

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV2018/0194

BETWEEN:

DENNIS BOITNOTT

Claimant

And

- 1. COCONUT BAY MANAGEMENT LIMITED**
 - 2. COCONUT BAY BEACH RESORT & SPA ST. LUCIA**
- Defendants**

Appearances:

Mrs. Maureen John-Xavier of Counsel for the Claimant

Mr. Ramon Raveneau of Counsel for the Defendants

2022: December 12;
2023: January 19,
September 29

JUDGMENT

[1] **INNOCENT, J.:** In these proceedings the claimant sought to recover damages for personal injuries suffered by him as a result of a fall that occurred at a hotel resort managed and operated by the defendants. The claimant alleged that his injuries were caused by the defendants' negligence and or breach of statutory duty. In fine, the claim concerns the question of occupier's liability. The present claim does not interrogate any issue relative to breach of statutory duty.

[2] The following facts are not disputed. The claimant was at the time employed by the defendants in the capacity of Executive Chef and

resided on the premises. At the time that the events giving rise to the present claim the claimant was not on duty and acting in the course of his employment with the defendants. The claimant was lawfully present on the premises.

[3] There appeared to be no dispute that the defendants had a sufficient degree of control over the premises and a degree of control over the state of the premises to place them under a duty of care to those who came lawfully onto the premises. It is also not disputed that the defendants owed a duty of care to the claimant.

[4] The claimant's case was that he sustained injury when he fell on the wet floor located in the washroom on the premises managed and operated by the defendants.

He claimed that his injuries were caused by the defendants' negligence.

[5] The defendants denied that the claimant suffered the injuries at the material time and place or in the manner alleged or at all; and denied that any injury suffered by the claimant was attributable to its negligence or that of its servants and or agents. Accordingly, the defendants denied that they were liable for any loss or damage suffered by the claimant.

[6] Therefore, what is in dispute is whether the claimant suffered the injury in the manner and at the time which he alleged; assuming that the claimant's injury was sustained at the time and place and in the manner in which he alleged, whether such injury was attributable to the defendants' negligence; and whether, in the circumstances of this case, the defendants owing a duty of care to the claimant, whether they failed in that duty and thereby caused the claimant's injuries.

[7] The claimant alleged that the defendants were negligent in that they failed to adequately or at all dry clean the floor; to place a prominent

sign or any other sign to alert the claimant that the floor was wet; by means of barriers or otherwise to prevent the claimant from walking in the vicinity of the wet floor; to devise, institute or operate an adequate system for identifying and dealing with wet floors; prevent the claimant's exposure to danger or hazard which was reasonably foreseeable as likely to cause injury; in all the circumstances of the case to discharge its common law duty of care to the claimant by ensuring that its premises were safe; and in all the circumstances of the case, to take reasonable care not to expose the claimant to unnecessary risk of injury.

- [8] The defendants denied that they were negligent in the manner alleged by the claimant in his particulars of negligence or at all. The defendants contended that it was their standard policy or standard operating procedure that when cleaning or mopping is done on the premises the appropriate floor signs are placed in the vicinity to alert passersby of the need to exercise caution.
- [9] Furthermore, the defendants pleaded, contrary to the claimant's assertions, that at the material time, no cleaning operations were being conducted in that area when the claimant allegedly fell.
- [10] It also appeared from the defendants' pleadings that they adopted the posture that the claimant's injury did not occur in the manner, at the time and at the location which he alleged or that the injuries for which he sought to make the defendants liable occurred under different circumstances, at a different time and date other than that which he alleged. In any event, the defendants did not seem to have challenged the fact that the claimant did suffer the injury alleged.
- [11] The defendants contended that if indeed the claimant had fallen in the manner in which he alleged and thereby sustained personal injury, this was not attributable to any negligence on the part of the

defendants but was instead attributable to the claimant's own negligence. The defendants did not particularise in their pleadings the manner in which they alleged that the claimant was negligent. In addition, the defendant's pleaded case did not interrogate any issue related to contributory negligence.

- [12] The principles that relate to liability for negligence are well settled. A person shall be held liable for negligence where he is taken to owe a duty of care to another, to avoid causing injury to that other person, in circumstances in which he should have reasonably foreseen that his act or omission would have caused the injury.
- [13] This principle finds its embodiment in the provisions of Article 985 of the Civil Code¹ which provides that every person capable of discerning right from wrong is responsible for the damage caused either by his act, imprudence, neglect or want of skill, and he is not relievable from obligations thus arising.
- [14] A person's liability in negligence is not only confined to his own acts but he is responsible for damage caused not only by himself but by persons under his control and by things under his care.² The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage. Therefore, employers are responsible for damage caused by their servants and workmen in the performance of the work for which they are employed.
- [15] The provisions of articles 985 and 986 were interpreted in the case of **Northrock Limited v Desmond Jardine and another**³ where Floissac CJ said:

¹ Cap. 4:01

² Article 986

³ [1992] ECSCJ No. 78

“There has never been any doubt that our articles 985 and 986 place on the plaintiff the onus of proving as a precondition of the defendant's delictual liability that the damage suffered by the plaintiff was caused by the defendant or by persons under his control or things under his care. Nor has there ever been any doubt that where the plaintiff alleges that the damage was caused by the defendant (as distinct from a thing under the defendant's care) or where the plaintiff relies on our article 985 (as distinct from our article 986), the onus is on the plaintiff to prove as a precondition of the defendant's delictual liability that the damage was caused by the defendant's fault. I use the word "fault" in its technical sense to signify the concept which is expressed in the words "act, imprudence, neglect, or want of skill" appearing in our article 985 and which is defined in our article 989 D (1) as "negligence, breach of statutory duty or other duty or other act or omission which gives rise to a liability in tort or would apart from this article give rise to the defence of contributory negligence".⁴

- [16] Floissac CJ found however that two questions were left in doubt by articles 985 and 986. The first question was whether in the case of damage caught by our article 986
(i.e damage proved to have been caused by a thing under the defendant's care), it

is necessary for the plaintiff to prove fault on the part of the defendant. The second question was the test for determining whether damage was caused by the defendant's fault and was therefore caught by our article 985 or whether the damage was caused by a thing under the defendant's care and was therefore caught by our article 986.

- [17] In **Northrock Ltd v Jardine**, the court held that the first question was resolved by the Privy Council's decision in **Quebec Railway, Light, Heat and Power Company v Vandry**⁵ where the Privy Council was required to consider and interpret article 1054 of the Civil Code of

⁴ At para 10

⁵ (1920) A C 662

Quebec which was in pari materia to article 986. In delivering the opinion of the Board, Lord Summer said:

"There seems to be no doubt that art. 1054 introduces a new liability, illustrated by a variety of cases and arising out of a variety of circumstances, all of which are independent of that personal element of faute which is the foundation of the defendant's liability under art. 1053. Furthermore, proof that damage has been caused by things under the defendant's care does not raise a mere presumption of faute, which the defendant may rebut by proving affirmatively that he was guilty of no faute. It establishes a liability, unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of faute and a liability defeasible by proof of inability to prevent the damage."⁶

[18] His Lordship then relied on the decision in **City of Montreal v Watt & Scott Ltd**⁷ where the Privy Council reviewed its decision in Vandry's Case where, Lord Dunedin delivering the opinion of the Board on the exculpatory paragraph of article 1054 of the Quebec Code said:

"Their Lordships, therefore, think it better to repeat emphatically that the exculpatory paragraph applies to the first paragraph as well as to the second, third, fourth and fifth, and that that is a necessary part of the interpretation given to the article in Vandry's Case. It is indeed obvious that if this was not so then the first paragraph would, as regards the damage done by things, impose a most onerous liability on those who had those things under their control. The only addition to the views expressed in Vandry's Case, which was not necessary there but is necessary here, is that in their Lordships' view "unable to prevent the damage complained of"

means unable by reasonable means. It does not denote an absolute inability."⁸

⁶ at pp 676,677

⁷ (1922) 2 AC 555

⁸ (at pp 562, 563)

- [19] Floissac CJ concluded that as a result of the decisions of the Privy Council in Vandry's Case and in **City of Montreal v Watt & Scott Ltd**, there was no doubt that where the plaintiff has proved that the damage which he suffered was caused by a thing under the defendant's care, there is no need for the plaintiff to prove fault on the part of the defendant as a prerequisite to the defendant's delictual liability for such damage. Proof by the plaintiff that the damage which he suffered was caused by a thing under the defendant's control engenders a presumptive or defeasible liability on the part of the defendant for that damage. The onus is then on the defendant to rebut the presumption of liability or to defeat the defeasible liability by proving that he was unable to prevent the damage by reasonable means.⁹
- [20] The learned Chief Justice reasoned that to the extent to which article 986 is a rule of law, it conflicts with the law of England and prevails over the latter by virtue of article 917A (4); and that to the extent to which article 986 is a rule of evidence, it excludes contradictory English rules of evidence the importation of which would otherwise have been authorised by article 1137.¹⁰
- [21] There is a distinction between damage caused by the defendant through the instrumentality of a thing and damage caused by an autonomous act of a thing without intervening human action. The former is caught by the Quebec article 1053 (article 985) which requires the plaintiff to prove fault on the part of the defendant. The latter is caught by the Quebec article 1054 (article 986) which creates a presumptive or defensible liability on the part of the defendant and exempts the plaintiff from proving fault.¹¹

⁹ At para 15

¹⁰ At para 16

¹¹ At para 17

[22] In the present case, the claimant appears to be relying on the provisions of both

Articles 985 and 986. In respect of liability under article 985, the claimant based on

his pleaded case alleged that the defendants, by the acts or omissions of their servants and or agents had breached the duty of care owed to him by their negligence as a result of which he suffered damage.

[23] The defendant in the present case could be held liable if the claimant's allegations regarding how he sustained the torn rotator cuff injury are true. The burden rests on the claimant to prove his case on a balance of probabilities.

[24] In order for the claimant to succeed in his claim, he must prove that the defendant is the owner or occupier of the premises where the injury was sustained. In the present case, there appeared to be no dispute concerning whether the defendants are the occupiers of the premises. The claimant must also prove on a balance of probabilities that the damage he sustained was caused by a breach of the duty of care owed to him.

[25] The claimant also sought to make the defendants liable for his damage under article 986 on the basis that the premises were under the defendants' control and management and without any human intervention or action, he was exposed to the unusual and hazardous danger which caused his injury. In such an instance, proof of damage would give rise to a rebuttable presumption of liability and the burden would therefore shift to the defendants to prove that the damage could not have been prevented by any reasonable means. Therefore, the claimant is not required to establish fault on the part of the

defendant but that the thing under the defendants' control caused the damage which he suffered.

[26] An occupier owes a duty to exercise reasonable care to prevent injury to persons who go onto his premises. The claimant is also required to prove that the defendants failed to take reasonable care that the premises were in such a state of repair that would not expose the claimant to any hazards that the claimant ought to be aware of. In sum, the occupier should take reasonable care to ensure that an invitee is not injured by an unusual danger on the premises which the occupier knows or ought to have known. An 'unusual danger' is one that is not usually found in carrying out the task or fulfilling the function for which the invitee entered the premises.¹²

[27] In the present case, there was no dispute regarding whether or not the defendants owed a duty of care to the claimant.

[28] Whether a danger is unusual depends upon the nature of the danger, the nature of the premises on which it is found, and the experience in the circumstances that an invitee might reasonably be expected to find. In the case **Cox v Chan**¹³ Sawyer J. reaffirmed the position that the duty of an occupier is not an absolute one. She stated:

“The occupier's liability is not an absolute one to prevent any damage to the plaintiff but is a lesser one of using reasonable care to prevent damage to the plaintiff from an unusual danger of which the defendant knew or ought to have known, and of which the plaintiff did not know or of which he could not have been aware.”

[29] Additionally, the claimant is required to prove on a balance of probabilities that the injury which he suffered was caused by the

¹² London Graving Dock Co. v Horton [1951] A.C. 737, at page 745

¹³ [1991] the Supreme Court, Bahamas, No. 755 of 1988 (unreported)

defendants' breach of duty to take reasonable care that the premises were in such a state of repair that would not expose the claimant to any hazards that the claimant ought to be aware of.

[30] The claimant's evidence was that on 6th August 2017, between 10 am and 10:30 am, he was on the premises where he proceeded to use the toilet located above the ground floor. He said that when he entered the toilet he fell onto the surface of the floor which he described as being slippery at the time. He stated that the floor was wet and appeared to have just been mopped. He also stated that there was no caution sign placed on the floor indicating that the floor was wet. He claimed to have reported the incident to the Bar Manager.

[31] In his written evidence he said that when he fell he hit his head and fell onto his shoulder. He said that he immediately felt pain in his shoulder, and he was unable

to get off the floor until he was assisted by one of the guests. He claimed to have remained on the premises for a few hours after the incident.

[32] In his evidence, the claimant maintained that the defendants had accepted responsibility for his injury and had agreed to pay all of his medical expenses. He said that he was informed by the defendants' manager that a claim such as his would be processed under their general liability insurance. He also said that all his expenses were to be paid under medical insurance coverage which he should have had with the defendants by virtue of his employment. According to the claimant, his claim under the insurance coverage was not processed by the defendants in a timely manner; therefore, the claim was denied.

- [33] The claimant was cross-examined extensively. Certain questions were put to him regarding the state of his health at the material time. It appeared that the tenor of the cross-examination was premised on the defendant's assumption that the claimant would have fallen not as a result of the wet floor but rather as a result of some preexisting physiological disability that the claimant suffered at the time which may have made him predisposed to falling down.
- [34] The claimant testified that he was 5 feet 10 inches tall and weighed 275 pounds. He claimed that he was not diabetic but that he took metformin for pre-diabetes as he was borderline diabetic. He said that he takes blood pressure medication and Lexapro to treat anxiety. He also testified that he had knee replacement surgery in 2013. He testified that he has not suffered from any side effects from these prescriptions and that he is not familiar with their side effects. He claimed not to have looked into the side effects of these medications. He said that he was suffering from sleep apnea. However, he said that he was not aware whether his sleep apnea was a side effect of those prescriptions; and that he has never suffered dizziness from taking them.
- [35] The claimant was cross-examined in respect of what the defendants regarded as a pre-existing underlying condition which he suffered in the form of osteoarthritis. He testified that he started getting osteoarthritis as he began aging.
- [36] It appeared that the purpose of the line of cross-examination embarked upon was to somehow establish a nexus between the claimant's alleged fall and his underlying physical condition. In the court's considered view, no such nexus was capable of being established by the evidence. Therefore, the court attached no weight to this evidence.

[37] The claimant was cross-examined concerning events that occurred after the fall. He said that he got up onto his feet. He testified that he went back to the gift shop and spoke to one of the employees at the desk and told them to get someone to clean the restroom because it was wet in there.

[38] He testified that before entering the toilet he remained in the lobby for at least 30 to 35 minutes before the incident. He said at that time he did not see other guests going in and out of the toilet. He said that at that time it was not usual for that area to have a lot of foot traffic. He said that he did not see the cleaners coming out of the toilet before he entered. He also said that he did not see any guests from the pool area entering and exiting the toilet.

[39] He said that he was not familiar with the cleaning schedule but that he knew that there were policies in place. According to the claimant, they probably had the 7 am schedule in place. He said that there was no mopping taking place at the time; and that he did not know what caused the water to be on the floor at the time. He said he did not notice if the floor was damp because he was walking and not looking down. He said:

“I did not see what the floor looked like. I was walking, I was not looking. I inferred that the floor was wet.”

He said that he remained at the hotel for a while then he took a car and went around the island on an excursion.

[40] The defendants have submitted whether explicitly or impliedly that it was unlikely that the claimant had suffered the injury of which he complained on 6th August 2017 at the hotel premises given his demeanor and apparent state of composure after

the incident. This much can be ascertained upon an assessment of the evidence led by at least one of the witnesses called to testify on behalf of the defendants.

- [41] The claimant relied on the testimony of Doctor Stuarde E Fromm ('Dr. Fromm') who was appointed by the court by order dated 13th November 2019 as a "medical expert" to provide the court with an expert report detailing: (1) the nature and extent of the injuries sustained by the claimant; (2) the nature and gravity of the resulting physical disability suffered by the claimant, if any; (3) the pain and suffering experienced by the claimant; (4) the loss of amenities, if any, suffered by the claimant; and (5) the extent to which the claimant's pecuniary prospects were likely to have been affected by his injury.
- [42] The court makes several observations concerning Dr. Fromm's evidence. In the first instance, the order made by the court on 13th November 2019 does not appear to conform to the provisions of CPR 32. No evidence was presented of the instructions given to Dr. Fromm to prepare his report. Additionally, the order does not state with any specificity the area of medicine in which Dr. Fromm is to give his expert evidence.
- [43] Furthermore, the terms of reference contained in the order of 13th November 2019, had nothing to do with the question of causation although in cross-examination Dr. Fromm gave evidence concerning the likely cause of the injury suffered by the claimant.
- [44] In any event, there appeared not to have been any challenge by the defendants to the contents of Dr. Fromm's report in their pleadings. In any case, there appeared to be no objection from the defendants regarding the admissibility of the evidence contained in Dr. Fromm's report or to his giving expert evidence at the trial.

- [45] Dr. Fromm's report was dated 24th April 2020. His witness statement was filed on 20th May 2020. Dr. Fromm is a registered medical practitioner who specialises in Orthopedic Surgery and is registered with the Association of Medical Practitioners in the United States. At the time of his report, he was employed with Black Hills Orthopedic & Spine Centre as a consultant. He said that he has 24 years of private practice experience. The claimant was seen and treated by Dr. Fromm between 1st September 2017 and 5th November 2018. He performed a surgical intervention on the claimant in October 2017 which involved an arthroscopic rotator cuff repair to his right shoulder. He said that it was a large to massive rotator cuff tear which he repaired.
- [46] Dr. Fromm gave no evidence regarding the issue of causation in his witness statement or his report save and except what was presented to him by the claimant by way of narrative. The question of causation was raised only in the crossexamination of Dr. Fromm.
- [47] In cross-examination, Dr. Fromm testified essentially that the large rotator cuff injury that the claimant suffered could have been caused by a fall. He qualified this by saying that the injury could be caused by a myriad of things but one can suffer a tear like that of the claimant from a fall. He said that the injury can occur as a result of aging or from an injury or by lifting heavy objects.
- [48] The court having assessed the evidence given by Dr. Fromm, concluded that Dr. Fromm kept his opinion as to the cause of the injury very guarded. He did not venture to confirm that the injury was in fact caused in the manner in which the claimant alleged and he did not discount the claimant's narrative either. Dr. Fromm quite forthrightly testified that he only recited the claimant's narrative in his

report and that he was not expressing any opinion as to precisely how the injury occurred.

[49] Based on what can be discerned from Dr. Fromm's evidence, the court can only speculate that there was a likelihood that the injury suffered by the claimant was likely caused by a fall. Dr. Fromm's evidence was not conclusive.

[50] The defendant relied on the testimony of Mr. Zachary Frangos ('Mr. Frangos') the general manager of the second defendant a position which he held from 24th April 2017. He testified that as general manager, he oversees the everyday running of the hotel and takes care of the day to day occurrences on the property which would come to his attention.

[51] In relation to the claimant's complaint, Mr. Frangos testified that an investigation was started on 7th August 2017. In his written evidence, Mr. Frangos said that on an eight hour shift, every allotted public area will be cleaned and received the necessary attention on an average of six times. According to his evidence, the toilet in question was one such public area. In the course of his investigations, he obtained the cleaning schedule for the week commencing 6th August 2017. According to his investigations, the toilet had been cleaned at about 7 am on 6th August 2017 and at that time a sign had been placed there.

[52] In cross-examination he testified that he had no personal knowledge of the events that occurred on 6th August 2017 other than from what was contained in the investigation reports. He said that he knew that the mopping of the floors was part of the duties of the housekeeping staff. He said that he did not supervise the ground level staff but he knows the systems in place and the systems that were monitored. He admitted that he had no direct supervision of these matters.

- [53] He also testified that information from what he described as the “daily task list” was compiled daily as part of the hotel’s standard operating procedure and that it was not correct that the information contained in these logs was inaccurate.
- [54] Mr. Frangos denied that the hotel had accepted responsibility for the claimant’s fall. He was referred to an Email dated 24th August 2017. He said that he did not recall that the claimant was referred to the defendants’ insurers. He was also referred to a letter from the Human Resource Management Department and the contents of paragraphs 5 – 7 of the claimant’s witness statement. He said that as an employer they maintained group liability insurance for employees and managers. He said that they wanted to ensure that the claimant was taken care of by the group medical insurance. He said that he offered to pay the deductibles. He was asked to distinguish between a group medical policy and group liability insurance which he did. In any event, the court thinks that the distinction was patently clear notwithstanding the explanation given by Mr. Frangos.
- [55] The court is not quite sure given the evidence lead at the trial that the exchange of correspondence that ensued between the claimant and the defendants’ agents can be interpreted as an admission of liability. It is clear from the evidence that the claimant was an employee and that as part of the terms and conditions of his employment with the defendants he was covered by the employees’ group medical insurance policy.
- [56] The claimant had said in his written evidence that immediately after the accident, and after considering his report, the hotel accepted responsibility and informed him that they would be paying all his medical expenses. He said that he was also informed by the general manager of the hotel, Mr. Frangos, that such a claim would be

processed under the hotel's general liability insurance. The claimant went on further to state that initially, all his medical expenses were to be paid under medical insurance coverage which he ought to have had with the hotel. He claimed that for reasons unknown to him the documents were not processed in a timely manner by the hotel and as a result, his claim under the group medical insurance was denied. The claimant maintained that he was entitled to join the hotel's group life and medical insurance plan upon the commencement of his employment.

- [57] The court was not provided with any details of the terms of either the group life and medical insurance or the group liability insurance. In any event, the court having read and assessed the evidence contained in the chain of emails exchanged between the claimant, the defendants, and the defendants' agents, that there was no outright and definitive commitment made by the defendants to cover the claimant's medical expenses which could be translated as an acceptance of liability by the defendants.
- [58] What can be inferred from the various exchanges between the parties was an attempt to determine whether the defendants could assist the claimant with the payment of his medical expenses under the assumption that he was covered with respect to the nature and circumstances of the injury that he suffered. Also, it must be taken into account that there is no evidence before the court with respect to the extent and nature of the coverage provided for under the group medical insurance. Ultimately, it may very well have been the case, as the evidence suggested, that the defendants' insurers had taken the view that any such liability incurred with respect to the claimant's injuries ought to have been dealt with under the defendants' general liability insurance.

[59] In any event, it appeared from the tenor of the email responses from the hotel's general manager that he did not express any firm or definitive commitment that the defendants would cover the claimant's medical expenses. In any case, it is doubtful whether the general manager was in a position to bind the defendants to any admission of liability either ostensibly or in the exercise of his express authority to do so. No evidence has been presented to prove that he did in fact have any such authority. In the circumstances, the court will refrain from placing any weight on this aspect of the claim; which in any event did not appear to have any relevance to the issue to be decided here given the nature of the present proceedings.

[60] Mr. Frangos was referred to what was contained in paragraph 4 of his witness summary where he said in part that:

“... the claimant's allegation that he slipped on a wet floor where there was no sign was highly unusual and quite frankly alarming. If there is a wet floor in a public area on property there is always a sign.”

In response to the question put to him, he testified that it was the policy and procedure of the hotel that where there is any wet area a “wet floor” sign is placed there. He said that it was correct that flooding was a highly unusual occurrence at the hotel and the presence of a wet floor with no sign was also a highly unusual occurrence. He qualified the foregoing statement by saying that it was very unusual given the protocols in place and the cleaners' experience.

[61] The witness was referred to paragraph 8 of his witness summary as it related to the placement of the signs. He testified that it should have read presently and not permanently. He explained that the signs are moved around all the time to areas that were wet or had spills.

[62] The defendants also relied on the evidence of Mr. Ted Barnard ('Mr. Barnard'). At the material time, he was employed by the defendants

as a bar manager. His evidence was that on 6th August 2017 he was on duty at the hotel and was at the food and beverage office which is located downstairs near the reservations desk. He said that at approximately 10:15 am the claimant came into the office and said that he had just had a fall in the upstairs guest bathroom.

[63] Mr. Barnard said he asked the claimant if he was alright and he replied in the affirmative. The claimant said that he was not injured and said that he did not need a doctor or needed to go to the hospital. According to Mr. Barnard, the claimant did not walk with a limp and did not show any signs of discomfort, pain, or injury. He said the claimant seemed ambulant and fine. He claimed that the claimant told him that he should ask someone from housekeeping to check out the bathroom. He said in his written evidence that he went to the toilet to see what was going on. He said on arrival, the bathroom seemed unremarkable which he explained meant that everything was fine and how it ought to have been. More importantly, he said that the floor was not wet. There were no puddles on the floor and no dampness which was attributable to recent mopping or cleaning activity. In his estimation, he saw nothing that would cause a person to slip or fall. He also asked housekeeping to inspect the floor. In cross-examination he explained that by ambulant he meant that the claimant looked fine and walked without assistance.

[64] Based on the evidence presented at the trial and the submissions of counsel for the respective parties, the court has arrived at the following conclusions.

[65] The premises in the present case was a hotel washroom where it would be reasonably expected that there would be moisture. This would require a person such as the claimant to exercise particular caution for the hazards that water or moisture on the floor could

cause, particularly in a washroom. Although the claimant's mere knowledge or appreciation of the risk may not lead ineluctably to the conclusion that

he is able to make a fair assessment of the risks or harm involved, it is still a factor that could benefit the defendants.

[66] It may be recalled that the claimant stated in his evidence that he did not look down at the floor and that essentially he did not know if the floor was wet and that he inferred that the floor was wet simply because he fell.

[67] The court has also taken the relevant circumstances of the state of the premises (the washroom) in determining whether they presented an unusual danger. It did not appear that the claimant was able to adduce any evidence to substantiate his allegation that the floor was wet and slippery and that as a result, it caused him to fall.

[68] In the court's view, the fall that the claimant suffered was not in and of itself sufficient proof that the floor was wet and slippery and therefore presented an unusual danger. The circumstances of the present case must be contrasted with a situation where it was proven that the surface of the floor was slippery and potentially dangerous to persons entering and using the washroom; particularly where the danger was covert or hidden and the defendants were aware of the danger.

[69] In the premises, the court has arrived at the conclusion that the claimant has not provided evidence that is sufficiently credible or reliable to establish causation. In other words, the court is not satisfied that there was reliable evidence on which to find that the claimant established on a balance of probabilities that the defendants, their servants, and or agents created the circumstances that caused the claimant's injury.

[70] Counsel for the defendants referred the court to the decision in **Ruthlyn Thomas v Jumby Bay Resort Ltd**¹⁴ where the claimant alleged that she was standing in one of the defendant's bathroom stalls, she slipped on water or some other moist or slippery substance on the floor, lost her balance, and fell, as a result of which she

suffered personal injury. The claimant in **Thomas v Jumby Bay Resort Ltd** did not at any time see water on the floor. She indicated that she was not looking for water. Her evidence was that she inferred that water was there because she fell and felt the back of her trousers wet. The court in the above-cited case, quite rightly, in the court's view, found that there was no basis upon which it could be inferred, and it not having been proven by the claimant, that the floor was wet.

[71] The court in the present case having found that the claimant has failed to establish on a balance of probabilities that the floor was wet, in effect having failed to prove causation, the court thinks that this is sufficient to dispose of the matter. However, assuming for the sake of argument that the court is mistaken with respect to the issue of causation, the court will therefore go on to consider whether the defendants ought to have known of the presence of water on the floor and whether the defendants were unable to avoid that which had caused the damage; or to put it another way, whether the defendants were unable to prevent the damage complained of by reasonable means.

[72] In his pleaded case, the claimant alleged that the defendants had failed to keep, maintain, or operate an adequate system for

¹⁴ [2020] ECSCJ No. 131

identifying or dealing with wet or moist floors. The claimant alleged that as a result of these shortcomings on the defendants' part, they breached their duty of care owed to the claimant and others by exposing the claimant and other users of the premises to the danger or hazard of slippage in circumstances where there was the foreseeable risk of danger.

[73] The defendants denied the foregoing allegations and maintained that it had as its policy or standard operating procedure that floors are mopped on the premises, and the necessary floor signs are placed on the floor to alert persons of the need to exercise caution. In fine, the defendants alleged that they had done all that was reasonable to prevent the likelihood of risk and danger to persons coming onto the hotel's premises.

[74] In his evidence, Mr. Frangos said that the defendants' hospitality department operated a very strict and efficient rotation system; and that members of that department are assigned to specific areas on the hotel's premises during an 8 hour shift and attend to their specific areas on an average of about 6 times during their shift. The washroom in question was one such area.

[75] Essentially, Mr. Frangos said that an investigation which involved the hotel's records revealed that on 6th August 2017, that specific washroom was cleaned at about 7 am and a sign was placed there. He insisted that it was the defendants' policy to keep and maintain signage in specific areas because of the nature of the activities taking place at the hotel's premises. He stated that the defendants were fully aware that many parts of the hotel's premises may be wet and that was the reason they painstakingly ensured that all precautions including the placement of signage, were undertaken. It was also Mr.

Frangos' evidence that the signs are moved around all the time to areas that are wet or where there is spillage.

[76] Under cross-examination, Mr. Frangos said that it was:

“... the policy and procedure of the hotel that any wet area must have a “wet floor” sign.” I have to trust my staff that they followed the rules and regulations outlined ... It is correct that flooding was a highly unusual occurrence.

He also testified that:

“The presence of a wet floor with no sign is a highly unusual occurrence. That it was very unusual given the protocols in place and given the experience of the housekeeping staff.

[77] Mr. Frangos' evidence was challenged ostensibly on the basis that he had no personal knowledge of the operations of the house cleaning staff as he had no direct supervision over them and that he was not the one who compiled the record kept in the task book. However, this, in the court's view, did not detract from the fact that he had knowledge of the systems in place although he had no direct supervision over these matters. After all, Mr. Frangos was the general manager of the hotel. Additionally, Mr. Frangos had access to and referred to the information contained in the daily task list which was compiled on a daily basis as part of the hotel's standard operating procedure. Clearly, these were records kept by the hotel for business purposes and in the course of monitoring its daily operations.

[78] The defendants also appeared to have taken the position that the claimant, in his capacity as a senior executive manager of the hotel, was not an unwitting guest and ought, therefore, to have been aware or appreciated the hotel's operations and the dangers inherent therein, particularly that the hotel is a “wet space”.

[79] In cross-examination, the claimant testified that:

“I agree that the hotel is typically a wet ... place with people moving around. I did not expect the floor to be wet if one has policies in place. I don't expect to tip toe and walk gingerly. I did not expect walking on a wet floor”

The court thinks that the foregoing evidence was elicited from the claimant to make the point that the wetness or dampness of the floor in the washroom was not an unusual or hidden danger but rather ought to have been obvious to the claimant given his knowledge of the premises. To that extent, the dampness or wetness of the floor was not unusual or hidden and was a condition of the premises of which the claimant was well aware and therefore not taken by surprise. In short that there was no lurking danger that the defendants were obliged to prevent.

[80] The claimant's case presupposed that the defendants had knowledge or ought to have had knowledge of the presence of water on the washroom floor on that day and at the specific time that the incident occurred, and by extension that they had knowledge or ought to have had knowledge of the danger or hazard that it created and did nothing to prevent it.

[81] The court is not satisfied by the evidence presented by the claimant that on a balance of probabilities, the defendants had knowledge of the wet floor, assuming that the floor was wet and that they failed to do all that was reasonable to prevent it from creating a danger or hazard to users of the bathroom. In the present case, there simply was no evidence presented to prove when the water came onto the floor and how long it had been there.

[82] The present case can be distinguished from a case where there is a constant, recurring or perennial episode of water or moisture on the floor and therefore it could properly be said that the defendants ought to have been aware and that the defendants had failed to put in place

a proper system of monitoring whether the spillage continued or continued to occur frequently. Therefore, the court has concluded that even if there was water or moisture on the floor it did not amount to an unusual danger.

[83] In **Harripersad v Mini Max Ltd**¹⁵ the defendant was found liable for breach of its occupier's duty to the claimant who injured her knee when she slipped and fell while she was shopping in Mini Max's supermarket. She fell in an area where water from an air conditioner had collected on the floor, which had smooth tiles. The defendants had placed sheets of paper on the floor to absorb the water. The paper became saturated. The Court found that these actions made the surface of the floor slippery and potentially dangerous to customers, particularly because the danger was thus covert and insidious and the defendants were aware of the danger.

[84] The Court in **Harripersad**, reasoned that the condition of the floor where the claimant slipped amounted to an unusual danger because the water on the floor was not easily visible, and the claimant did not see it because it was covered. The court also expressed the view, however, that even if the claimant saw it, but had nowhere else to pass except over the slippery portion of the floor, the defendant could still have been liable.¹⁶

[85] In the court's view, given the nature of the premises where the incident occurred, the incident could clearly have happened no matter what degree of care the defendants exercised. Therefore, no reasonable system which the defendants could have been expected to put in place would have prevented the claimant's accident.¹⁷

¹⁵ [1978] High Court of Trinidad and Tobago Suit No. 654 of 1973 (unreported)

¹⁶ *McSweeney v Super Value Food Store Ltd.* [1980] Supreme Court of the Bahamas Civil Suit No. 481 of 1979.

¹⁷ Per Kelsick J. in *Thomas v Jumby Bay Resorts Ltd.* *infra* at paras [21] – [33]

To hold otherwise would be to impose too unnecessary and onerous a burden on the defendants.

[86] In the premises, the court is inclined to find that even if there was water or moisture on the floor, the claimant has not made out his case that the defendants breached their duty of care or had failed to employ all reasonable means to detect and prevent the presence of water or moisture. This is particularly the case because, assuming the presence of water or moisture on the floor, there simply was no reliable evidence presented to explain how or when the water or moisture came to be deposited and that its presence was undetected because the defendants failed to take reasonable steps to prevent it.

[87] For the reasons which the court has stated in this judgment, the claimant's claim is dismissed. The claimant shall pay to the defendants prescribed costs in the sum of \$25,363.24.

Shawn Innocent
High Court Judge

By the Court



Dp. Registrar

