

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim No. BVIHCV 2022/0211

BETWEEN

IAN SEYMOUR SMITH

CLAIMANT

AND

BRITISH VIRGIN ISLANDS PORTS AUTHORITY

FIRST DEFENDANT

TORTOLA PIER PARK LIMITED

SECOND DEFENDANT

Appearances: Ayodeji Bernard for the Claimant
Terrance Neale, Elizabeth Ryan and Laurence Neale for the First and Second Defendants

**2024: May 13th
May 15th**

JUDGMENT

- [1] **YOUNG J:** The Cyril B Romney Park, better known as the Pier Park, is a beautiful colonial style shopping, dining and entertainment complex located at the cruise ship dock in Road Town, the capital city of Tortola.
- [2] The Claimant says that on the 27th January, 2022, while he was washing his hands in a bathroom there his leg was injured when an unknown man of notable size (whom he believed to be a cruise ship passenger) slipped on the wet floor and fell on him.

- [3] The Claimant alleges that the Pier Park is owned by the First Defendant but occupied by both Defendants who are responsible for its control, maintenance and management. He has, therefore, brought his claim in negligence against them both jointly and severally.
- [4] He alleges that given the high volume of persons at the Pier Park on the day of the incident they ought to have taken adequate steps to ensure that the washroom floor was dry and posed no danger to users. He seeks damages both general and special with interest and costs.
- [5] The Second Defendant admits that as the occupier of the Pier Park he does owe a duty of care to the Claimant as a visitor. The First Defendant makes no such admission. Together, they deny any negligence and seek to have the claim against them both dismissed with costs.

The Issues:

Whether the First Defendant have a duty of care to the Claimant

Whether the Defendants breached their duty of care

Whether that breach cause injury to the Claimant

Whether the Claimant is entitled to damages and in what quantum

Whether the first Defendant have a duty of care to the Claimant

The Law:

- [6] The occupier of premises owes a duty of care to any one invited onto those premises. To be considered an occupier, that person must have a “sufficient degree of control over the premises to put him under a duty of care towards those who came lawfully on to the premises.” **Wheat v E Lacon & Co Ltd**.¹ Ownership alone does not establish occupancy and control - **Mathewson v Crump and Anor**². What is crucial is the extent of control which the person exercises over the premises at the relevant time.

¹ [1996] AC 552, 577G

² [2020] EWHC 3167

The Parties' Case:

- [7] The First Defendant is the owner of the Pier Park. This is agreed. The parties also agree that the Court in determining the issue must look primarily to the Management Agreement (the Agreement) made between the two Defendants.
- [8] While the Claimant maintains that the Agreement clearly shows some degree of control over the premises by both Defendants, the Defendants themselves insist that it was the Second Defendant only who had the total management and control.
- [9] They add that the fact that the Claimant reached out to the Second Defendant's staff after he was injured is indicative of his awareness that the Second Defendant managed and controlled the park. This is indicative of nothing as the Claimant's belief is in no way determinative of this issue.

The Court's Consideration:

The Agreement

- [10] The Agreement assures that the Pier Park had been leased by the First Defendant to the Second Defendant for a period of 50 years. Ordinarily, an owner would part with possession and control of premises leased. However, this does not seem to be so in this case since the First Defendant expressly "reserved the right to develop, operate, manage and maintain the Pier Park during the term of the lease."
- [11] It was also agreed that the First Defendant had to approve the annual budget for the park and where there was insufficient income to meet expenses the First Defendant would cover the shortfall as it deemed appropriate.
- [12] The First Defendant also retained some control over the management of the facility. They agreed to provide the senior management resources for the proper management of the Second Defendant. The management team for the Pier Park was also subject to the general direction of the First Defendant. The First Defendant was responsible for providing suitable resources required for the

proper management of the Pier Park and the operations of the Second Defendant (including staff but otherwise, undefined) and retained the power to discipline and discharge this staff.

- [13] In fact, the Board of Directors of the Second Defendant could not appoint a General Manager or any other senior officers and members of the Management Team without the prior approval of the First Defendant and the Second Defendant could only discipline and discharge this staff after consultation with the First Defendant. The Second Defendant's free reign re discipline or discharge only reached the administrative and support staff. This is all quite telling indeed.
- [14] The First Defendant could in a limited way negotiate with and even lease available spaces within the Pier Park to tenants without the approval of the Second Defendant. This is however stated to be done on behalf of and for the Second Defendant. Nonetheless, the First Defendant was to use its best efforts to secure occupancy and leases of available space.
- [15] Finally, although the Second Defendant through the General Manager was responsible for the day to day maintenance and upkeep of the Pier Park both Defendants agreed to procure that the facility was kept and maintained in good, safe, substantial order and condition and in good repair at all times. The Second Defendant could not make any improvements to buildings, structures and paved surfaces without the prior approval of the First Defendant who alone could obtain any licences or permits etc for the approved developments. More importantly, both Defendants were seised with procuring and maintaining insurance coverage for the park.
- [16] There is absolutely no doubt in my mind that despite the testimony and allegations of the Defendants, the First Defendant maintained a substantial level of management and control of the Pier Park, including the bathrooms, sufficient to have a duty of care, as an occupier, towards the Claimant, a visitor to the premises.

Whether the Defendants breached their duty:

The Law:

[17] The duty of care owed by an occupier is to use reasonable care to prevent damage from any unusual danger on the premises which he knows or ought to have known of. The burden of proof lay always with the Claimant who must also prove that the breach caused loss.

[18] An unusual danger was described in **London Graving Dock Ltd v Horton**³ where Lord Porter stated:

“I think” ‘unusual’ is used in an objective sense and means such danger as is not usually found in carrying out tasks or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises.”

The Evidence:

[19] The evidence of the incident is as given by the Claimant only. It was a busy time at the Pier Park. Two cruise ships were at the port and there were several tourists about. The Claimant testified that he was about to leave the washroom when the unknown man moved towards the soap dispenser at one of the sinks. The unknown man slipped, fell backwards and knocked the Claimant to the ground. The Claimant’s right foot from ankle up to his knee was caught under the unknown man’s back and he felt a pull/stretch in the area of his right ankle.

[20] With much effort, another individual assisted in lifting the unknown man off him. There was water where the unknown man had fallen but there were no wet floor signs in the bathroom or attendants cleaning or mopping the floor.

[21] The Claimant noticed tenderness in his right foot and pain in his ankle. Soon the pain became severe and his ankle begun to swell. He tried sitting rather than standing and placing a bag of ice on the ankle but had to seek medical attention. He was subsequently informed by a doctor that his right foot had been fractured in two places. His precise diagnosis was posterior malleolus and high fibula fractures of that foot.

³ [1951] 2 ALL ER 1 at 6

[22] The Defendants say they conducted their own investigation once the Claimant reported the incident and could find no evidence which supported his version of events. There were no other eye witnesses and no visual evidence of the incident.

[23] They rely on the Cyril B Romney Tortola Pier Park Health and Safety Protocols, Covid - 19 Pandemic 2021 which was in place at the relevant time due to the outbreak and which contained detailed cleaning protocols for the washrooms and other public spaces of the park. This protocol required hourly checks to wipe and sanitize surfaces, clean toilets and mop and dry any spilt liquid on the floor.

[24] In any event the water may have been on the floor for various reasons and may have occurred between the scheduled cleaning. They also informed that whenever they are made aware of a potential danger the cleaning staff would immediately place the appropriate warning signs to alert visitors.

The Claimant's Case:

[25] The Claimant made eleven allegations of negligence. They could easily be distilled into whether there was water on the restroom floor making it slippery so as to pose an unusual danger to persons using the Pier Park washroom.

[26] The Claimant submitted that the evidence remained unchallenged that there was water on the floor at the point where the unknown man fell and that was the most logical reason for his fall. He asked the Court to apply the doctrine of **res ipsa loquitor**.

The Defendant's Case:

[27] The Defendant raised that the Claimant lacked credibility so little weight should be attached to his evidence. They submitted that it was surprising that the Claimant could bring neither of the other two witnesses to corroborate his version of the events.

The Court's Consideration:

- [28] There is no doubt that the Claimant had been injured while in the Defendant's bathroom. But this is not a straightforward case where the Claimant himself alleges that he slipped. The Claimant must prove that there was water on the floor which caused the unknown man to slip and fall on him resulting in his injury. This is purely factual and there was no eyewitness testimony apart from the Claimant's. The Court was, however, confronted with two versions of what occurred from the Claimant himself.
- [29] The Claimant on the 31st January, 2022, a mere four days after the incident, prepared and provided an incident report. In that report he said he observed the unknown man had a cane which was between him and the counter. As the Claimant was preparing to leave the unknown man "moved to get the soap and fell backwards to the ground on me."
- [30] There is noticeably no indication whatsoever of the Claimant observing water on the floor or that water was present where the unknown man had slipped. There is more importantly no indication that he actually saw the man slip. The man was said simply to have fallen backwards.
- [31] Mr. Smith is an economist, a businessman, the Chief Operating Officer of a group of Companies and was then the President of the Rotary Club of Tortola. He appeared to be an astute and articulate man. He would be aware of the difference between slipping and falling backwards and simply falling backwards.
- [32] What he goes on to say almost at the end of his report (some five paragraphs away from his rendition of the incident) is this:
- "Accidents happen, but in my opinion this was avoidable, the water on the floor contributed to the man's fall and my foot being fractured. There was not (sic) signage about the wet floor and being cautious. This is needed during high traffic time when a significant amount of water is on the floor from persons washing their hands and using the urinals and.(sic) Also, someone should be cleaning or manning the restroom at these times."

- [33] This is troubling. Here is a man injured and this is his first written report which it seems he provided to someone related to either of the Defendants. One would expect that he would explain precisely what had happened. He would be as detailed as possible taking special care to recount how the incident occurred. Moreover, the incident would have been quite fresh in his mind at that time.
- [34] The fact that water on the floor caused the unknown man to slip and fall should have been at the fore. However, the way the report is written the water seems merely incidental to and not even an important or integral cause of the unknown man's fall. I do not believe that the Claimant actually knew what caused the man to fall backwards.
- [35] The Claimant did admit under cross examination that the unknown man fell because of a number of variables but the water was the most reasonable. This alters what he said quite clearly in his witness statement and convinces me further.
- [36] The witness statement acknowledged the presence of a cane and says "Whilst the gentleman was moving to the said soap dispenser, I saw when he slipped, I tried to move but it happened so fast the gentleman fell backwards to the ground knocking me down" He continued: "At the point where the gentleman fell, there was water on the floor (in the vicinity of the sinks wash basins)..."
- [37] The Court wondered why he used the word "contributed" in his report in relation to the fall but leaves it out completely in his witness statement. But beyond that, how is he able to say in his witness statement that he saw the unknown man slip but omitted this entirely from his report. It begs the question, why is that report less detailed than his witness statement which was written more than a year later?
- [38] It would certainly have been good to have some corroborating evidence. The Claimant revealed that he made no attempt whatsoever to get a name or any contact information from the unknown man. This strikes me not only as surprising but very odd. It must be remembered that the Claimant's injury was a direct result of the unknown man falling on him. Even if the unknown man was not entirely to blame he may have had some culpability. His being a cruise ship passenger did not make this any less so.

- [39] The Claimant made no attempt to explain this omission in his witness statement. However, under cross examination he disclosed that it was not because he had not thought his injury was that serious when it occurred, but rather he was in a rush and prioritized returning to the Rotary Club meeting which he was chairing and had left unattended.
- [40] This is baffling at best. He knew he was injured, by his own admission he thought it to be a sprain but he did not know the extent. Why would he have assumed that securing that pertinent information would have delayed him for any lengthy period and that adult rotarians would somehow perhaps perish in neglect or frustration during this period.
- [41] Mr. Smith also admitted under cross examination that he sought assistance in getting video footage from the Pier Park in an effort to verify the unknown man's identity. He said he did not include this information in his statement as he had not been successful in receiving any such footage.
- [42] The second possible witness seemed to have come on the scene after the incident had occurred. His testimony too may have been helpful but it is also absent without explanation.
- [43] The Claimant provided video and photographs taken months after the incident. They were of little help since they did not show the scene during or immediately after the incident. He also produced the second Defendant's bathroom cleaning log sheets from 2023.
- [44] Those log sheets really have no more evidential value than their existence since the incident occurred in 2022 not 2023.
- [45] There is no evidence presented to prove that the Covid protocols remained in place in 2023 or that cruise ships were in port on those few days where there were two hour lapses between cleaning. The comparison which the Claimant seeks to make is an impossible, if not incredible, one.
- [46] The videos, photographs and log sheets may have been helpful in establishing a pattern but the Court still had to consider the Claimant's two versions.

- [47] It would seem that the Claimant wished the Court to accept that because the incident took place at the sinks in the bathroom the likelihood that there was water on the floor ought to be accepted. So too the likelihood that if someone fell there it was caused by water on the floor. While some spillage is expected at a sink being frequently used (two cruise ships in dock) accepting that a certain quantity of water was present or any fall occurring at the sink area was due to the water is, undoubtedly, a quantum leap.
- [48] The Court recognizes that the unknown man had a cane. He was said to be over six feet tall and 400lbs. The way he was said, in the Claimant's report, to have simply fallen backward seems more in keeping with a mobility issue rather than having slipped. This Court is convinced that had he actually slipped the Claimant would have stated so, without hesitation, at his very first opportunity. It would have been prominently placed in that written report.
- [49] The Claimant had to prove that the danger existed and it was unusual. This Court can not find even on a balance of probability that if the bathroom floor was wet, that the water caused the unknown man to slip and fall. For this reason alone the Claimant's claim must fail and inquiry need go no further.
- [50] But even if we were to go further the Claimant has to prove that the Defendants failed to take reasonable steps. The Defendants however say that they were cleaning the bathrooms on an hourly schedule. The protocol they presented certainly demands this. However, I agree with the Claimant that they could have brought their cleaning log to support this contention. They chose not to.
- [51] The protocols only tell this Court that there was a proactive written procedure in place. The log would have demonstrated that the procedure had indeed been followed. It would also have shown the last time the floor had been cleaned prior to the Claimant's fall and who had done the cleaning. The Court may also have benefitted from hearing from that cleaner as to the condition the floor was left in.
- [52] But even so the Court notes that the Claimant never noticed water on the floor prior to the incident. The Court has found that he did not see the unknown man slip in the water either. He simply noticed (as stated in his witness statement only) that there was water in the vicinity where the man fell.

[53] The Claimant himself asked the Court to find that on days when there is a higher volume of visitors there should be a more frequent attendance for mopping etc by the Defendants' janitorial staff. This Court is not sure on what premise it is to do this. No evidence whatsoever has been provided to show what is the usual cleaning interval in high traffic bathrooms in the BVI and that hourly cleanings are not sufficient. This Court is certainly not positioned to presume.

Disposition:

[54] For all these reasons the claim will be dismissed with costs to the Defendants on the prescribed basis as agreed. I shall depend on Counsel on both sides to calculate this figure.

**Sonya Young
High Court Judge**

By the Court

Registrar