

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

IN THE HIGH COURT OF JUSTICE

**CLAIM NO. SKBHCV2020/0079
Formerly SKBHCV2019/0135**

BETWEEN:

ROSEMARY HERBERT

Claimant

And

**KEVIN WALTERS
(Doing business as Boozies Restaurant)**

Defendant

Before:

The Hon. Mr. Justice Trevor M. Ward QC

Appearances:

Mr. Jason Hamilton for the Claimant.

Mr. Garth Wilkin for the Defendant.

2021: June, 01
December 21

JUDGMENT

[1] **WARD, J:** The claimant, Rosemary Herbert, seeks damages for injuries sustained when she stumbled and fell as she entered the defendant's restaurant on 20th April, 2018. In her Statement of Claim, she attributes the cause of her fall to a protruding object at the entrance of the restaurant that made the ground uneven and created an obstruction in the area. She alleges that her fall was caused by or contributed to by the negligence and/or breach of the duty owed by the defendant

generally to all patrons and/or invitees to his premises and specifically to her, in that, the defendant:

- (a) Failed to conspicuously mark the presence and position of the said obstruction and/or protrusion and/or obstruction (sic);
- (b) Failed by means of signs or notices or otherwise howsoever to warn of the presence or position of the said protrusion and/or obstruction and or protrusion (sic) ...
- (c) Failed to provide at or in the vicinity of the said protrusion and /or obstruction and/or protrusion (sic) any or any adequate handrail or other indication of their existence or means of handhold;
- (d) Failed to warn the claimant of the presence and position of the said protrusion and/or obstruction or otherwise to prevent the Claimant walking in the vicinity thereof;
- (e) Failed to provide adequate lighting and/or illumination in the area of the protrusion and/or obstruction that would have allowed the Claimant to see same and be forewarned;
- (f) Exposed the claimant to a danger or a trap and a foreseeable risk of injury;
- (g) Failed to take any or any adequate care for the safety of the Claimant;
- (h) Failed to discharge the common duty of care to see that the claimant was safe in using the premises.

[2] As a result, the claimant sustained injuries and incurred expenses totalling \$12, 770.00 which she claims as special damages. The description of the injuries sustained by the claimant is necessarily skeletal in this judgment because there was no medical evidence properly before the court.

The defendant's pleadings

[3] The defendant, Kevin Walters, denies any liability for the claimant's injuries. The defendant's pleaded case is that immediately before entering the restaurant, the claimant was observed speaking with other persons who were accompanying her when she stumbled in the public drain outside of the restaurant's entrance. She attempted to break her fall by holding on to the entryway to the restaurant but fell to the floor inside of the restaurant. The defendant contends that he is not responsible for the construction, control or maintenance of the said drain which does not form part of the premises occupied by the restaurant and that he was not authorised or obliged to mark, place signs, or warn members of the public about the existence of the public drain outside of the

restaurant. The defendant contends that his duty of care is owed to visitors who are on the restaurant's premises and not before they enter.

- [4] The defendant asserts that there was no obstruction, no protrusion, no danger, no trap, no foreseeable risk of harm to anyone in the public drain and denies that there was any protruding object which makes the ground uneven at the entrance to the restaurant or that there is any unsafe object or obstruction of any nature at the entrance. He maintains that at all material times the premises were inherently safe for all patrons.
- [5] Alternatively, the defendant pleads that the claimant's fall was as a result of her own negligence, in that, she failed to pay heed to the existence of the public drain whilst walking towards the entrance to the restaurant. It is said that she distracted herself by engaging herself in conversation with other persons who were accompanying her whilst she was walking in the public drain.

The claimant's evidence

- [6] Ms. Herbert's witness statement was admitted as evidence-in-chief. She stated that she and her husband, James Herbert, attended the defendant's restaurant (Boozies) on the evening of 20th April 2018, to have dinner with three friends who were visiting the island. She entered the restaurant through the main entrance which is located on Princes Street, Basseterre. Upon entering the restaurant she lost her footing and fell as the ground was uneven. She attempted to break the fall by extending her left hand and injured her left wrist in the process.
- [7] Ms. Herbert stated that having fallen on the inside of the premises, she observed that the flooring in the area shortly after the entrance was uneven. She observed that there was "some sort of ditch or drain that was on the floor on the inside of the premises that made the flooring uneven and unlevelled. The ditch or drain also had a protruding ridge." Ms. Herbert said that at the material time, it was approximately 6:00pm and although it was not completely dark, dusk had set in and the area by the entrance where she fell was not properly illuminated. There were no warning signs alerting patrons to the drain or ditch and/or the uneven nature of the floor.
- [8] Ms. Herbert stated that she was assisted off the floor by her husband, the bartender and a waitress. They helped her to her seat at the table where her friends were already seated. She stated that immediately after her fall, her left wrist was in excruciating pain which was made worse whenever she tried to move her fingers. A staff member brought her some ice in a paper towel

which she applied to her wrist. Although she could still move her fingers, she did so with much discomfort.

- [9] Although her husband and her friends ordered dinner and ate, she did not on account of the pain she was experiencing. She thought the pain would eventually subside so remained at dinner with her friends. However, as the night progressed, the pain grew increasingly worse. One of her friends gave her some pain killers but this did not bring any relief.
- [10] Upon completing dinner some time between 8:30 pm and 9:00 pm, Ms. Herbert and her husband travelled immediately to the Joseph N. France General Hospital as the pain in her wrist had intensified. She underwent an x-ray. Her wrist was placed in a half cast and she was discharged with instructions to return on 23rd April for a full cast to be applied. She was prescribed pain killers upon her discharge.
- [11] Ms. Herbert subsequently underwent a number of medical procedures, including having the cast reset and having pins inserted into her wrist. She said she endured constant pain post-surgery. During the period April 2018 to the end of June 2018, she remained with the cast applied to her wrist and was totally dependent on her husband, who had to assist her with basic, everyday chores, bathing, using the bathroom and combing her hair. She was unable to perform any of the household chores she would typically perform.
- [12] During the period April 2018 to August 2018, she was unable to ply her trade as a Taxi driver. This impacted the family business which operated two buses driven by her husband and herself. They usually booked tours in advance online using their website. During the period April 2018 to August 2018, she was forced to cancel several bookings due to her inability to drive.
- [13] Ms. Herbert stated that at present, she is still unable to have the full use of her fingers without some level of discomfort and her wrist is still painful from time to time, particularly when the weather is cold or when she performs a task requiring her to use her wrist for an extended period of time.
- [14] Under cross-examination, Ms. Herbert described the obstruction that caused her to fall. She said it was after the door after you enter the restaurant. She testified that it looked like it used to be a drain saying "it was like a dip and it continued along. It was long ways as I walked..." She said as she walked in it twisted her foot. She testified that she did not see it when she walked in but only

observed it on her way out of the restaurant and realised that that was how she fell. She said on observing this and concluding that this was what caused her to fall she did not report it to the manager of the restaurant. She claimed to have reported it the following day to a lady at the restaurant but was forced to accept that she had not mentioned that detail in her witness statement. Ms. Herbert claimed to have a photo of the ditch/drain on her phone but accepted that she had not submitted it in evidence.

- [15] Ms. Herbert said she had not observed the public drain outside of the restaurant. She said that although she walks through Princes Street occasionally she hadn't paid attention to whether there was a public drain outside of the restaurant. When shown a photo of it, she accepted that a public drain ran outside of the entrance to the restaurant. However, she said she was not in the public drain when she entered the restaurant because she had approached from the direction of Independence Square (East). She walked along the pavement and turned left to enter the restaurant. Under further cross-examination she admitted that she had to step down into the drain to turn left into the restaurant. She agreed that the drain was V shaped and that in order to enter the restaurant she had to step on part of the V but she maintained initially that this part was level but then agreed when probed that it was not flat but was "slightly down".
- [16] Ms. Herbert denied that she had slipped in the drain and fallen into the entrance of the restaurant. She also denied that she had entered the restaurant conversing with her friends as they were already seated when she arrived.
- [17] The final witness for the claimant was her husband, James Herbert, whose witness statement was also admitted as his evidence-in-chief. Mr. Herbert's evidence substantially supports his wife's account. He stated that on entering the restaurant he saw her fall to the floor within the entrance. He observed her holding her left wrist and complaining of pain. He said that having seen her fall, he observed that the flooring in the area shortly after the entrance of the premises was uneven and observed "some sort of ditch or drain that was on the floor on the inside of the premises that made the flooring uneven and unlevelled. The ditch or drain also had a protruding ridge." Mr. Herbert also remarked on the absence of proper lighting at the entrance and warning signs. His account of what transpired after his wife fell accords generally with her account and does require rehearsal here.

- [18] Under cross-examination, Mr. Herbert testified that he did not know what caused his wife to fall because he was looking forward when he walked in and was not looking at her feet. He said the lighting inside the entrance way was very dull.

The defendant's case

- [19] The defendant, Kevin Walters, and Bladimir Grant, an employee who was on duty at the material time, gave evidence on behalf of the defendant. In summary, they both testified that they observed when Ms. Herbert entered the restaurant because, in the case of Mr. Walters, he was positioned at the cash till which faces the entrance, and in the case of Mr. Grant, because he was positioned close to the entrance as it was his duty to await the arrival of customers. They both stated that at about 6: or 6:30 p.m. they observed the claimant entering the restaurant in company with other persons with whom she was conversing. They saw her slip in the public drain outside of the entrance of the restaurant. She tried to break her fall by holding on to the entrance of the restaurant but was unsuccessful and fell into the restaurant. A member of staff assisted Mrs. Herbert to her feet.
- [20] Mrs. Herbert then proceeded to her table and had dinner with the people she was with for about an hour and a half to two hours before departing. Mrs. Herbert made no complaints to staff or to either of them.
- [21] Mr. Walters and Mr. Grant both stated that there was no obstruction, no protrusion, no danger, no trap, no foreseeable risk of harm to anyone in the public drain and denied that there was any protruding object which makes the ground uneven at the entrance to the restaurant or that there was any unsafe object or obstruction of any nature at the entrance. Mr. Grant stated that if there were such, he would have known since it was his task to clean that area every day that he works. Mr. Walters asserted that he takes pride in maintaining the safety of his customers at all times.
- [22] Mr. Walters stated that the lighting outside of the restaurant was good because it was illuminated by a bright street light right above the entrance to the restaurant.
- [23] Under cross-examination, Mr. Walters testified that the entrance to the restaurant was illuminated by two four foot floor lamps and two lights positioned on either side of the entrance. He said he first became aware of a complaint when Mr. Herbert came to his restaurant months after the incident and complained to him. However, when confronted with a letter from the claimant's lawyers sent to

him and dated 23rd May, 2018, he conceded that it had not been months after that he first learned about the incident.

- [24] He further testified that he first saw Mrs. Herbert when she was directly in front of the entrance but could not say from which direction she had come. He conceded that it might be true that the only person she was with at the time she entered the restaurant was her husband but said there were persons behind her with whom she was speaking. He assumed they were her friends since her husband had said that they were there to have dinner with friends when he made his complaint.
- [25] Mr. Walters said that the floor level at the entrance of the restaurant is lower than the top part of the drain and slopes downwards from the doorway. He said after the incident he had placed some yellow and black tape at the tip of the “government drain” to alert patrons to the presence of the drain outside of the restaurant. He did so as a precaution and not because it was not an obvious impediment to people entering the restaurant. He has made no adjustments to the entrance of the restaurant on the inside.
- [26] Mr. Walters disagreed with the suggestion that he had not seen Mrs. Herbert fall and he did not agree that the entrance to the restaurant posed a danger to persons entering.
- [27] When Mr. Grant was cross-examined he testified that when the claimant was entering the restaurant he was at the bar watching the entrance. He had gone to get a drink. He saw Mr. Walters at the end of the bar but couldn’t remember exactly where he was.
- [28] He testified that as far as he could recall, on the night of the incident there were yellow tapes on the floor saying “watch your step”. This was to alert customers to the drain. He said on entering the restaurant the floor is not flat but slopes slightly downward (demonstrating a very slight degree of slope). He stated that he didn’t see the claimant fall; he saw her on the ground and saw her grabbing the door. He said he didn’t see what caused her to fall. He denied that he had only taken notice of the claimant when she was on the ground.

Issues

- [29] The issues for resolution in this case are: (1) Whether the claimant’s fall was caused by a protrusion/obstruction on the floor of the restaurant at the entrance; (2) whether the said protrusion/obstruction constituted an unusual danger; (3) if so, whether the defendant failed to take

reasonable care to prevent damage from said unusual danger which he knew or ought to have known; (4) whether the claimant was contributorily negligent.

The law

- [30] This is a case where the issue of occupier's liability arises. Every occupier of premises owes a duty to an invitee to "use reasonable care to prevent damage from unusual danger, which he knows or ought to know." An occupier is a person who, having a sufficient degree of control over the premises ought to realise that any failure to use care may result in injury to any person coming lawful there: **Wheat v Lacon**.¹ An invitee is any person who enters upon the premises "upon business which concerns the occupier, and upon his invitation, express or implied": **Indermaur v Dames**²
- [31] An unusual danger is described as something that the invitee did not know of or of which they could not be aware. In **Cox v Chan**³ it was pointed out by Sawyer J. that the occupier's duty is "not an absolute duty 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 which he could not have been aware." It is therefore to be assessed objectively as being a danger not usually found in the given circumstances.
- [32] These propositions are uncontroversial. As the owner and operator of a public restaurant, to which the defendant says the claimant was a regular visitor, there can be no doubt that the defendant was an occupier of premises and that the claimant was an invitee to whom he owed a duty of care to ensure that the premises were reasonably safe for purpose. The dispute in this case is really a factual one: was the claimant's fall attributable to a protrusion/obstruction on the floor of the defendant's restaurant?
- [33] For the claim to succeed the burden rests on the claimant to prove (1) that a protrusion/obstruction on the floor of the restaurant at the entrance, caused her to stumble and fall; (2) that the protrusion/obstruction constituted an unusual danger; and (3) that the defendant knew or ought to have known that it was dangerous.

¹ [1966] AC 552

² (1866) LR 1 C.P. 274

³ (1991) Supreme Court, The Bahamas No.755 of 1988 (Unreported)

Analysis

Did a protrusion/obstruction on the floor of the restaurant cause the claimant to fall?

- [34] The claimant's pleaded case was that there was a protruding object/obstruction on the floor of the restaurant that caused her to stumble and fall. In her witness statement, she elaborated on this describing it as "some sort of ditch or drain that was on the floor on the inside of the premises that made the flooring uneven and unleveled." If true, this would have been a conspicuous defect on the restaurant's floor right at the entryway. Leaving aside the implausibility of a restaurant having an aesthetically devaluing feature of a drain or ditch running along its floor at the entrance, a number of features in the evidence of the claimant leads me to doubt this evidence, as discussed below.
- [35] The claimant testified that after her fall she continued to dine with her husband and friends for almost two hours. It was only on her way out did she realise what had caused her to stumble and fall. Even with all the pain she experienced during dinner, she did not bring to the attention of the manager that it was this protrusion or obstruction in the form of a ditch or drain on the floor that had caused her to fall. What is more, even though her husband claims to have realised after she fell that this is what caused her to fall at the time, he too sat through dinner and never drew it to the attention of anyone. When pressed on this, Mrs. Herbert claimed that she had reported it the following day when she returned to the restaurant and told an unidentified lady. She also claimed to have taken a photograph of the floor.
- [36] I have difficulty in accepting this evidence as true for two reasons: none of this is contained in her witness statement; and no such photograph has been exhibited in this case. If the claimant had the presence of mind to return to the restaurant and to take a photograph of the floor, she must have appreciated that this would have been important evidence. I cannot see how she could fail to ensure that it formed part of her case, particularly after she became aware that the defendant was asserting that there was no protrusion or obstruction on the restaurant's floor.
- [37] Mrs. Herbert's credibility suffered further when she initially sought to disclaim knowledge of the public drain that ran in front of the entrance to the restaurant. When confronted with a photograph of it, her memory was jogged. She first said she did not have to step into the drain to enter the

restaurant since she had approached the restaurant from an Easterly direction but later admitted that she had to step on part of the drain to enter the restaurant.

[38] Based on the evidence, I am satisfied that there is a public drain that runs in front of the restaurant and which forms no part of the restaurant. I accept the defendant's evidence that a street light properly illuminated the entrance to the restaurant and the public drain. I find that the claimant did not pay attention to the drain and tripped on it and fell. Based on the evidence relating to the position of the drain relative to the entrance of the restaurant, it is plausible that if the claimant tripped or stumbled on the edge of the drain she was likely to fall in the doorway of the restaurant. This scenario would be consistent with the evidence of the defendant and his witness that the claimant sought to break her fall by trying to hold on to the entry door of the restaurant. I find that the public drain was the cause of her fall and not any protrusion or obstruction on the floor of the defendant's restaurant. The claimant concedes that she did not see what caused her to fall and her evidence has not satisfied me on the balance of probabilities that it was attributable to any defect in the restaurant's floor.

[39] For completeness, I should add that while I find that on entering the restaurant the floor slopes slightly downwards, this is not an unusual danger as, objectively speaking, it is not likely to have caused someone to stumble and fall in the ordinary course of things. Having regard to the defendant's evidence that the entrance was illuminated by two four foot floor lamps and two lights positioned on either side of the entrance, and mindful of the claimant's obligation to exercise reasonable care for her own safety, I conclude that the defendant took reasonable safety precautions to ensure that the area was sufficiently illuminated and these measures would have enabled the claimant to see the slope. However, I do not accept the evidence of Mr. Grant that there was warning signage on yellow tapes at the time of the incident. I believe he is mistaken about the timing of the placement of the signage. I prefer and accept the defendant's evidence that they were placed on the outside on the edge of the drain after the incident as an extra precaution to alert patrons to the presence of the public drain.

[40] The claimant has not adduced any evidence that this very slight slope constituted an unusual danger which the defendant knew or ought to have known was dangerous. In any event, this gentle slope was not pleaded as the cause of the claimant's fall. The pleadings do not attribute the unevenness of the floor to a slope but rather to a protrusion or obstruction like a drain or ditch.

[41] Having failed to establish that the cause of her fall was attributable to anything on the defendant's premises, it follows that the defendant is not liable for her injuries and loss as he was not in breach of his duty of care to her. Accordingly, the claim fails.

[42] The claimant shall pay prescribed costs to the defendant pursuant to CPR 2000.

Trevor M. Ward QC
High Court Judge

By the Court

Registrar