first presented to Dr Mansingh fourteen months after his fall. It is noteworthy that with the severe pains that the claimant alleges he suffered immediately after the incident, and his allegation that he saw “many” doctors to seek relief, he has not given any evidence of who these doctors were, when he consulted with them or their diagnoses and findings, if any. I would have expected him to provide this type of evidence. To merely say, without more, that he saw “many” doctors is simply inadequate evidence to support his personal injury claim. Furthermore, the MRI results which Dr Mansingh examined were from a scan done on February 4, 2016, over one year since the fall, and was the only investigative diagnostic report which the claimant presented to him. It seems to me that in these circumstances, it would be highly speculative to make a definitive causal connection between the fall and the diagnosis 14 months later of degenerative disc disease at L4L5 and L5S1 levels (with annular fissure at L5ISI) with mild exit foraminal narrowing, based only on the historical account of the claimant that he immediately began to feel pain after the fall.

[21] When considering expert evidence, a court is not bound to accept it but must consider it and come to its own conclusion in light of all the evidence. The causal connection made by Dr Mansingh troubles me, not only for the reasons I have already expressed, but also because the claimant’s account of the incident on which he relies, raises questions as to whether the diagnosis of degenerative disc disease, is due to the fall on January 7, 2015, or some subsequent incident ; or was a pre-existing condition resulting from the claimant’s age , his occupation as a professional tennis player or some previous incident. He fell from a height of a mere foot, and he landed on sand. In my view, it is improbable, that he would have sustained a serious injury, such as degenerative disc disease at L4L5 and L5S1 levels (with annular fissure at L5ISI) with mild exit foraminal narrowing, from such a fall. In fact, it seems more probable than not, that this disease pre-existed the fall and may have been occupational.

Conclusion

[22] In summary, I find that the claimant has failed to establish that the defendant was in breach of a duty of care which it owed to him to ensure that the hotel and its facilities, including the lounge chair in question, were safe to use. If, however I am wrong in this finding, I have determined that the claimant has also failed to establish that the injuries he sustained were causally connected to the fall on January 7, 2015.

Orders

[23] In the result, I make the following orders: -

a) The claim is dismissed.

b) Costs to the defendant to be agreed or taxed.

A Jarrett
Puisne Judge