

EASTERN CARIBBEAN SUPREME COURT

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv2021/0010

BETWEEN:

MONIQUE JAMES-ROBERTS

And

Claimant

ABI INSURANCE COMPANY LTD

1st Defendant

REDCLIFFE HOLDINGS LTD

2nd Defendant

Appearances:

Mr. Loy Weste with him Ms. Tiwana Martin for the Claimant

Ms. Kema Benjamin for the 1st Defendant

Ms. Jacqueline Walwyn with her Mr. Wesley George for the 2nd Defendant

2024: June 10;

July 25;

August 2 (*Re-issued*)

- [1] **BYER, J.:** This claim concerns the obligations between an employee, their employer and the owner of a building in which the employer is a tenant.
- [2] The claimant is an employee of the first defendant. She commenced working with the first defendant in or around June 2016 at the premises of the first defendant who had leased space in the building of the second defendant . The first defendant is also the insurer of the second defendant under a Public Liability Insurance policy.
- [3] The lease entered into between the first and second defendant was for the rental of office space on the first floor of the building which then expanded to the third floor. The lease agreement also set out the obligations of both parties. Under its terms, the first defendant was obliged to pay the

rent and to maintain and upkeep the interior of the portion of the building which they occupied. The second defendant retained responsibility of among other things, to maintain the common areas and the outside structure of the building and to “repair and replace... the central air conditioning unit , elevator , standby generator and sewage system.”¹

- [4] On the 11th January 2018, during the currency of the said lease, the claimant alleged that she sustained injuries after she stepped out of the elevator in the said building of the second defendant . The allegation was that the elevator when it came to a stop on the first floor had not stopped flush with the floor creating a height of between 6” to 10” from the floor and that when the claimant stepped out of the elevator she stumbled causing injury to her lower back and spine.
- [5] The claimant therefore believing that both the first defendant as her employer and the second defendant as the owner of the building are liable for her injuries, commenced the claim under consideration, on that belief.
- [6] At the further pre trial review of the matter before this court as presently constituted, this court considered that the trial of the matter should be bifurcated and the trial on the 10th June 2024 therefore proceeded on that basis.
- [7] Upon considering the evidence that was led at trial, the pleadings and the closing submissions filed, it is clear to the court that the issues that this court has to consider and determine are as follows:
1. Whether the first defendant is liable in negligence as the employer of the claimant for the injuries suffered by the claimant ?
 2. Regardless of whether the first defendant is liable, is the second defendant as owner of the building liable in negligence to the claimant for the injuries suffered by the claimant?
 3. If the answer is yes to either or both of the previous issues, was there any contributory negligence on the part of the claimant , and if so to what extent?
- [8] Before the court delves into these issues there are two matters which this court needs to deal with and to set the tone for the determination that it is to undertake.

¹ Lease entered into by the parties on 1st April 2016 at page 81 of the TB 3- not agreed document of the first defendant

[9] It appeared to the court at the trial of the matter that there may have been some query on the part of the defendants and the second defendant in particular as to whether the claimant suffered any injury at all on the day in question. In this court's mind, whether the claimant suffered any injury and the extent of that injury is a matter to be dealt with after and in the event that the court finds that the defendants were negligent. If the court finds that no negligence can attach to the circumstances that arose on that day the question of an injury becomes moot. Therefore in this court's mind this aspect of the proceedings that the court will be considering is whether the defendants, (both or either of them) had a duty to the claimant, that they breached that duty and then that the claimant suffered damage as a result of that breach. The extent and the nature of that damage is then the matter to be dealt with once the court considers the first two limbs of the law.

[10] In that vein it is therefore clear that this court has to consider what was in fact pleaded by the claimant.

[11] It is clear from the pleadings that the claimant couched her claim in negligence and in breach of duty setting out particulars of negligence against both defendants. However the claimant did not plead a breach of the provisions of any statutory obligation that the first defendant may have owed to the claimant. Indeed it is clear that where a breach of a statutory duty is combined with a claim for negligence they may be pleaded together but they must be distinguishable and particulars of the breach of statutory duty and negligence should be set out separately.²

[12] This was not done in the case at bar and as far as this court is concerned it will only be considering the common law duty of an employer to an employee and not the provisions of any statutory regime that may exist within the State of Antigua and Barbuda.

Issue #1 : Is the First defendant as employer of the claimant liable to the claimant in negligence for the injuries suffered?

[13] The claimant claimed against the first defendant the following particulars of negligence

- a) Allowing the claimant to utilize the lift when it was not safe to do so

² Atkins Court Forms Personal Injury Vol 31(2) (3) paragraph 7

- b) Failed to direct or put the claimant on notice that there existed a gap between the lift and the floor so that the claimant could take caution
- c) Failed to direct the claimant to use the stairways in light of the defective operation of the lift
- d) Failed to give the claimant adequate warning that the lift was unsafe
- e) Failure to give notice of previous complaints made by the employees of the first named defendant or other invitees to the property of the circumstances when the lift would malfunction
- f) Failure to consider or take notice of the risk of injury to the claimant

[14] Having assessed these particulars of negligence this court must first consider whether there was any duty owed by the first defendant to the claimant and whether they breached that duty in the manner as averred by the claimant.

[15] At common law the test as to an employer's liability has long been settled. In **Stokes v GKN (Bolts and Nuts) Ltd** ³ Swanwick J put it this way, " ...the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in light of what he knows or ought to know.....He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected as a reasonable and prudent employer in these respects he is negligent."

[16] Thus it is the duty of the employer to take reasonable care for the safety of its employees in all the circumstances so as not to expose the employee to an unnecessary risk. " An employer's duty is to take reasonable care to carry on his operations so as not to subject his employees to unnecessary risks, is a single and continuing duty applicable in all circumstances and includes

³ [1968] 1 WLR 1776 at 1783

the duty to take reasonable care to provide and maintain a reasonably safe place of work for his employees and reasonably safe access to it.”⁴

[17] Therefore what can be extrapolated from the duty owed is governed by the words ‘reasonable care’, “but what reasonable care demands in each case will no doubt vary” ⁵ and the obligation is discharged once the employer has exercised due care and skill at the operative time.

[18] It is therefore clear that there is no absolute obligation on an employer at common law and the court is mandated to consider whether an employer has done all that is reasonable or that he took reasonable care for the safety of his employees. This therefore requires an assessment of the circumstances that operated at the time of the incident with the claimant. The only person who came to give evidence on behalf of the first defendant was the manager of the first defendant at the time, Leslie Ellis.

[19] In summary Mr. Ellis told the court the following:

- i) that first defendant leased the premises from the second defendant,
- ii) that the second defendant had the obligation to maintain the common areas of which the elevator was one,
- iii) that the first defendant had been made aware of the complaint of the claimant and watched the security camera footage which did not show that the claimant had suffered any significant issue stepping off the elevator ,
- iv) in any event they did not owe any duty of care to the claimant for the malfunctioning of the elevator,
- v) the claimant was also aware of the malfunction of the elevator once the power had been suppressed in the building and that as such she should have used the stairs;
- vi) up to the time that he retired from the company in 2021 the issue with regard to the malfunctioning of the elevator had not been fixed and

⁴ **Cheryl Malone v AMS Financial Services Limited** BVIHCV2013/0241 per Ellis J at paragraph 51

⁵ **Wilson v Tyneside Window Cleaning Co.**[1958] QB 110 at 124

vii) the company never provided any notice written or otherwise to its employees of the malfunction of the elevator after a power outage.

[20] It is not disputed and must be once again stated, the first defendant was a tenant in premises that they leased from the second defendant . It is also not disputed that it was not the obligation of the first defendant to repair the elevator of the second defendant. Further it cannot be disputed that the first defendant knew of the “quirk” of the elevator when there was a power outage in the building, in that the same would not stop flush with the floor to which it came leaving a drop from the elevator floor to the floor at which it came to rest.

[21] It is clear from the sole witness for the first defendant that this was a perennial issue of which the second defendant knew . In fact in the witness statement of Mr Ellis he had this to say “ the first defendant brought the issue of the malfunctioning elevator to the second defendant’s attention several times long before the claimant’s accident but it was the second defendant’s responsibility only, to have it properly addressed and resolved.”

[22] However nowhere in the evidence did the first defendant point to any communications that passed between the first and second defendant on this point. There were no emails, no phone logs, no letters written which then begs the question , how were the second defendant notified of this issue by the first defendant whose responsibility was to their employees who used this equipment. In this court’s mind, if the first defendant was prepared to sit on the lease obligations(even though that same lease provided for the first defendant to carry out any repairs to the common areas if not undertaken by the second defendant and for the second defendant to repay the first defendant if they undertook such repairs ⁶) that the repairs were to be carried out by the second defendant and say so in order to establish that they had acted reasonably in all the circumstances, this court would have expected that the first defendant would have had to establish much more than mere “say so” .

[23] Indeed in the case of **Smith v Austin Lifts Ltd** ⁷ the House of Lords held that an employer was liable to his employee who had suffered injury on premises that the employer had been contracted at to maintain the lift services because they had not visited the premises to see that the place of work was safe, they having on four previous occasions notified the occupiers of the need to repair the area of the building where the employee was injured, even in circumstances

⁶ Paragraph 2c of the lease agreement at page 84 of the core bundle filed 22/5/2024

⁷ [1959] 1 All ER at page 81

where the employer had reduced such complaints into writing. The court held, by Lord Morton⁸ that even if the employer expected the occupier to put it right, the occupier having failed to do so, it was incumbent on the employer (where they did not own the premises) to insist on the occupiers repairing it or doing the repairs themselves.

[24] This court finds that similar proactive steps should have been taken by the first defendant in this case at bar. Further, even if the first defendant was not prepared to invest that money into a building that was not theirs, or insist on the same being repaired , at the very minimum then they should have sent out cautions to their employees including the claimant as to the issue that arose with the elevator. In this court's mind, for the first defendant to take reasonable care was to ensure that those who were employed by them were not subject to unnecessary risk.⁹

[25] Indeed there is no evidence before the court that the claimant in fact was aware of the malfunction of the elevator after a power outage in the building and the first defendant's nebulous statement through the witness Mr Ellis that "everyone knew" of the issue was rendered nugatory in cross examination when he admitted that the first defendant had not informed any of its employees and that further he himself had not been told of any incidents prior to the claimant's report but rather that he "had heard talk". Further in any event "for knowledge by the claimant to actually disqualify an employee it must either have been such as to enable him efficiently to carry out work without least risk to himself or per contra, the risk must have been so great that no sensible person would in any circumstances have incurred it ;otherwise the fact that he voluntarily and knowingly encountered it is relevant only to the question of contributory negligence when recovery will be merely reduced but no longer defeated."¹⁰

[26] This court is therefore satisfied that the first defendant failed to take reasonable steps to ensure that they had provided a safe place of work for the claimant. I therefore accept that the first defendant owed a duty to the claimant, that they breached that duty in failing to act reasonably and as such the claimant suffered damage as a direct result of that breach. The claimant has therefore proven the particulars of negligence as pleaded against the first defendant.

[27] However since the first defendant was only the lessee of the premises and the obligation to repair remained with the second defendant, this court finds that the question must arise whether the first defendant is wholly or only in part liable to the claimant . In this court's mind, this question

⁸ Ibid at page 87 H

⁹ **Wilson** case Supra at page 124

¹⁰ The Law of Torts John C Fleming 7th ed at page 483

can of course only be answered following the court's consideration of the liability, if any of the second defendant.

Issue #2: Is the second defendant as owner of the building liable to the claimant for the injuries suffered?

[28] In considering this issue, it must be borne in mind that the second defendant retained an obligation to the first defendant to maintain all common spaces including the operation of the elevator. The question that therefore needs to be asked, is whether that obligation to the first defendant translates into an obligation to the claimant. If in fact an obligation arises in relation to the claimant, the court must consider the context of that obligation and if that gives rise to any liability.

[29] In considering what if any obligation arises in relation to the second defendant and the claimant, it cannot be denied that the second defendant falls within the parameters of the definition of an occupier of premises. As was stated in the case of **Gabrielle M Hill- Junke (a minor through her next friend Robert Junke) v Sea Grape Limited and ors**¹¹ Gill, M (as she then was) in considering the case of **Wheat v E Lacon & Co Ltd**¹² stated that an "occupier is simply a convenient word to denote a person who has sufficient degree of control over premises to put him under a duty of care to those who come lawfully onto the premises"¹³. Indeed, it is recognised that in order to be an occupier "it is not necessary for a person to have entire control of the premises. He need not have the exclusive occupation. Suffice it that he has some degree of control. He may share control with others . Two or more maybe "occupiers".¹⁴

[30] In the case at bar, it is clear that both the first and second defendant shared the control of the building as between them and as such "...the extent of the particular control which is exercised within the sphere of joint occupation will become a pointer as to the nature and extent of the duty which reasonably devolves upon a particular occupier."¹⁵ The court has already determined the nature and extent of the duty by the first defendant as joint occupier.

¹¹ SVGHCV2020/0001

¹² [1966] AC 522

¹³ **Hill- Junke** Supra at paragraph 28

¹⁴ **Wheat v E Lacon and Co Ltd** at page 578 C- F

¹⁵ **Wheat v E Lacon and Co Ltd** at page 586 ; **Adele Shtern v Monica Cummings** [2014] UKPC 18

[31] Thus, in relation to the second defendant, their retention of obligations to the exclusion of the first defendant makes it clear that the second defendant must by necessity also owe a duty to persons who fall within the purview of the control they exercise. That is, they must owe a duty to persons, who come to the building and who use or come into contact with, portions of the building for which they retain exclusive control. It would indeed be incongruous if the second defendant having the obligation to maintain the outer façade of the building failed to do so, and a portion of that fell on a passer by that they would have no obligation to that person merely because they shared control of the building with the first defendant who had no such obligation in relation to that portion of the building. It is therefore without a doubt that the second defendant must be considered a joint occupier, and as an occupier what is the nature and extent of the duty owed to the claimant in the present circumstances. That is was the claimant an invitee, a licensee or a trespasser.

[32] Clearly, the claimant having been in the building of the second defendant lawfully, could not be considered a trespasser. However this court must also agree with the submissions of the second defendant that the claimant could likewise not be considered an invitee of the second defendant.

[33] In the case of **Indermuar v Dames** ¹⁶the court defined an invitee as a person who enters the premises of an occupier “upon business which concerns the occupier and upon his invitation express or implied” and he owes that invitee a duty to exercise reasonable care to prevent damage to the invitee from unusual danger known to the occupier or of which the occupier ought to have known.¹⁷ (my emphasis added)

[34] As an invitee the occupier owes that person the highest duty as that person has come to the premises usually to conduct business with the occupier or at the very least is a person who the occupier obtains a “material benefit”¹⁸ from that person. That invitee is the person to whom the occupier says “come in.” However beyond the invitee, a person who is lawfully on the premises but not there to conduct business with the occupier or to which the occupier has no interest, a duty is still owed to that person who is classed as a licensee. A licensee is seen as a person who the occupier either expressly permits to be on the premises or has knowledge of his presence which he does not stop or gives some permission to be there. So although the occupier may not have a vested interest in the licensee, and it is accepted that he owes no duty to

¹⁶[1866] LR 1 CP 274 at 288

¹⁷ Commonwealth Caribbean Tort Law, Gilbert Kodilinye at page 150

¹⁸ **Hartwell v Grayson** (1947) KB 901

ensure that the premises are safe, that occupier is still bound not to create a trap nor allow a concealed danger to exist upon the said premises which is not apparent to the licensee but which is known or ought to be known to the occupier.¹⁹

[35] It would therefore appear to this court that the claimant falls squarely within the definition of a licensee. She was permitted to attend at the building of the second defendant as she was employed by the lessee of the second defendant. Her attending the building was of no interest, benefit or “material advantage”²⁰ to or for the second defendant. However, the second defendant is not absolved of a duty to the claimant even if she is classed as a licensee in these circumstances. Thus although the occupier may not have a vested interest in the licensee, and it is accepted that he owes no duty to ensure that the premises are safe, that occupier is still bound not to create a trap nor allow a concealed danger to exist upon the said premises which is not apparent to the licensee but which is known or ought to be known to the occupier.²¹

[36] In the case at bar, it is clear to this court that an elevator that does not work as it is supposed to after a power suppression is a clear example of a concealed danger which would not have been apparent to the claimant but which was known to the occupier.

[37] In fact the only circumstance that could defeat this finding that the malfunctioning of the elevator was not a concealed danger would be if this court accepts that the claimant knew of the danger, assumed the risk and suffered damage accordingly. However, this court has already determined that there was no evidence before it which uncontrovertibly establishes on a balance of probabilities that the claimant knew of the danger of the elevator’s malfunction after a power outage. The claimant made it clear that she was not in the habit of utilizing the elevator to the compliance department as that was the task for her assistant who on that particular day had not attended work. There was no evidence to show that she would have therefore had previously encountered the risk or knew of the risk of the elevator’s not running as it should after a power outage.

[38] Indeed the finding of the court that this was a matter within the knowledge of the second defendant as occupier was replete in the evidence of the second defendant’s witness Ms Nichole Phillip. Ms. Phillip occupied the position of Property manager of the second defendant’s building from 2012 to 2021. Her clear evidence to the court was that she was aware that during her tenure

¹⁹ **Robert Addie and sons (Collieries) Ltd v Dumbreck** [1929] AC 358

²⁰ The Law of Torts Supra

²¹ **Robert Addie and sons (Collieries) Ltd v Dumbreck** [1929] AC 358

that once there was a power outage in the building, the elevator would not stop flush with the designated floor. Indeed Ms. Phillips went on to accept the depiction of the height of the elevator from the floor as shown in the photographs entered into evidence by the claimant ²² from an incident in 2023 as the usual occurrence. On cross examination the second defendant's witness even went on further to say that although being aware of this malfunction and having contractors attend to deal with the apparent malfunction, it had not been resolved up to the time of her departure in 2021.

[39] However what was even more interesting to the court was that Ms. Philips also categorically stated that she never received any complaints from the first defendant as to the problem with the elevator and that further the second defendant never placed any warnings, cautions, notices or make any other notification to users of the elevator of the issue after a power outage.

[40] In the Bahamian case of **Favre v Lucayan Country Clubs Ltd** ²³ the issue of a concealed danger was considered in relation to a licensee. The claimant in that case, a regular attendee at the Golf club run by the Defendants, but for which he paid no fees, was attacked and shot by a masked bandit during his golf game. In considering the circumstance the Learned Judge, Smith J after making a finding that the claimant was a licensee he having not been required to pay green fees or any other costs associated with playing golf went on to find that the defendant owed the claimant a duty which they had breached by failing to inform the claimant or any other player of an incident the day before of another player being attacked and shot on the same course during their golf game. He had this to say " I am satisfied that the Defendant knew of the danger or ought to have known of the likelihood of the plaintiff being injured by armed thugs as in fact he was and should have warned the plaintiff of the danger. No warning was given to the plaintiff although there was ample time and opportunity to give him that warning. It has been stated before and I believe it is still good law to state that if the possibility of danger emerging is reasonably apparent then to take no precautions when there is duty to, is negligence."

[41] This court is ad idem with that statement by the learned judge. The second defendant knew of the danger, they made no attempt to warn any users of the elevator of the issue, not even a "mind the gap" notice. The second defendant in this court's mind has therefore breached the duty owed to the claimant and must bear responsibility for her injuries suffered.

²² Pages 61-63 TB 3 filed 22/5/2024

²³ BS 1990 SC 64

[42] That being said this court is further satisfied that there must be an apportionment as between the first and second defendants and their liability to the claimant. They both owed her a duty and they both breached that duty to her. However this court is also satisfied that the second defendant bearing the obligation to repair and/or to warn of concealed dangers must bear the brunt of the liability owed to the claimant.

[43] I therefore apportion the liability as between the first and second defendant as to 80% to the second defendant and 20% to the first defendant.

[44] For completeness on the issue of liability and for the avoidance of doubt, the first defendant has not and upon questions from the court in fact made it clear that they were not seeking to avoid the terms of the Public liability insurance policy which they hold in favour of the second defendant. The second defendant is therefore entitled to rely on the same upon the assessment of damages knowing that the first defendant is also liable for 20% of whatever those damages may be assessed at if the same are not discounted by a finding of contributory negligence which the court will now proceed to consider.

Issue #3- Was there any contributory negligence on the part of the Claimant ?

[45] It must be clear that when Contributory negligence is set up as a defence "...all that is necessary to establish such a defence is to prove ...that the injured party did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that where a man is part author of his own injury he cannot call on the other party to compensate him in full." ²⁴

[46] Thus the question must be asked, did this claimant by her own act or omission contribute to her injuries in that " she failed to take reasonable care for [her] own safety ..." ²⁵ When this court assesses the evidence elicited from the claimant on cross examination on behalf of the first defendant , this court accepts on a balance of probability the following a) that the claimant was hurrying to meet a customer who had come to see her in a matter with which she was currently involved ;b) she was not accustomed to using the elevator and was therefore not prepared to assess her surroundings before she stepped out the elevator, c) she was wearing heels that day and c) that she was clearly distracted upon reaching the lobby as she did not pay any attention

²⁴ **Nance v British Columbia Electric Railway Co Ltd** [1951] AC 601 at 611 per Viscount Simon

²⁵ **Martin Alphonso and ors v Deodat Ramnath** BVI Civ App 1/1996 per Satrohan Singh JA

as to how she stepped out of the elevator walking quickly towards her appointment. It is the combined effect of these facts that the court finds that the claimant failed to take reasonable care for her own safety in the use of a piece of machinery, by her own admission, with which she was not familiar.

[47] In this regard I however consider the blameworthiness of the claimant is such that it amounted to no more than the final nail in the coffin of the sequence of events that led to the eventuality of the claimant being injured. However that blameworthiness must be considered and placed in the scales. This court does not find that this act of the claimant lacking proper attention to her surroundings would afford a substantial reduction of responsibility by the first and second defendant. Therefore I am prepared to find that the claimant's global figure shall be reduced by 5% of the damages to be assessed.

[48] The order of the court is therefore as follows:

1. The claimant's claim is granted as prayed apportioning liability as between the first and second defendant as to 20% to the first defendant and 80% to the second defendant
2. The global sum to be found due on the assessment of damages is to be reduced by 5% representing the finding of contributory negligence on the part of the claimant
3. The claimant is to file an application for the assessment of damages within 45 days of the date of this order and the same is to be set down before a Master of the High Court for case management
4. Costs to the successful claimant to be determined on the assessment.

Nicola Byer

High Court Judge



By The Court

Deputy Registrar