

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

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2013/0241

BETWEEN:

CHERYL MALONE

Claimant

AND

AMS FINANCIAL SERVICES LIMITED

Defendant

Appearances: Ms. Ruthilia Maximea and Ms. Nellien Bute of Maximea and Co., Counsel for the Claimant
Mr. Terrance Neale and Ms. Elizabeth Ryan of McW Todman, Counsel for the Defendant

2018: 24th October
2020: 13th May

JUDGMENT

- [1] **ELLIS J:** An issue in this case is a claim for damages for injuries and loss sustained as a result of an accident which occurred in the Claimant's workplace. The background facts reveal that on 26th August 2011, the Claimant who was employed by the Defendant as a maintenance administrator went into the filing room to retrieve a file. A ladder was kept in the filing room to assist filing clerks in accessing the filing cabinets in the room. While going to unlock one of the filing cabinets to retrieve the file, the Claimant's right foot became entangled in the ladder which was standing at the right of the filing cabinet. The Claimant lost her balance and fell against the handle of the filing cabinet hitting her left shoulder. In addition, the foot of the ladder punctured the top of her right foot. She contends that she suffered injuries and loss as a result of this incident.
- [2] In her amended statement of claim, the Claimant contends that the Defendant was at all material times in breach of its common law duty to provide a safe system of work in that they failed to

provide a safe and functional working environment in the course of her duties. Although the Claimant provided full particulars of the injuries and loss suffered by her, she provided no further particulars of the negligence alleged.

[3] The Defendant took issue with this lack of particulars and further denied that it was negligent in any way. In its amended defence, the Defendant contends that it provided a safe and functional working environment for the Claimant to carry out her duties at all times. The Defendant asserts that the filing room area was fully lit at all times so as to permit the Claimant to easily see any dangers which may occur during the course of carrying out her duties and so avoid the same. They state that a small stepladder was provided to allow employees to access those files which could not easily be reached. When not in use, the ladder could easily be folded and put away so as not to present a danger to anyone using the area. Further, the Defendant contends that the space between the filing cabinets were sufficiently wide to allow the Claimant and other employees sufficient room to manoeuvre without difficulty while carrying out their duties.

[4] Alternatively, the Defendant contends that the Claimant was negligent and contributed to her injuries in that she failed to have sufficient regard to her own safety by failing to notice or avoid falling over the stepladder which was plainly visible in the well-lit filing room. The Claimant failed to take steps to ensure that the stepladder was stored against the wall and out of harm's way and further she failed to keep a proper look out or heed where she was going, so as to avoid falling over the ladder.

[5] The Claimant filed no reply in the matter.

ISSUES FOR DETERMINATION

- [6] The following issues therefore arise for the determination by the Court;
- a. Whether the Defendant breached its common law duty of care to the Claimant to provide a safe system of work?
 - b. Assuming that the Defendant breached its duty of care, did such breach result in the Claimant's injuries, loss and damage?
 - c. Whether the Claimant's acts or omissions contributed to her injuries, loss and damage?

- d. What is the appropriate measure of damages if the Court finds that the Defendant's breach of duty caused or contributed to the Claimant's injuries?

GENERAL LEGAL PRINCIPLES

- [7] In several English decisions the broad outlines of the employer's duties have now become well defined. Singleton L. J. in **Latimer v A. E. C. Ltd.**¹ summed up the position, in the following terms;

"The duty of the employer is to act reasonably towards his men; to take care, in the way that a prudent employer would, to see that his workmen are not exposed to unnecessary risks; and that obligation extends to the building in which they work, to the plant, and in some cases at least it covers the providing of a proper system of work."

- [8] In light of this statement, an employer's duties have been generally classified as including:

- i. The duty to provide a competent staff;
- ii. The duty to provide a reasonably safe place of work;
- iii. The duty to provide reasonably safe plant, machinery, and materials; and
- iv. The duty to provide a reasonably safe system of work.

- [9] In respect of the duty to provide a reasonably safe system of work, this has been said to include *"the physical lay-out of the job; the setting of the stage, so to speak; the sequence in which the work is to be carried out; the provisions in proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job, or it may have to be modified or improved to meet the circumstances which arise."*² An employer must therefore organize a safe system of work for his employees and must ensure as far as possible that the system is adhered to as far as possible.

THE EVIDENCE

- [10] What a reasonable employer would do in order to safeguard the health and bodily integrity of his employees is a question of fact. In this case, the Parties each relied on one witness as it relates to the question of liability. In her witness statement, the Claimant recounts the accident and she denies that her actions contributed to her injuries. At paragraph 15 of her statement she stated

¹ [1952] 1 T. L. R. 1349, 1353

² per Lord Greene M. R. in *Speed v. Thomas Swift & Co., Ltd.* [1943] K. B. 557, 563 - 564

that the area where the files were kept was a narrow passage, with files to the side. While it was not an extremely dark area, it was not a well-lit area. It was a room without windows with just a door to enter. The ladder was in front of a glass area between opened metal filing cabinets with the feet sticking out in the passage. On the left of the ladder were closed filing cabinets with iron winding handles.

[11] When she started working there the Claimant states that she saw the ladder there. The ladder was a part of the filing room. It was never closed and in fact files were often stored on the ladder itself. It was provided by the Defendant and placed in the filing room in order to assist shorter persons in accessing files. She stated that she had nothing to do with the placement of the ladder and she was not aware that the Defendant took any steps to ensure that the ladder was folded or closed or stored against the wall. She reiterated that her foot got caught in the ladder because it was protruding in the passage and the passage was a narrow one. The Defendant however, was well aware that the area was a very narrow one which could not accommodate two persons passing side by side and were it not for its placement; she avers that her foot would never have become caught and she would not have been injured.

[12] When she was cross examined, the Claimant stated that she began working with the Defendant in 2008. The accident occurred in August 2011. She agreed that the ladder would have been in the filing room for a considerable period while she was employed there and so its presence on 26th August 2011 would not have been a surprise to her. As she was taller, she made no use of it but it was routinely used by the other employees who would also go into the filing room to retrieve files on a daily basis. However, none of the other employees had ever slipped and fallen on the ladder. She further stated that before the accident occurred, she was not aware that the ladder posed a danger but when she tripped on it, it was sticking out between the filing cabinets.

[13] In describing the lighting in the filing room on the day of the accident, she noted that it was not dark but it was also not brightly lit. The Claimant was then shown photographs of the filing room and she was somewhat critical indicating that only some scenes depicted in the photographs were familiar to her. She agreed that the room was well lit and that she could readily see the ladder in the photographs. However, when she was reexamined, the Claimant explained that the photographs do not accurately represent or depict the room as at the date of the incident. She

noted that on the date of the incident, the ladder was not in the same position as it appears in the photographs.

- [14] At a critical point in her cross examination, the Claimant made two important statements which would carry much weight. When she was asked to describe the room. She stated that it had a straight corridor that was well lit, and so she could readily see the ladder. And later she reiterated that when the four filing clerks would enter the room, they would know the situation in the room and none of them have ever fallen as a result of the ladder.
- [15] The Defendant's sole witness was Ms. Fay Roberts, the compliance manager who only took up employment with the Defendant in March 2012 some 7 months after the Claimant sustained her injuries. As a result she did not have first-hand knowledge of the circumstances surrounding the incident or the conditions of work which existed prior to her joining the Defendant. Instead, she relied on the written records which were maintained by the Defendant.
- [16] In her witness statement, Ms. Roberts described the filing room as a rectangular room approximately 19 feet 8 inches long with a walking access corridor approximately 1 foot 10 inches wide with files stacked in open shelves approximately 4 foot 7 inches on one side and a glass partition on the other side. She also stated that the floor is laid with ceramic tiles and the area very brightly lit with several fluorescent bulbs so that someone entering the filing room would have a clear view of any obstacles in their path.
- [17] According to Ms. Roberts, at the time a folding step ladder was kept in the filing room between the cabinets to permit access to files which were not easily within reach. The step ladder was 4 foot 7 inches high and 1 foot 6 inches wide from the bottom and contained two rungs for climbing. It could be folded and placed between the filing cabinets.
- [18] Ms. Roberts noted that prior to the accident, the Claimant had been retrieving files from the filing room for approximately 18 months on average 3 – 5 times per day and as such was very familiar with the area. The Defendant's records indicated that the Claimant lodged a formal accident report on 30th August 2011 in which she alleged:

"I tripped on the leg of the ladder by the glass window. Loss (sic) my balance and hit my left shoulder on the handle of the shelf (sic) file"

She further stated:

"Received cut on top of my right foot swelling occurred immediately turned blue in colour. Also I received damage to my left shoulder from the handle of the file shelves....As a result of the above my shoulder was thrown out of place (sic)".

- [19] When she was cross examined, Ms. Roberts reiterated that she had no personal knowledge of the details of the accident in 2011. Instead, she relied only on what she read when she assumed duties as compliance manager in 2012 and what she had been told by a third party who was not called as a witness by the Defendant. She made it clear that she was unfamiliar with the layout of the filing room in 2011 as she was not employed there at that time. Notwithstanding this, Ms. Roberts stated that the room would have basically been the same as when she went there in 2012 and it was well lit. She agreed that the records of the incident which she reviewed did not indicate that the room was well lit. However, during reexamination, when Counsel for the Defendant suggested that as it was necessary for employees to clearly read the labels on the files in the filing room so as to be able to retrieve the correct file, the room would indeed have been well lit, Ms. Roberts agreed it would not have been possible for a clerk to read the labels if the room was dark.
- [20] Ms. Roberts clarified that there were no photographs taken of the room in 2011 following the incident. However, she was also shown a recent photograph taken of the filing room. She identified the ladder in the photograph and she agreed that its positioning presented a potential hazard. She also agreed that as a regular user of the filing room, the Claimant would know that it was equipped with a ladder. She indicated that she would expect that a person who is accustomed to using the room would be aware of its contents. When it was put to her that there was a higher duty of care placed on an employer who was aware that the employee would be busy conducting the business of the employer to take steps to protect its workers her response was equivocal. She agreed that there may well have been some sort of guidelines or procedures which may not have been followed but she could not be certain.
- [21] Ms. Roberts also testified that there were no safety signs in the room. She further stated that she would expect that there would be some policy in place regarding the storage of the ladder used in the filing room but to the best of her recollection and after perusing the documents available, she saw no leaflets, brochures on how to store the ladders or other working tools in the filing room.

She could not recall seeing any documents which ensured that the employees were made to adhere to the policies and procedures. Nevertheless she disagreed that there was a safe system of work in the filing room. She also could not speak to what training on safety measures were in place at the time. She did however recall seeing a handbook on general health and safety responsibilities of the employer and employees but it did not specifically address the safety and operations of the filing room.

- [22] When she was reexamined, Ms. Roberts indicated that if there was an issue with the safety procedures in the filing room she would have expected that matter to be brought to the attention of a manager. She stated that there are no records of complaints in respect of the procedures in the filing room. When she was asked whether in the circumstances, a compliance manual would have been appropriate, she responded that she did not know but she was sure that a simple procedure would have been acceptable.

ANALYSIS AND CONCLUSION

Did the Defendant breach its common law duty of care to the Claimant by failing to provide a safe system of work?

- [23] Counsel for the Claimant submitted that the evidence in this case clearly reveals that the positioning of the ladder created a potential hazard and that the Defendant breached its duty to the Claimant. She submitted that despite the fact that the Defendant was aware that there were four (4) filing clerks whose duties demanded constant access to the files in the filing room, the Defendant failed to ensure that the filing room was safe. It failed to implement safety rules or measures by way of leaflets, brochures or notices about how the ladders should be used and stored. Counsel referred to section 7 of the Defendant's handbook which addresses health and safety guidelines and she noted that it did not reference the ladder which was used by the filing clerks in the filing room. She further submitted that even if such rules were in place, the Defendant's liability would not be displaced because they are still mandated to make allowances for the imperfections of human nature.

- [24] Counsel concluded that had the Defendant put more effort into protecting its employees and ensuring that safety rules and measures were implemented, then the ladder would have been stored away properly and the accident may not have happened at all.
- [25] As regards the question of contributory negligence, Counsel for the Claimant conceded that the evidence revealed that the Claimant must bear some but not all of the responsibility for the accident and the injuries suffered. Counsel referred to the Claimant's evidence under cross examination where she conceded that upon entering the room there was a straight passage, the room was lit so that the Claimant could have seen where she was going. In light of this evidence Counsel submitted that the Claimant partly but not fully bears some responsibility for the accident.
- [26] Counsel for the Claimant relied on the judgments in **Elizabeth McLachlan v Early Learning Centre**³ and **Neil v East Ayrshire Council**⁴ in which the claimants had some form of training with regard to the handling and usage of ladders. She contrasted these cases with the case at bar where the Claimant was never exposed to any form of training; neither was there any notices posted in the filing room identifying safety measures. Counsel concluded that in this case, the momentary inattention of the Claimant means that liability should be apportioned on the basis of 20% to the Claimant and 80% to the Defendant.
- [27] The Defendant however, trenchantly denied that it bears any liability in the circumstances of this case. Counsel for the Defendant submitted that the ladder was functional and was stored between the filing cabinets in a brightly lit area with which the Claimant was very familiar. Importantly, it was in plain view of anyone entering the filing room. He further noted that in approximately 3 years, the Defendant received no complaints about the ladder and no accidents were reported either by the Claimant or any other employee. The fact that the Claimant tripped on the ladder once would not make the Defendant negligent rather the more plausible explanation is that the Claimant was negligent and failed to take sufficient care to avoid injuring herself.
- [28] Alternatively, Counsel submitted that the evidence revealed that the Claimant was mostly to blame for the accident as she failed to keep a proper lookout or avoid her foot coming into contact with the step ladder although being very much aware that it was there. In the circumstances, Counsel

³ [2011] CSOH 25

⁴ [2005] CSOH 13

submitted that in the event that the Court finds the Defendant to be liable at common law, then the Claimant is at least 70 – 80 % to blame for the accident and any damages awarded should correspondingly be reduced.

[29] However, Counsel for the Defendant then submitted that it can hardly be regarded as negligence if an employer puts a step ladder in a filing room to facilitate shorter employees accessing files and while that ladder is tucked away in the limited space available for its storage, in plain sight, of any employee entering the room an employee who is very much aware of the ladder stumbles against it and falls despite having seen it upon entering the room.

[30] The test of an employer's liability in common law negligence is settled. In **Stokes v GKN (Bolts and Nuts) Ltd**,⁵ Swanwick J described the position as follows:

“From these authorities I deduce the principles, that the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. 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 of a reasonable and prudent employer in these respects, he is negligent.”

[31] This statement has been adapted and developed in another well-known judgment in **Thompson v Smith's Shiprepairers (North Shields) Ltd**⁶ where Mustill J said:

“I shall direct myself in accordance with this succinct and helpful statement of the law, and will make only one additional comment. In the passage just cited, Swanwick J drew a distinction between a recognised practice followed without mishap, and one which in the light of common sense or increased knowledge is clearly bad. The distinction is indeed valid and sufficient for many cases.”

⁵ [1968] 1 WLR 1776 at 1783; applied in *Baker v Quantum Clothing Group Ltd and other companies* - [2011] 4 ALL ER 223

⁶ [1984] 1 ALL ER 881 at 889, [1984] QB 405 at pages 415 – 416

[32] Neither side in the case at bar referred the Court to any authority in which a court would have considered an employer's common law duty in the context where an employee would have sustained injury and loss as a result of an obstruction of the workspace floor. In the two cases referenced by Counsel for the Claimant, the facts disclosed that the claimants fell when actually using the ladder. Moreover, in both cases the court's finding of liability was predicated on a breach of statutory duty.

[33] In **Elizabeth McLachlan v Early Learning Centre Ltd**, the claimant fell from a ladder while attempting to retrieve a box from a high shelf in the stockroom of the premises. The defendants admitted liability to make reparation to the claimant in respect of their breach of regulation 6(2) of the Work at Height Regulations 2005. The substantive issues before the court were, firstly, whether the pursuer was contributorily negligent and, if so, to what extent; and, secondly, quantification of damages. In **Neil v East Ayrshire Council**, the claimant suffered injuries when he fell descending from a loft space in an upper storey flat. The claimant alleged that the accident was caused by the fault of the defendants at common law and their breach of statutory duties imposed by Regulations 4 (suitability of work equipment), 8 (information and instructions) and 9 (training) of the Provision and Use of Work Equipment Regulations 1998. The claimant also alleged breaches of the defendant's common law duty (failure to provide a safe system of work, a safe means of access and suitable and safe equipment to carry out the work on which the claimant was employed). The court's ratio demonstrates that this case has little relevance to the case at bar. At paragraph 22 the court held:

“... in my opinion the pursuer has established that his accident was caused by a breach of regulation 4(3) of the 1998 Regulations. That the pursuer used the 5 feet 6 inches step-ladder to get access to and take egress from a hatch in a ceiling situated 9 feet above floor level had the result that the defenders failed to ensure that work equipment was used only for operations for which, and under conditions for which, it was suitable. Mr. Marnie sought to persuade me that there could have been no breach of regulation 4(3) because it was not reasonably foreseeable that the pursuer would use this step-ladder for this task. I was not persuaded. I would have thought that when a workman is provided with a 5 feet 6 inches step-ladder and only such a step-ladder, it is reasonably foreseeable that he might use it to get access to a point which is somewhat above its safe reach (even where the workman has the option of requesting a longer ladder) but even if I am wrong about that, it does not appear to me to matter.”

[34] The basis for proving liability for breach of the common law duty is different from that required where a breach of statutory duty is alleged. Indeed at page 658 of the judgment in **Latimer v**

A.E.C. Ltd.,⁷ the distinction was emphasized by Lord Tucker who expressed concern lest the employer's common law duty be so enlarged that it becomes indistinguishable from a duty created by statute.

"I only venture to add a few observations out of respect for the careful judgment of Pilcher J., and because it appears to me desirable in these days, when there are in existence so many statutes and statutory regulations imposing absolute obligations upon employers, that the courts should be vigilant to see that the common law duty owed by a master to his servants should not be gradually enlarged until it is barely distinguishable from his absolute statutory obligations."

[35] The distinction is summarized in the following excerpt from the judgment of Ralph Gibson LJ in **McGovern v British Steel Corporation**⁸

"At common law the question whether the defendant was negligent in doing what he did or in failing to do what it is alleged he ought to have done is to be decided by reference to whether a reasonable man, being under a duty of care, would have foreseen the risk of injury to the plaintiff from the action or inaction alleged. Where the statute imposes an absolute obligation to do, or not to do, the relevant act, then the question whether the defendant should reasonably have foreseen the risk of injury is, in my opinion, precluded both as to the existence of the duty and as to remoteness. The question of foreseeability may, however, be relevant to proof of breach if the terms of the statute or regulation so provide: thus the question whether a part of machinery is dangerous for the purposes of s.14 of the Factories Act 1937 (1961) is to be decided by foreseeability or risk of injury: see **Close v Steel Company of Wales Ltd** (1962) AC 367; **F E Callow (Engineers) Ltd v Johnson** (1971) AC 335."

[36] Thankfully, English case law is replete with more relevant judicial authorities. The consistent thread throughout these cases is the court's consideration of both the common law and statutory duty of the defendant employer. In most of these cases the courts quickly dismissed that part of the claim which alleged common law negligence and then went on to dispose of the claim on the basis of the alleged breach of the statutory duty.

[37] In **Pengelly v Bell Punch Co. Ltd**⁹ a workman, while lifting a reel down from a rack, put his foot between two of the reels on the floor and twisted his knee when turning. His case is that the defendants were negligent at common law in that they failed to provide a safe system of work in allowing these webs to be on the floor, and he also alleged breaches of the Factories Act in that the webs on the floor constituted an obstruction to the gangway or passage-way or to the floor.

⁷ [1953] A.C. 644

⁸ [1986] IRLR 411

⁹ [1964] 1 WLR 1055

The claimant contended that he did not have a safe means of access to the rack, and also that, in so far as the rack from which he was taking this web was a place of work, he did not have a safe place of work.

[38] At page 614 of the judgment, Davies LJ sets out his reasons for dismissing the common law claim:

“This practice of having the large webs on the floor had been going on for many years, and the plaintiff and his work-mates knew all about it. It had been going on without any mishap, and there was really no evidence worth the name before me to show that the plaintiff or any of his work-mates had the least idea that any mishap might occur, or that the defendants really had any reasonable ground for foreseeing or apprehending that any mishap might occur. One of the plaintiff's witnesses told me that the job could be done perfectly safely, and Mr. Birdsey, the defendants' foreman, was obviously of the same opinion, and pointed out not only that these webs could be taken down from the racks easily and safely despite the presence of the webs on the floor, but also that the men who had to put the webs on the rack in the first place were able to do that without any difficulty at all. [His Lordship referred to some evidence of a former complaint, which he rejected, and continued:]

This history of years of operation of this system without any complaint—the plaintiff does not suggest that he made one to his union or shop steward or anyone of that sort—and without any mishap puts completely out of court any common law negligence in this case. Counsel for the plaintiff, of course, was keeping that point alive; but I could not help observing that when I indicated in the course of counsel for the defendants' final address to the court that I was not very impressed with the allegation of common law negligence, counsel for the plaintiff, with some discretion, did not really press that point very hard.” Emphasis mine

[39] Davies LJ then went on to deal with the alternative basis upon which the claim was brought. He held that the employers were in breach of s 28(1) of the Factories Act 1961, because the place where the large reels were stored was a part of the “floor” of the factory within s 28(1), for it was where a workman might be expected to walk in the course of his duties to get the small reels down from the rack, and the large reels were an obstruction within s 28(1) notwithstanding that they had customarily been stored there over a period of years. That finding was later overturned by the English Court of Appeal in **Pengelly v Bell Punch Co Ltd**¹⁰ where the court held that the employers were not in breach of duty under s 28(1) as the big reels, being stored on the floor which was used as storage space, were not an obstruction within s 28(1) of the Factories Act, 1961, because the reels were properly there and were not a source of risk to persons ordinarily using the

¹⁰ [1964] 2 ALL ER 945

place. Importantly, other than recounting the first instance decision on common law liability, the appellate court said nothing to disturb the judge's finding in that regard.

[40] In **Marshall v Ericsson Telephone Ltd.**¹¹ a trolley pulled along by a tow-bar, and bringing material to the lathes, was left, without any unreasonable delay and in the course of the normal work of the factory, partially in one of the passageways of the factory. On the trolley were long metal bars hanging down to some extent over the tow-bar, and probably concealing some portion of it as it lay on the ground. The claimant, who was employed by the defendants as an auto-tool setter and had been working in the factory for many years, left the lathes at which he was working and crossed the way to speak to a fellow employee at the trolley; he fell down either by catching his foot underneath the tow-bar or slipping on it and broke his ankle. In an action by the claimant against his employers, the court held that no breach of the common law duty of master towards his servant had been established and there was no breach of statutory duty under Factories Act 1961 (c 34) s 28(1) because the trolley being where it was an ordinary use of the factory floor in the normal course of work without there having been unreasonable delay. The Court felt that such circumstances were not within the mischief of s 28(1) and the trolley was properly where it was.

[41] The English Court of Appeal in that case reviewed the first instance judgment of Phillimore J in which he gave judgment for the claimant on his claim for breach of statutory duty under s 25(1) of the Factories Act, 1937, but part of the claim which alleged that the defendants were not liable at common law. At page 614 of the judgment, the Court of Appeal dealt with the learned judge's reasoning on common law liability:

"The learned judge went further than applying that section and finding in favour of the plaintiff on the ground of obstruction, because he said that, at common law, this amounted to a trap. At one stage he said that the whole trolley in its position amounted to a trap; but on the whole perhaps he was intending to say that the somewhat concealed tow-bar, which protruded towards the front, ought to be regarded as a trap, so as to give rise to liability for breach of duty as between master and servant at common law. With great respect to the learned judge, I find that quite untenable. **This vehicle, with its structure, its design, and its load, was something well-known to the plaintiff, and nothing could have been more obvious to him as he came to cross the gangway. It was straight in front of him. It was not small. It was of sufficient size to be seen; and in that respect there has been brought home no sort of liability against the employers at common law.**"¹² Emphasis mine

¹¹ [1964] 3 ALL ER 609.

¹² Per Seller LJ at page 614.

[42] Later in the judgment, Harman LJ agreed with that conclusion, observing:

“On the common law point I entirely agree with what Sellers LJ has just said. I **think that it is quite wrong to say that the front of the trolley, where the tow-bar was, was a trap. The plaintiff after all was walking towards the trolley. He was familiar with these things; he knew there was a tow-bar at one end and not at the other; he said that he knew which the front end was, and he knew that the tow-bar was there.** To call it a trap seems to me, with all respect to the judge, to be altogether untenable.” Emphasis mine

[43] Interestingly, by a majority, the court also found that there was no breach of statutory duty under s 28(1) a of the Factories Act, 1961, because (per Sellers LJ), the trolley being where it was, was an ordinary use of the factory floor in the normal course of work without there having been unreasonable delay, and in such circumstances was not within the mischief of that section. The critical part of the court’s ratio is set out below:

“The trolley had to be placed somewhere in the course of the work. I cannot see that it was in any way an infringement of that section that it was placed where it was. In one sense I can see that it was an obstruction of that particular area; but, looking at the whole section and its purport and intention, it was not an obstruction which was an unnecessary one; it was not one which was in any way unreasonable. In fact, in the circumstances, it was reasonable to have it there. Indeed, I think that it was essential to have it there in the ordinary course of business and not reasonably practical to have it otherwise than in a gangway.”

[44] In **Betts v British Leyland (UK) Ltd**¹³ the claimant was on the night shift when he decided to get to the position he wanted to look at the side of the engine. He decided to get there by stepping over the box containing the two silver objects, which were in fact metal rocker covers. The claimant ought to have stepped, and ought to have been able to step over the rocker cover which was no longer in the box but was on the ground beyond the box. The plaintiff stepped over the box but he accidentally stepped on the rocker cover and fell. The claimant contended that he did not see the cover because he was watching various other things, including the engine about 2 ft. beyond the box. In his evidence, the claimant frankly admitted that there was no restriction on his ability to see the boxes as he approached. The factory was very well lit and the rocker cover was a bright silvery piece of metal. Nevertheless, the claimant alleged that this rocker cover was an obstruction, as were the boxes. At first instance, the court considered whether there was a breach of statutory duty as well as a breach of the defendant’s duty at common law.

¹³ [1981] Lexis Citation 694

[45] The judge at first instance concluded:

"In my judgment, it cannot be said that the boxes were things which either had no business to be there or ought not reasonably to have been there. Accordingly, in my judgment, the boxes did not constitute an obstruction. By causing or permitting them to be on the floor the defendants were not in breach of their duty to the plaintiff either under the Act or at common law. The plaintiff's fall was caused by his own carelessness."

[46] On appeal, the learned judges of the Court of Appeal did not consider that the system of work in that case was improper. The Court found that it created no more than minimal risk to the men and it could not be said that these potential obstructions had no business to be there or ought not reasonably to have been there. The Court also considered the speeches of their Lordships in the case of **Jenkins v Allied Ironfounders Ltd.**¹⁴, and in particular the speech of Lord Reid, in which he noted that the word 'obstruction' was "*clearly not [] intended to include easily visible objects properly put on the floor in the course of a proper system of work.*"

[47] In **Jenkins v Allied Ironfounders Ltd.**¹⁵ the claimant alleged that he tripped on an obstruction concealed in the sand which covered the foundry floor and that it was reasonably practicable for the defendants to have kept the floor free of obstruction by two particular expedients which he set out in his pleadings. The claimant's claim was based on two grounds, breach of statutory duty under section 28 (1) of the Factories Act, 1961, and common law negligence. The defendants denied negligence at common law and pleaded contributory negligence against the claimant/pursuer. The common law case disappeared at an early stage and was not argued before the appellate court but Lord Reid's discussion of the definition of "obstruction" in the statutory context is instructive.

[48] In direct contrast to the previous line of cases is **Robinson v Midland Bank Plc.**¹⁶ In that case, the claimant, a senior tax technician was injured when retrieving some files from a cabinet. She tripped or stumbled over a library kick stool that had been moved into the aisle leading to the cabinet by another employee. The kick stool had not been in the aisle when the claimant first went to the filing cabinet. When she passed by, the other employee was kneeling on the ground in a side aisle and had some papers resting on the kick stool. That other employee moved the kick stool into the aisle while the claimant was collecting her papers from the filing cabinet. The

¹⁴ [1969] 3 ALL ER 1609

¹⁵ 1970 SC (HL) 37, 41 per Lord Reid

¹⁶ [2000] ALL ER (D) 1560

claimant brought an action against the bank for breach of statutory duty and common law negligence. The claimant argued that the kick stool in the aisle constituted a breach of section 12(3) of the Workplace (Health, Safety and Welfare) Regulations 1992, which provided “So far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall”.

[49] The first instance judge held that that the aisle was a traffic route for the purposes of r 12(3), but held further that there had been no breach of statutory duty, as it was not reasonably practicable always to have the kick stool away from the aisle, and the true cause of the accident was that the claimant failed to look where she was going. The claimant appealed.

[50] In allowing the appeal, the Court of Appeal held that on the facts, it was clear that the cause of the accident was another employee (Karen Bond) moving the kick stool from where the claimant had seen it earlier. No doubt the Court reasoned that if there had been a reason for the kick stool being there, the other employee should at least have told the claimant that it was there. Simon Brown LJ explained the critical distinguishing feature which informed the findings on liability in paragraph 12 of the judgment:

“That, I have to say, is the way the case strikes me too. The essential flaw in the judge's reasoning with regard to primary liability appears at the end of the passage I have already quoted from his judgment: his suggestion, twice repeated, that the claimant knew that the Dalek was there. That, of course, is just what she did not know. Certainly she knew that the Dalek was in the general vicinity. She had seen it just previously in the adjacent aisle. But what, critically, she did not know is that, in the short space of time since she had seen it there, Karen Bond had moved it; and moved it, moreover, not back to its usual resting place, but instead directly into this narrow walkway. In my judgment, it is impossible in those circumstances to say that it was not reasonably practicable to have kept the floor at that point free from the obstruction of the Dalek.

Furthermore, it seems clear to me that if by any chance there was some good and sufficient reason for the Dalek to have been put where it was, then Karen Bond should at the very least have told the appellant that it was there.”

[51] At common law an employer is under a duty 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. The duty may vary with the employee's particular circumstances which are known, or ought reasonably to be known to the employer. An employer's duty 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 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.

[52] Following the trial of the matter, the Parties' evidence and their legal submissions reveal that there is significant common ground between them. The uncontroverted evidence before the Court is that there were no previous complaints made in regard to safety in the filing room. Neither had there been any accidents reported in the filing room which would have given rise to any concerns that the presence of the ladder, or the way it was stored posed a risk to the safety of its employees. The practice of keeping the ladder in the filing room had been going on for many years and the claimant and her fellow employees knew all about it. It had been going on without mishap and there was really no evidence to show that the Claimant or the other employees had the least idea that any mishap could occur. The job of retrieving files in that room could have been done perfectly safely and clearly had been done safely in the past.

[53] It is also agreed that the Claimant was at the time a relatively long term employee who regularly utilized the filing room and would therefore be aware of its dimensions and layout. She would also have been aware that when not in use, the ladder was kept in the filing room to be used by employees who could not otherwise reach the top cabinets. As it stands, there does not appear to be any genuine dispute as to the dimensions of the filing room and the ladder or the width of the passage or indeed the manner in which the accident occurred. When the Court reconciles the conflicting evidence between the Parties, the Court is satisfied that the filing room would have been sufficiently lit to enable any employee, including the Claimant, to see the ladder upon entering the room.

[54] On the day of her accident, the Claimant went into the filing room to collect a file. To that end, she had to pass down the passageway. The ladder was located on the right of the filing cabinet from which the Claimant was seeking to retrieve the file and the Court has no doubt that she would have been aware of its presence there. Indeed, her evidence makes that plain. The Claimant's written evidence is that *"I was passing the area of the ladder to retrieve a file and my foot got caught in the ladder. My foot got caught in the ladder because it was protruding in the passage and the passage*

was a narrow one." Her oral evidence is unequivocal and makes the position even clearer. She accepted that it was a straight corridor and she accepted that she could readily see the ladder.

[55] In light of the above the Court finds it impossible to say that any reasonable employer, applying his mind to the work that the Claimant had to do, should have foreseen that in attempting to retrieve a file from the filing room she would have been exposing herself to any unnecessary risk of injury. First of all, as she conceded in cross-examination, she could readily see the ladder on approach. Given the dimensions and purpose of the ladder it seems to the Court that there would have been no real difficulty in moving the same in order to freely access the file in the filing cabinet. Secondly even if moving the ladder was not possible, in the Court's judgment, any sensible employer would have foreseen that the Claimant would have been able to manouvre herself in a way which would not expose her to any real risk of danger, or alternatively, if she was in any way hesitant about that ability, that she would and should have gone to get help which no doubt would have been readily available. In the Court's judgment the Claimant was in no way constrained from so doing by the system of work that was being operated in the filing room.¹⁷

[56] The Court therefore finds that this accident occurred because the Claimant accessed the filing cabinet in the vicinity of the ladder which was routinely located in the filing room and clearly served a purpose there. It is not that case that she failed to see the ladder, rather she failed to pay sufficient attention to where she was going, in the sense of keeping her eyes on the floor where she was stepping so that she could avoid the ladder. There was no evidence that she was distracted, she tripped on the ladder simply because she was not looking down at the time and failed to take sufficient care to avoid injuring herself.

[57] Moreover, the history of years of operation of this system without any complaint by the claimant or otherwise, or mishap negates any finding of common law negligence in this case.

[58] What, therefore, is the effect of these findings upon the liability, if any, of the defendant, as employer to the Claimant? At common law the employer's duty is a duty of care and the burden of proving negligence rests with the claimant employee throughout the case. If he alleges a failure to provide a reasonably safe system of work, a claimant will generally be obliged to plead and

¹⁷ Clarkson v Breco Furniture Products [1984] Lexis Citation 1526 QBD

therefore prove what the proper system was and in what relevant respects it was not observed.¹⁸ Merely to prove the circumstances of the accident will usually not be enough. The Court must consider the actual pleadings advanced by the Claimant in this case. The Claimant's allegation on this issue is set out in paragraph 6.2 of the Amended Statement of Claim where he specifically contended that the Defendant was in "breach of the common law duty to provide a safe system of work by failure to provide a safe and functional working environment in the course of the employee's duties." The Claimant has not particularized any specific acts of negligence in her Amended Statement of Claim and accordingly this pleading does not meet the requirements of CPR Part 8.7 which imposes a duty on a claimant to set out a statement of all the facts on which the claimant relies. CPR Part 8.7A proscribes the claimant from relying on any allegation or factual argument which is not set out in the claim but which could have been set out there unless the court gives permission to do so. This highlights the importance of carefully constructed and thorough drafting of pleadings.

[59] In the case at bar, the Claimant chose to particularize her negligence claim in her written evidence in which she seemed to indicate that the Defendant failed to take steps to ensure that the ladder was folded away or closed or stored against the wall¹⁹. Further, it was only in legal submissions before this Court that the Claimant argued that the Defendant's failure to have manuals, leaflets and brochures dealing with safety measures concerning the use of the ladder was a breach of its common law duty. These submissions followed detailed questioning of the Defendant's sole witness in which Counsel for the Claimant sought to solicit evidence which really ought to have formed part of its primary case on liability. Certainly, where the mode of operation is complicated or highly dangerous or prolonged or where it is of a complicated or unusual character, a system of work should be prescribed which would involve the preparation of operating manuals and safety brochures or leaflets. However where the operation is simple and the decision as to how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the workman on the spot.²⁰

¹⁸ *Colfar v Coggins & Griffiths (Liverpool)* [1945] A.C. 197 at 203 Viscount Simon L.C; and see *Dixon v Cementation Co.* [1960] 1 WLR 746

¹⁹ see paragraphs 13 – 16 of the claimant's witness statement

²⁰ per Lord Oaksey in *Winter v Cardiff RDC* [1950] 1 ALL ER 819 at page 823

[60] Ultimately, much will depend on the particular circumstances of each case. In the Court's judgment a prudent employer inspecting the state of affairs in the passageway, in the knowledge that from time to time employees would wish to come into that filing room in order to remove and replace various items therefrom, would in my view not foresee an unnecessary risk of injury by virtue of the presence of the ladder which was known to be habitually in that room and which was clearly visible.

[61] In the event that the Court is wrong on the issue of primary liability, it is clear to the Court that the Claimant would in any event have been partially responsible in law for her accident in not keeping a proper look out for where she was going when it was clear that she was aware of the presence and location of the ladder.

[62] On the facts of this case the Defendant would have met its burden to prove contributory negligence, a fact which was apparently conceded by Counsel for the Claimant in her closing submissions. Had the Court found the Defendant liable, the Court would have found the claimant to be at least 2/3 contributory negligent.²¹ However, for the reasons indicated, although the Court has the greatest sympathy for the Claimant in what must have been an unpleasant and painful injury, the Court is unable to find that her employer was in breach of its common law duty, owed to her and in the circumstances the Claimant's claim must fail and must be dismissed.

[63] Accordingly, the Court's Order is as follows:

- i. **Judgment is entered for the Defendant.**
- ii. **The Claimant's Claim is dismissed.**
- ii. **The Defendant will have its costs assessed on a prescribed basis.**

[64] Finally, the Court conveys its sincere regrets for the delay in rendering the judgment in this matter which was inordinate and must thank Counsel and the Parties for their patience.

Vicki Ann Ellis
High Court Judge

By the Court

Registrar

²¹ Shackleton v M-I Drilling Fluids UK Ltd. 2016 Scot (d) 11/6; [2016] CSOH 82