SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 2004/0721

BETWEEN:

RAYMOND PETER FOULKES

Claimant

AND

SAINT LUCIA AIR & SEA PORTS AUTHORITY

Defendant

Appearances:

Mr. Andie George for Claimant
Mr. Hilford Deterville Q.C. in association with Ms. Samantha Charles for Defendant

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2006: January 16, 18, 23
March 8. 29
May 19
December 22, 29
2007: February 12

……

JUDGMENT

Mason J

[1] The Claimant herein claims against the Defendant in negligence and/or breach of the Defendant's statutory duty.

Facts

[2] On 3rd April 2004, the Claimant, an English visitor, went on a scuba diving boat trip arranged by Dive Fair Helen, a company which organizes diving tours here in St. Lucia.

[3] On its return the boat anchored at Ganter's Bay in the Vigie Cove area where a bus was waiting to take the people from the boat trip back to their hotels.

[4] After alighting from the boat, the Claimant sought to use the toilet facilities at a nearby restaurant called Froggie Jacks. The restaurant was closed for business but the Claimant was able to enter the premises. This he did by way of one route and on his return, he used a different route.

[5] While walking back, an incident occurred: according to the Claimant, he tripped over a length of exposed pipe, fell and dislocated his shoulder. The Claimant contends that it as a result of the negligence of the Defendant in allowing the pipe to remain exposed on its premises that he was injured.

[6] In his particulars of negligence, the Claimant avers that the Defendant:

1) failed to observe that the exposed feed pipe would cause harm and injury;
2) failed to give adequate warning of the danger of the feed pipe; and
3) failed in the premises to take any reasonable care for the safety of the Claimant and as a result he suffered pain and injury and sustained loss and damage

[7] The Defendant in defence denies any negligence or breach of its statutory duties and contends that the Claimant impliedly consented to run the risk of injury because he knew or ought to have known that the manner and place in which he chose to exit the premises was dangerous in all the circumstances in that he chose to exit the restaurant in a place where the ground surface was uneven with protrusions for as much as three (3) inches off the ground when there was a safe and obvious exit.

[8] The Defendant pleads in the alternative that the accident was caused or contributed to by the negligence of the Claimant.

Evidence

[9] There were only two (2) witnesses: the Claimant and a witness for the defence and in effect the only evidence before the Court as to the circumstances of the Claimant's misadventure is that of the Claimant himself since the witness for the defence did not actually see the incident as it occurred but according to him only saw the Claimant rolling on the ground.

[10] It is the evidence of the Claimant that on the day in question, on his return from the dive trip, that he asked a member of the boat crew (and not the witness for the defence) about toilet facilities after getting off the boat. He was directed by that person to the toilet at the restaurant. The Claimant said that he walked into the grounds of the restaurant, past the

restaurant building to the toilet block which is detached and located on the grounds behind some mature trees. The restaurant is on elevated ground.

[11] According to the Claimant on his way out, he chose the path which was closest to the toilet block. The path leads down to a ramp, the bottom of which is an open gate through which he exited. The waiting bus was obscured from his view at the point where he exited the gate because there are many trees and bushes growing in the restaurant grounds.

[12] On exiting the gate, there is a stone wall approximately 3 to 4 feet high on the right. The Claimant stated that he continued to walk along this wall and after taking several steps, he felt his right foot "catch on something". He said that having been on the island for ten (10) days he was accustomed to the uneven ground and pavements. He instinctively tried to take a step forward again and felt his foot was pinned down. He could not move his foot forward. This caused him to lose his balance and he tripped and fell forward. As a reflex action, he extended his left hand and his left palm landed on the ground first and he heard a loud crack which at that immediate time he thought his bone was broken. He later learnt that it was a dislocation.

[13] At that point he could see clearly that he had tripped over an exposed pipe which ran horizontally across the ground for about four (4) feet. It was situated just above the ground.

[14] The Claimant continued that he became acutely aware that no one had seen him and so his immediate thought was to get within sight so using his right hand he pushed himself up with his feet and staggered towards the quay side away from the wall. He staggered for some 10 – 15 feet and then slumped against a parked vehicle situated on the concrete part adjacent to the water's edge.

[15] The Claimant was taken to the hospital where he was treated and discharged.

[16] The Claimant explained that there are three (3) exit routes from the restaurant: the one where he had come in, another immediately opposite the toilet block with steps and a ramp through the gate. This one seemed to him to be the most sensible route to take as it was closest to the toilet. He admitted that to retrace his steps would also have been a sensible route. The third exit route descends by way of a concrete staircase straight down to the office block.

[17] He denied that the defence witness had accompanied him to the toilet and had told him to pass back the way he had come in. He also denied rolling when he fell.

[18] Under cross examination he denied telling his previous lawyers that he "stubbed" his toe. He did not agree that the story of the defence witness was more consistent with one falling from a height and rolling than his own story of stubbing his toe and rolling. He denied telling anyone that he had fallen from a height. He suggested that the doctor would have got that statement from Mr. St. Omer (manager of the dive company who was with the Claimant at the hospital).

[19] The Claimant admitted that after the trek to the toilet, he did not attempt to retrace his steps, he chose another path.

[20] He agreed that the incident happened about 3:30 in the afternoon and that it was a bright day. He stated that the gate through which he exited is about 6 to 7 metres from the pipe. He denied that where he walked could be called a road. He said it was dry and it was a place where people and vehicles pass. He estimated that the place was 10 to 15 metres wide, that the pipe was 4 feet in length, the wall was to his right and the 4 feet of the pipe started from the wall. He admitted that there was no physical obstruction preventing him from passing where the pipe was not protruding.

[21] He agreed that he did say that he was used to uneven ground. He stated that one is more likely to fall from uneven ground than from a smooth surface. His visibility was good he could see for over 100 metres. He stated that there were big stones in the road. He chose not to pass on the flat surface although admitting it was safer. The sole of his sandal got trapped under the pipe. His sandal had a back strap and so the sandal did not come off.

[22] The Claimant stated that he uses his right hand to write and it was correct to describe him as a right hander. He denied that he chose to put out his left hand, he claimed that it was a reflex action.

[23] The evidence of the defence witness is that he escorted the Claimant through the restaurant to where the toilets were located, having made their way through the gate at the

top entrance. He stated that he told the Claimant to pass back that way on his return. He left the Claimant and made his way back to the office building to wait for the Claimant. While he was speaking to a guest from the boat trip, he heard a " hard loud sound" and when he turned, he saw the Claimant rolling along the ground. He rolled from the side where the restaurant's wall ran over to the other side (by the quay) and stopped by a parked vehicle.

Submissions

[24] Counsel for the Claimant submitted that the Defendant admitted the existence of the protruding pipes, that the Defendant never denied that the parcel of land upon which the feed pipe protrudes does belong to them. Counsel also stated that during the trial, the Claimant sought and obtained leave to produce a land register to establish that the parcel upon which the piece of feed pipe is located belongs to the Defendant.

[25] It is further submitted by Counsel for the Claimant that the duty of care owed by the Defendant as stated in Article 985 of the Civil Code of St. Lucia is:

> *"Every person capable of discerning right from wrong is responsible for damage caused either by his act, imprudence, neglect or want of skill, and he is not relievable from obligations thus arising".*

[26] Counsel continues that the law imposes a duty of care upon the Defendant if it is reasonable, foreseeable and probable that the protruding pipe would result in harm or injury to the Claimant. The standard of foreseeability is that of a "reasonable man".

Counsel was of the view that a protruding pipe as the one seen lying in the area which is used by the public would prove a potential hazard/risk to members of the public and injury, loss and damage could be caused by someone tripping over this pipe. The area was and is frequently used by clients, employees of various businesses in that area as well as tourists who use the area immediately before and after their sea excursions.

[27] Counsel contends that the Defendant, being the owner of the feed pipe and/or the parcel of land, upon which the feed pipe is/was placed or passes, is under an obligation to ensure that the metal pipe is buried at a depth underground that would pose no risk of injury to users of the restaurant and/or the jetty area. The Defendant is also under a duty to ensure that the metal pipe even if buried underground is properly maintained so that it causes no potential damage or risk of injury to users of the restaurant and/or the jetty area.

[28] Counsel opines that it is not sufficient to say that there was ample space for the Claimant to pass. The obligation remains and in no way excludes the Defendant from their duty.

[29] Counsel for the Claimant next submitted on the issue of causation, which he states is simply a question of fact. For legal purposes casual relationships are usually perceived on a practical or day to day basis and in the majority of cases, such relationships would either be self evident or easily established. Counsel suggests that if the Court accepts the Claimant's version of the incident, then the Court would also likely conclude that the Defendant's protruding feed pipe was the cause of the Claimant's fall and resulting injuries.

[30] Counsel stated that the Claimant contends that the injury sustained by him was as a result of the fall he received, that in his witness statement he stated that he tripped over a pipe which crossed the path directly in front of the bottom of the ramp. He explains further in his witness statement that his foot was trapped in the pipe and his forward motion caused him to fall, that as a reflex, he reached out with his left hand and fell on his palm, dislocating his shoulder.

[31] In response to these submissions, Counsel for the Defendant referred to the well known case of Donoghue v Stevenson (1932) AC 562 in which it was established that for negligence to be proved one must show three things, namely that:

1) a duty of care was owed;

2) there was a breach of that duty; and

3) the breach resulted in loss of damage

[32] If any one of the three (3) elements is absent, then there can be no finding of negligence.

[33] Counsel contends that the Claimant has not shown how the Defendant owed him a duty of care, that no evidence has been led to prove how the Defendant would be responsible at all for the pipe and any injury it may cause. Counsel cites paragraph 69 of Halsbury Statutes Volume 36 (1) fourth edition where it is stated that a party is bound by his pleadings unless he is allowed to amend them. According to Counsel the Claimant claims to have fallen on a pipe located at Ganter's Bay docks and has instituted proceedings against the Defendant but did not plead that the Defendant owned the land on which he had fallen or tender any evidence of ownership. Counsel cited the case of Blay v Pollard

and Morris (1930) 1KB 628 where it was held that "cases must be decided by the issues on the record and if it is desired to raise other issues they must be placed on the record by amendment". Thus this default in the Claimant's claim, that is, not establishing a duty of care, could therefore have been remedied by amendment. Counsel also referred to Parts 20 (1) and 20 (3) CPR 2000 with respect to changes to Statements of Case and stated that while the Claimant changed legal counsel, the information or evidence that may have established if or how the Defendant owed a duty of care to the Claimant would have been available to the Claimant from the institution of the proceedings and that change of legal practitioner does not amount to a change in circumstances within the meaning of part 20.1.

[34] Thus the Claimant, having not amended his Statement of Claim is bound by it and based on the record of proceedings both pre and during trial, the Claimant has not shown how the Defendant or its actions are responsible for his fall and has not established a duty of care.

[35] With respect to the breach of duty, Counsel for the Defendant was of the view that the Claimant's injury was caused solely on account of his actions and therefore the maxim "volenti non fit injuria" applies.

[36] Counsel referred to the testimony of the Defendant's witness with respect to the Claimant rolling along the ground and stated that the Claimant did not in fact trip over the pipe at all but chose to pass over the balcony of the restaurant and because the terrain was sloping, uneven and not meant to be used as a pathway, the Claimant fell. There was nothing

compelling the Claimant to pass where he did. He deliberately did not return the way he had been shown in, which was the easiest and most sensible route back to the waiting bus. In other circumstances, given the uneven, sloping and steep nature of the area where he chose to pass, the Claimant must be taken to have known of the risk of injury and to have voluntarily accepted the risk.

Findings

[37] It is trite law that it is only when the following four (4) requirements have been satisfied that there exists a liability in negligence:

1) existence in law of a duty of care;

2) breach of that duty;

3) a causal connection to the defendant's careless conduct and the damage; and

4) the particular kind of damage not being too remote

[38] The parties in this case are diametrically opposed on the question of the existence of the duty of care. Counsel for the Claimant is of the view that, because of the existence of the evidence of the Land Register indicating that the Defendant is the owner of the premises and there being evidence that the Defendant admitted the existence of the protruding pipe, there exists a duty of care. Counsel for the Defendant contends that even if there were in fact a duty of care, in the absence of evidence of ownership of the land by the Defendant, the Defendant cannot be liable.

[39] Let me at the outset state that the court must reject the argument of Counsel for the Defendant because a perusal of the records of evidence reveals that the court permitted Counsel for the Claimant to produce in evidence records of the Land Register which established that the premises in question did indeed belong to the Defendant.

[40] It appears from the legal authorities that there is a three (3) stage approach necessary for the concept of a duty of care to exist: there must be reasonable foreseeability, a close and direct relationship of "proximity" between the parties and it must be fair, just and reasonable to impose liability.

[41] Taking these factors into account, there exists a prima facie duty of care owed by the Defendant to the Claimant for there being an exposed length of pipe running across a portion of the land owned by the Defendant which the public, including the Claimant, is allowed to pass, reasonable foreseeablity of resulting harm or danger exists. The first two elements – forseeability and proximity - having been satisfied, there yet remains the third – whether it is fair, just and reasonable to impose liability.

[42] It would seem from the legal authorities that this third element is perceived as merely an overlap of the others and is to be "determined by judicial judgment", a test of "ordinary reason and common sense". See the comment of Lord Oliver in the case of Caparo Industries plc v Dickman (1990) 2 AC 605 at 633.

> *"Indeed it is difficult to resist a conclusion that what have been treated as three separate requirements are, at least in most cases, in fact merely facets of the same thing, for in some cases the degree of foreseeability is such that*

it is from that alone that the requisite proximity can be deduced, whilst in others the absence of that essential relationship can most rationally be attributed simply to the court's view that it would not be fair and reasonable to hold the Defendant responsible".

[43] It would seem therefore in light of the foregoing that, without more, there exists a prima facie duty of care.

[44] Having decided that the Defendant does owe to the Claimant a duty of care, the next question is whether there has been a breach of that duty owed by the Defendant to the Claimant to make his premises safe or to give adequate warning of danger to the Claimant.

[45] It is accepted that there exists at common law a positive duty not to permit the existence of a danger in a place to which there is an absolute right of access.

[46] In response to this, the Defendant has pleaded "volenti non fit injuria" – that the Claimant not only knew of the risk of harm or injury but consented to run that risk at his own expense so that he and not the party alleged to be negligent should bear the loss.

[47] It is common ground and has long been established that knowledge of the risk is only one of the elements which together with other circumstances has to be taken into account in deciding whether the inference that the Claimant agreed to take the risk upon himself can

be drawn. In other words, knowledge is not sufficient: there must also be consent to bear the consequences of the risk.

[48] The legal authorities indicate that the test is: "the consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk ….and requires on the part of the plaintiff at the time he gives his consent full knowledge of the nature and extent of the risk that he ran": per Diplock LJ in Woolridge v Sumner (1963) 2 QB 43 et 60.

[49] See also the case of Dann v Hamilton (1939) 1 AER 59 where, although it was held that the plea of volenti could not be upheld, Asquith J suggested that the maxim might nevertheless be applicable to cases where a dangerous physical condition had been brought about by the negligence of the defendant and the plaintiff with full knowledge of the existing danger elected to run the risk thereof.

[50] In the case of Osbourne v London and North Western Railway (1888), Wills J had this to say:

> *"If the defendants desire to succeed on the ground that the maxim "volenti non fit injuria" is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it".*

[51] This statement which has been regularly quoted was expressly approved by the Privy Council in Letang v Ottawa Electricity (1926) AC 225 where the facts were similar to those in Osbourne.

[52] In the Letang case, an action was brought by the appellant on account of injuries sustained by his wife owing to the negligently dangerous condition of a stairway by which she was approaching the respondent company's railway station for the purpose of traveling. In both Osbourne and Letang the Defendant failed partly because although the maxim "volenti non fit injuria" was argued, it was found that the plaintiff had not been appropriately cross examined on the facts and according to Lord Shaw of Dunfermline. "In order to succeed the defendants should have gone further in cross examination for unless the question of fact had been found in their favour, the application of the maxim on which they relied could not be established". It was held that the maxim "volenti non fit injuria" affords no defence to an action for damages for personal injuries due to the dangerous condition of the premises to which the plaintiff has been invited or on an errand of business unless it is found as a fact that he freely and voluntarily with full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it. Lord Shaw of Dunfermline quoted Bowen LJ in the case of Thomas v Quartermaine 18 QBD 685 where he said:

> *The maxim be it observed is not "scienti non fit injuria" but "volenti". It is plain that mere knowledge may not be a constructive defence ……..The Defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger ……..knowledge is not a conclusive defence in itself. But when it is a knowledge under*

circumstances that leave no inference open but one, namely, that the risk has been voluntarily encountered, the defence seems to me complete".

[53] And finally I should wish to quote from the case of Bowater v Rowley Regis Corporation (1944) KB476 which was cited by Counsel for the Defendant and in which the issue of voluntarily submitting to risk of injury was addressed:

For the purpose of the rule ....a man cannot be said to be truly "willing" unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will".

[54] The question for us in this case therefore is whether the Claimant knew that the risk was there, appreciated the danger involved and also willingly undertook it.

[55] Regard will now be had to the evidence.

[56] In paragraphs 5 and 6 of his witness statement, the Claimant said:

5. On leaving the grounds of the restaurant, I went down the ramp from the grounds to the harbour side, on my way back to the minibus.

6. I tripped over a pipe which crosses the path directly in front of the bottom of the ramp. I did not see the pipe".

[57] In his oral testimony at trial, the Claimant said:

"The restaurant is on elevated ground and I chose the path which was closest to the toilet block. This path leads down to a ramp, the bottom of which is an open gate which I went through .....The bus was obscured from my view at this point – the point at which I came through the gate – because of the lie of the land plus there are many trees and bushes growing in the restaurant grounds. To my right at this point is a stone wall approximately 3 to 4 feet high. I continued to walk with the wall on my right and to the left of the quay and the water. At this point after having taken several steps, I felt my right foot catch on something and having been on the island for ten (10) days at this point, I was used to the uneven ground and the uneven pavements that are typical of St. Lucia, and as I said before, I'm used to walking on uneven building sites, so I'm a careful person when it comes to walking on uneven ground. I instantly tried to take a step forward again and I felt my foot was pinned down. I could not move my foot forward. This caused me to lose my balance and I tripped and fall forward".

[58] Under cross examination the Claimant stated:

"....the incident happened about 3:30 in the afternoon. It was a bright day. The gate is about 6 to 7 metres from the pipe. I wouldn't call it a road. It was dry - a place where people and vehicles pass. I would estimate it to be 10 to

15 metres wide….. There was no physical obstruction preventing me from passing where the pipe was not protruding. I did say that I was used to the uneven ground. One is more likely to fall from uneven ground than from a flat surface. My visibility was good. I could see for over 100 metres. There are big stones in the road. I chose not to pass on the flattest side".

[59] The court undertook a visit to the locus in quo on a bright sunny day at around 2:30 p.m. – the kind of day and time approximate to that which the Claimant stated that he was injured. It proved to be instructive.

[60] What the court found was that the gate at the bottom of the ramp through which the Claimant passed is about 35 feet from the protruding pipe and not "directly in front of the ramp" as suggested by the Claimant, that there is a sloping grassy verge extending from the gate up to where the pipe protrudes, that the roadway is clearly defined and is about 15 feet wide in some places and about 20 feet wide in others, that where the pipe protrudes, in addition to that protrusion, the road at that point is about 12 feet wide , that there are no big stones on the roadway but there were indeed a few stones embedded in the grassy verge as well as in the earth around the area of the protruding pipe, that the pipe fades away and does not protrude onto what is the clearly defined roadway.

[61] In the view of the Court, the verge being slightly sloping and slightly rocky, it is not an area where a reasonable man would be minded to walk and especially on a clear bright day where visibility extends over 100 metres. The Claimant admitted in cross examination that he chose not to pass on the flattest side". It is not expected that a reasonable person

would choose to leave the clearly defined and smooth path to walk where the Claimant suggests that he walked and had his accident. The Claimant under cross examination admitted that "there was no physical obstruction preventing him from passing where the pipe was not protruding". In addition being accustomed to uneven ground according to him, he consented to take the risk to walk on the uneven surface when there is no evidence that he was constrained so to do. It was of his free will, being mindful of the risk involved, that he undertook it.

[62] It was stated earlier that in addition to knowledge, there are other circumstances and relevant matters to be considered in determining whether the Defendant has fulfilled the duty of care. It is said that the court is free to have regard to such things as the purpose of the visit, the conduct that is expected of the visitor while on the premises, the nature of the danger and whether it is obvious or not, what warnings if any should be given and the age of the visitor.

[63] In the case of McGinley or Titchener v British Railways Board (1983) 1WLR 1427, a girl aged 15 was struck by a train and seriously hurt when crossing the railway line between two stations. Access to the line could readily be obtained by climbing an embankment and passing through gaps which existed in the respondent's fencing. Her claim failed.

[64] It was said in that case that the existence and extent of the duty ……to fence depends on the circumstances of the case including the age and intelligence of the particular person entering upon the premises but the duty will tend to be higher in the case of a very young

or a very old person than with a normally active and intelligent adult or adolescent. The nature of the locus and the obviousness or otherwise of the railway may also be relevant.

[65] Counsel for the Claimant quite rightly submitted that the standard of forseeability that the protruding pipe could result in harm or injury is that of a reasonable man.

[66] The Claimant appeared to the court to possess the criteria justifying the designation of a reasonable man - he spoke intelligently, soberly and knowledgeably, he is of full age (45 years old) and is a self - employed businessman – and being accepted as such must exercise reasonable care given the circumstances. Scrutton L J in Hall v Brooklands (1933) 1KB 205 opined:

> *"What is reasonable care would depend upon the perils which might reasonably be expected to occur and the extent to which the ordinary (spectator) might be expected to appreciate and take the risk of such perils:*

[67] On the evidence adduced before the court, I hold that the Claimant, being a reasonable man did freely and voluntarily expressly agree to accept the risk of walking along the "precipitous" part of the area ("I chose not to pass on the flattest side") with the full knowledge ("having been on the Island for 10 days and accustomed to the uneven ground and pavements") of the nature and extent of the risk ("one is more likely to fall from uneven ground than from a smooth surface"). To hold otherwise would in my opinion defy logic and commonsense.

[68] In my judgment the Claimant could not possibly have strayed onto the pipe unawares: the part over which he indicated he stumbled is located close to the wall, is slightly rocky and is away from what is clearly defined as the path over which any reasonable man could have been expected to pass. I am thus satisfied that there was no special danger peculiar to the locus of the Claimant's mishap. I am also satisfied that in compliance with the requirement adumbrated in Letang, Counsel for the Defendant was adequate in his cross examination thereby establishing the relevant facts.

[69] Taking all these circumstances together and on the basis that it has been established that the Claimant was fully capable of appreciating the full nature and extent of the risk and voluntarily accepting it, I would have no doubt whatsoever that the maxim "volenti non fit injuria" applies to defeat the Claimant's claim for according to Lord Herschell in Smith v Baker (1891) AC 325" the maxim is founded in good sense and justice". The Claimant's injury I am satisfied was due solely to his own fault.

[70] I therefore reject the Claimant's claim on the basis of the application of the maxim "volenti non fit injuria".

[71] In these circumstances, no question of apportioning the blame on the ground of contributory negligence arises and I will therefore not be considering it.

ORDER

The Claimant's claim is hereby dismissed.

Costs prescribed to the Defendant in accordance with Part 65 CPR 2000.

SANDRA MASON Q.C.

High Court Judge