

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2015/0594

RUTHLYN THOMAS

Claimant

and

JUMBY BAY RESORT LTD.

Defendant

Appearances:

Mr. Dane Hamilton Jr and Ms. Judith Dublin, Counsel for the Claimant
Mr. Justin L. Simon QC and Mrs. Nelleen Rogers-Murdoch, Counsel for the Defendant

2020: March 16th
April 28th

JUDGMENT

- [1] **KELSICK, J [Ag.]**: The Defendant is the owner and operator of a hotel property on Jumby Bay Island known as "Jumby Bay Resort". There are three restaurants on the property, one of which is known as "The Veranda" ("Restaurant"). On 29th January 2014, the Claimant was an employee of the Defendant, working as a waitress at the Restaurant.
- [2] Whilst at work on that date, the Claimant went to the bathroom. In her statement of claim, the Claimant avers that as she "was standing in one of the stalls situated in the said restroom, she slipped upon water or some other wet, moist or slippery substance upon the floor, lost her balance and fell" as a result of which she suffered injuries.
- [3] The Claimant asserts that the Defendant was negligent and gave the following particulars:

- (i) failure to give the Claimant any or any adequate or effective warning of the presence of water or some other wet, moist or slippery substance upon the floor;
- (ii) permitting the Claimant to use the bathroom facilities when they knew or ought to have known that it was unsafe and dangerous for her to do so;
- (iii) failure to direct the Claimant to make use of an alternative restroom facility;
- (iv) failure to keep the Claimant away from the area by putting a barrier at the entrance to the area or by some other means;
- (v) failure to give the Claimant any or any adequate warning that the floor was wet and unsafe¹;
- (vi) causing or permitting the floor to become or to remain a danger and a trap to persons lawfully using the same;
- (vii) failure to institute or enforce any adequate system for the inspection and cleaning of the floor;
- (viii) failure in all the circumstances to take reasonable care for the Claimant's safety.

The Evidence

- [4] In her Witness Statement, the Claimant stated, in relation to the circumstances leading to her fall:

"5. On Sunday 29th June, 2014 while dressing after using the bathroom, I slipped on some water on the floor of the stall of the bathroom. Both of my legs went in opposite directions and I hit the right side of my head on the wall and my left hip also. I called out to Virginia and Alex, my co-workers, for help but they didn't hear me. Then I blacked out.

6. I remember Mario, another co-worker, shaking me and I regained consciousness. He then tried to lift me up but his attempt failed. He said I was too heavy. He placed me back in the same position and went for help. I blacked out again.

7. I remember one of the security officers touching my leg and shaking me as I regained consciousness. I opened my eyes. He told me to hold

¹ It will be noted that this duplicates the allegation set out in paragraph [3](i)

his hand to help pull myself up. I could not so he lifted me and held me around the waist and helped me to the ambulance...”

[5] It was common ground that at the time of the accident the Claimant was significantly overweight. Whether she can be characterised as then being obese it is not necessary for me to decide.

[6] Some further information was elicited in cross-examination of Ms. Thomas by Mr. Simon QC:

- (i) When she entered the cubicle, the Claimant said she was not looking for water because it was supposed to have been cleaned every morning. She also did not look for water when she sat on the toilet.
- (ii) The Claimant pulled down her trousers and underwear and used the toilet;
- (iii) After she was finished, she stood up and after she was finished pulling up her underwear and trousers she slipped on the water and fell. At no time did she remove her shoes.
- (iv) After she fell, she felt a wet area on her trousers in the area of her right buttocks.
- (v) The Claimant was asked on what basis she said that she slipped on water. She said she decided that there had to be something on the floor that made her fall and then she felt water on her right buttocks.
- (vi) It is therefore clear that the Claimant inferred that there was water on the floor because of the dampness on her trousers. She gave no evidence that she at any time observed water on the floor of the toilet.
- (vii) It was put to Ms. Thomas that in the process of falling her right hand entered the toilet bowl causing water to splash and this water was the source of the dampness on her trousers. She responded that she did not remember her hand going into the toilet bowl and that the incident occurred a long time ago and she did not recall every detail.
- (viii) It was put to her that when other persons entered the cubicle after she fell, no one saw water on the floor but did see some water on her clothing. The Claimant disagreed.
- (ix) It was put to the Claimant that she fell as a result of losing her balance and not because of slipping on water, to which she disagreed.

[7] This was the entirety of the Claimant's evidence on the issue of liability.

[8] The Defendant's evidence on liability follows.

[9] Mr. Jimmy Abraham, an employee of the Defendant at the time of the incident (and of the trial as well) said in his Witness Statement that:

- (i) At the time of the incident he was the manager of the Restaurant;
- (ii) The Defendant has, and had then, guidelines and policies for workplace safety, a copy of which was exhibited;
- (iii) Employees are informed of all safety rules for their departments and are expected to follow them. It is an established policy that staff members are to immediately report any accident or unsafe condition;
- (iv) On the day of the incident, he arrived at work at around 10am and saw a staff member alerting another. On making inquiries he was informed that the Claimant had fallen in the staff bathroom at which point he went to the scene to assess the situation;
- (v) He entered the bathroom and noticed the Claimant sitting on the floor of the cubicle with her back slumped against the wall, with her left arm on the toilet bowl and her head on the toilet paper roll. He demonstrated how he met the Claimant and a photograph was taken of that demonstration which was put into evidence;
- (vi) He asked the Claimant what had happened and she said that after using the bathroom she slipped and fell, her hand went into the toilet bowl and she hit her head on the toilet paper roll. He asked the Claimant to explain how she fell and she said that she believed the floor was wet and she slipped.
- (vii) He saw no water or other substance anywhere on the bathroom floor or on the Claimant's clothing except what had splashed out of the toilet bowl.
- (viii) The tiles in the staff bathroom are not slippery. They are 12-inch tiles with sections which provides some friction which are tiles normally found in the bathrooms at the Resort. A photograph of the tiles was also put into evidence.

[10] It is implicit in Mr. Abraham's evidence that he thought he found the Claimant in the same position in which she was when she fell. However, in the Claimant's evidence, as indicated in paragraph [4] above, Mario had tried to lift her up. Her evidence was that Mario placed her back "in the same position", which I find to mean the same position in which he had found her. There was no evidence from the Claimant that she moved from this position before being lifted up by the security guard.

[11] I therefore find that the position that Mr. Abraham observed the Claimant in was substantially the same position she was in when she fell.

- [12] Mr. Abraham, and all the Defendants' witnesses, were asked why Mario did not come to give evidence. None could answer.
- [13] Mr. Abraham was asked when the bathroom was last cleaned before the Claimant fell and he said he did not know.
- [14] Finally, Mr. Abraham was referred to the report which he prepared for his employer about the incident and he agreed that he did not mention in that report that the water he saw on the Claimant came from the toilet. Mr. Abraham said that he came to that conclusion after he wrote the report as it was the only logical conclusion. This is an inference not evidence.

Findings

- [15] The first issue to be determined is whether there was water on the floor on which the Claimant slipped. The burden of proving this, and all other averments necessary to establish the cause of action, is of course on the Claimant.
- [16] It will be recalled that the Claimant did not at any time see any water on the floor. She indicated she was not looking for water. Her evidence was that she inferred that water was there from the fact that she fell and felt water on her trousers in the region of her left buttocks. Inferences are to be made by the court and not a witness or party.
- [17] On the other hand, Mr. Abraham who arrived at the bathroom while the Claimant was still on the floor gave direct evidence that he saw no water or other substance anywhere on the floor of the bathroom.
- [18] Finally, the Claimant did not fall as soon as she entered the toilet. She proceeded to pull down her underwear and trousers to use the toilet, used the toilet, stood up, pulled up her underwear and trousers and then slipped and fell. If water was indeed on the floor, the Claimant must have stepped in it during the course of her undressing, use of the toilet and/or redressing. It is simply not plausible that she would have avoided this in the small cubicle² if water was indeed there.
- [19] Mr. Abraham's evidence was that the Claimant told him this came from water in the toilet bowl after her hand went into the toilet. The Claimant did not deny having this conversation with Mr. Abraham. Rather, she said she could not remember because it was so long ago that she could not remember every detail.
- [20] I believe Mr. Abraham's evidence. I therefore find that there is no basis on which it can be inferred, and it has not been proven by the Claimant, that there was any water on the floor.

² The photograph put into evidence by Mr. Abraham referred to in paragraph [9](viii) above was taken in the stall where the incident occurred.

- [21] This is sufficient to dispose of the case. However, for completeness I will address the situation had I found that water was indeed present.
- [22] All of the particulars of negligence pleaded by the Claimant are founded on the assertion, explicit or implicit, that the Defendant knew, or ought to have known, of the presence of the water and the danger it posed. Absent evidence of express knowledge, of which there was none, why ought the Defendant to have known of the presence of water? It was not alleged that they ought to have stationed someone full time in the bathrooms to observe whether water fell. Such an allegation would have been excessive and unsustainable.
- [23] The only other basis to find that the Defendant ought to have known of the presence of water would be that there ought to have been a system for the regular checking of bathrooms, and that the water would have been detected had the system been properly observed. The foundation of such an argument, however, would be some evidence that the water had been on the floor for some time. There was no such evidence. No finding can be made therefore as to whether the water was therefore for 5 minutes or 5 hours.
- [24] Clearly, no matter how good a system is in place and how vigilantly it is observed, water cannot be detected immediately upon its deposit.
- [25] Can the principle stated in *Ward v Tesco Stores Ltd* [1976] 1 WLR 810 be relied upon by the Claimant? In this case, the plaintiff slipped on yoghurt. This is not an uncommon occurrence in supermarkets as a result, inter alia, of customers activity, inadvertent or otherwise. The evidence in that case was that such spillages occurred about ten times each week, usually from broken squash bottles. There were about 30-35 staff members on the premises on duty on the day the incident occurred, although in the middle of the day that number was reduced because some staff were on lunch. Lawton LJ said, at page 814:-

“Now, in this case the floor of this supermarket was under the management of the defendants and their servants. The accident was such as in the ordinary course of things does not happen if floors are kept clean and spillages are dealt with as soon as they occur. If an accident does happen because the floors are covered with spillage, then in my judgment some explanation should be forthcoming from the defendants to show that the accident did not arise from any want of care on their part; and in the absence of any explanation the judge may give judgment for the plaintiff. Such burden of proof as there is on defendants in such circumstances is evidential, not probative. The judge thought that prima facie this accident would not have happened had the defendants taken reasonable care. In my judgment he was justified in taking that view

because the probabilities were that the spillage had been on the floor long enough for it to have been cleaned up by a member of the staff.”

[26] This is an odd passage. Spillages cannot be detected instantaneously. A proprietor can only be expected to have a reasonable system in place, based on all the facts, which is reasonably implemented. Clearly, if spillages are frequent, then the system will require more frequent surveillance and vice versa. Lawton LJ felt able to find that the burden of proof had shifted merely because yoghurt was on the floor. To say that the burden of proof had shifted is really no more than to say that the plaintiff had led sufficient evidence to prove her case and therefore the defendant was required to rebut this evidence to avoid a finding of liability against it.

[27] In this case, Omerod LJ gave a very brief dissenting judgment. He said, at pages 814/5:

“I have the misfortune to disagree with the judgment of Lawton L.J. Starting from the beginning, I do not think that it was established that this accident was caused by any want of care on the part of the defendants. The accident described by the plaintiff — and she did no more than describe the accident, namely, that she slipped on some yoghurt which was on the floor of the supermarket — could clearly have happened no matter what degree of care these defendants had taken. The crucial question is how long before the accident the yoghurt had been on the floor. Had some customer knocked it off the shelf a few moments before, then no reasonable system which the defendants could be expected to operate would have prevented this accident. So I think that the plaintiff fails at the outset.

....

I for my part am unable to distinguish this case in any material respect from the judgment of Devlin J. in *Richards v. W. F. White & Co.* [1957] 1 Lloyd's Rep. 367. Devlin J. put the matter in the clearest possible terms at the bottom of p. 369 in the passage which Lawton L.J. has read. I cannot improve upon that statement of the law, and would not attempt to. It seems to me quite clear that unless there is some evidence as to when the yoghurt got on to this floor no prima facie case can be made against these defendants. I would only add that to hold otherwise would seem to me to put upon the defendants a wholly unreasonable burden, not only of care, but also of proof. I ask myself what evidence could they have called? It would have been fortunate, perhaps, if they had been able to show that their sweeper had passed over this bit of the floor five minutes before the accident. But it would not have shown that their system was either better or worse than if the sweeper had gone by that bit of the floor an hour earlier. I cannot think that the case would have been carried any further by calling evidence from such employees as

may or may not have been about. This is a supermarket, not a place with counters and assistants behind the counters. I cannot imagine what evidence they could give except to say that they had not noticed the spill; and the matter would have been taken no further."

[28] I agree entirely.

[29] This case was discussed in *Lougheed v. On The Beach Limited* [2014] EWCA Civ 1538. At paragraph 28 of his judgment, Tomlinson LJ (after setting out the above passage from the judgment of Lawton LG in *Ward v. Tesco*), said:

"I confess to having some difficulty with this passage. Of course the accident would not have happened if the spillage had been dealt with as soon as it occurred. That however begs the question whether the staff ought to have seen the spillage as soon as it occurred. Perhaps in that case the inference that the spillage had been on the floor long enough for it to have been cleaned up by a member of the staff was justified because of the frequency of spillages of sticky substances and the number of staff on the premises."

[30] And at paragraph 29:

"We are bound by the decision of the majority in *Ward v Tesco Stores*. It seems to me however that the premise of that decision is that it was proved that the defendant "knew that during the course of a working week there was a likelihood of spillages occurring from time to time."

[31] I find this gloss unconvincing. The evidence in that case was that there were 30 to 35 spillages per week. The relevance of this evidence may be to assess whether the system implemented by the Defendant was adequate. It does not address whether, in dealing with a particular spillage, there was negligence in its detection.

[32] The decision of the majority in *Ward v Tesco* is not binding on me and I would not follow it and I adopt, instead, the decision of Omerod LJ.

[33] I therefore hold that even if there had been water present, the Claimant has not proven that the Defendant was in any way in breach of its duty of care by not detecting the presence of the water. This is primarily because there is no evidence what so ever when the water, even if there, was supposedly deposited there.

Orders

[34] I therefore order as follows:

(i) The claim is dismissed.

(ii) The Claimant shall pay the Defendant prescribed costs in the sum of \$7,500.00.

Postscript

- [1] At the close of the hearing I granted leave to the Claimant to file closing submissions on or before 24th March 2020 and for the Defendant to do so by 30 March 2020.
- [2] Neither party has filed submissions. This might have been due to the disruptions caused by the COVID-19 pandemic. However, practice directions were issued that permitted filings by email. There has been no application to extend the time for filing submissions.
- [3] I therefore determined to proceed with the issue of the judgment, the result of which rested in the end upon findings of fact.

Damian Kelsick
High Court Judge (Ag.)

By the Court

Registrar