St-Lucia

IN THE EASTERN CARIBBEAN SUPREME COURT
THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO.: ANUHCV 2009/0343

BETWEEN:

AUDREY BARRATT

Claimant

AND

HAWKSBILL LIMITED

Defendant

Appearances:

Ms. Leslie Ann Brissett for the Claimant
Ms. Fidela Corbin Lincoln for the Defendant

2011: June 27, 28
July 14
2012: January 25

JUDGMENT

INTRODUCTION

[1] **REMY J.**: During the period 16th May 2008 to 23rd May 2008, the Claimant Audrey Barratt and her husband Roger Barratt were vacationing at the Hawksbill Hotel (the Hotel) operated by the Defendant company. The Claimant alleges that on the third day of her vacation at the Hotel, namely the 19th May, 2008, at approximately 7 p.m., after leaving her room for dinner at the restaurant of the Hotel, and while walking on the pathway outside her room, she slipped and fell and suffered injury to her left foot and ankle. She further alleges that "the said accident was caused by the negligence and/or breach of contract of the Defendant, its servants or agents."

[2] By Claim Form and Statement of Claim filed on the 23rd June 2009, the Claimant claims against the Defendant, the following:-

> "Damages for personal injuries sustained and for loss and damage suffered caused by the negligence of the Defendant; alternatively damages for personal injuries sustained and for loss and damage caused by the breach of implied contract term by the Defendant; special damages, interest and costs."

[3] By its Amended Defence filed on the 9th June 2010, the Defendant denies the Claimant's claim and pleads further that the Claimant contributed to her injury by failing to turn on the light switch for the area and by failing to accept medical care offered.

[4] The Claimant in her Reply to Defence pleaded that she exercised reasonable care for her personal safety when she left her room and re-iterates that the Defendant is negligent.

ISSUES

[5] The issues for the determination of the Court are as follows:-

(i) Whether or not the Claimant's fall was caused as a result of the negligence of the Defendant and/or a breach by the Defendant of an implied contractual term?

(ii) Whether or not there was contributory negligence on the part of the Claimant? If yes, what reduction should be made.

(iii) Is the Claimant entitled to compensation? And if so, what compensation is payable to her.

THE EVIDENCE

[6] The Claimant and her husband Mr. Roger Barrett gave evidence on her behalf. Ms. Agatha Leonard and Mr. Richard Michelin, Guest Services Co-ordinator and General Manager respectively of the Hotel, gave evidence on behalf of the Defendant.

THE CLAIMANT'S EVIDENCE

[7] In her Witness Statement, the Claimant averred that on May 16th 2008, she and her husband Roger Barratt arrived at Hawksbill Hotel to commence their all- inclusive one-week vacation. Due to flight delays, they arrived at the hotel at about 11 p.m. that day. They were met on arrival by Ms. Agatha Leonard who provided keys to their room, Unit number 140. A Mr. S. Sam took them to their room and deposited them and their luggage on the patio of Room 140. Mr. Sam left without mentioning any details about the room facilities or any light switches and did not show them anything at all concerning the Unit.

[8] According to the Claimant, for the next two days, they left the hotel shortly after breakfast and spent their time driving around Antigua and they would return in the late evening for dinner. When they returned to their room on both those evenings, "the sun had already set and they met the light between their bungalow room 140 and bungalow room 141 on." The Claimant further stated that this light, "illuminated the stairs leading to their bungalow's patio and that general area between the two rooms." She stated that on Monday May 19th, 2008, at approximately 7 p.m., she proceeded to leave her room by opening the patio door which leads to stairs between their bungalow and the next. On entering the doorway, she found herself in complete darkness as the area was not lit. She thereafter fell down the stairs, injuring her left foot and ankle.

[9] The Claimant alleges that her injury and subsequent disability were caused by the negligence of the Defendant for which she is entitled to be compensated.

[10] Under cross-examination, the Claimant testified that she was not negligent in walking in a dark, unlit area.

[11] The next, and only other witness, to give evidence on behalf of the Claimant was her husband, Roger Barrett (Mr. Barrett) In his Witness Statement, Mr. Barrett stated that on Monday, May 19th, the Claimant and himself returned to their room during daylight

hours. They made preparations to leave for dinner that evening. It was dark by then. The Claimant proceeded ahead of him, and as he closed the door to their bungalow, he heard the Claimant scream. He rushed to the doorway to find the Claimant "sprawled at the bottom of the stairs" of their private patio area, which was in "complete darkness". He stated that he assisted the Claimant back into the bungalow, at which time she expressed that her left ankle was giving her great pain. Mr. Barrett stated that he did explain to Clara, one of the Hotel employees how the incident had occurred. He stated that in addition to the stairs not being lit on the night of his wife's injury, their own private patio "was poorly lit, due to a bird's nest totally obstructing the light that faced the stairs as well."

[12] Under cross-examination, Mr. Barrett testified that himself and the Claimant never operated the light switches, because they did not know they existed until the General Manager Mr. Michelin explained to them, when he visited them on May 22nd, how the light switches worked. The witness denied saying that himself and his wife "stupidly had not switched on the lights before going outside." He stated that what he said was that the lights were off between their Unit 140 and Unit 141, causing his wife to fall on the steps between the two Units.

THE DEFENDANT'S EVIDENCE

[13] The first witness to give evidence for the Defendant was the Guest Services Co-ordinator of the Hotel, Ms. Agatha Leonard (Ms. Leonard). In her Witness Statement, Ms. Leonard stated that on the evening of May 19th 2008, following a report that the Claimant had fallen, she accompanied another employee to transport the Claimant and her husband to the dining room. She stated that she enquired what had happened and was informed by the Claimant that "she had missed a step on the stairs and fell down." She stated that Mr. Barrett explained that the Claimant had proceeded outside before he had turned on the outside lights and that he commented "that it was stupid of them to go outside before turning on the lights." The witness gave evidence that "at no time during her visit with the Claimant and his wife on the 19th or at any time thereafter, including during their visit with Mr. Michelin did the Claimant or Mr. Barrett report that any light in or around their

bungalow had "malfunctioned." She stated that she went to visit the Claimant on the 20th May and again on the 21sty May. On the 22nd May, she accompanied the General Manager, Mr. Michelin, when he went to visit the Claimant in her room.

[14] Under cross –examination, the witness testified that it was not true that the Claimant and her husband reported that there was a bird's nest on the patio shade of room 140. She agreed, however, that there are times when guests did not know that they were to turn on the lights.

[15] The final witness for the Defendant was Mr. Richard Michelin. In his Witness Statement, Mr. Michelin stated that on the morning of 20th May 2008, he received information that the Claimant had fallen outside her room on the evening of 19th May. He stated that the bungalow which was occupied by the Claimant has two wall lamps on the patio and one light affixed to the side of the bungalow to light the walkway leading to the bungalow. He added that the light switches for all the internal and external lights of the bungalows are located within the bedroom and on the patio of the bungalow. As a consequence, the lights are operated by the guests personally.

[16] Under cross-examination, Mr. Michelin testified that he could not say for sure that the Claimant and her husband were shown the features of Room 140. He testified that there was a possibility that housekeeping may have turned off the lights in Room 140. He stated that he did not explain to the Claimant and Mr. Barrett how the lights worked when he visited them in their room on the 22nd May 2008.

SUBMISSIONS OF COUNSEL

[17] In paragraph 4 of her Statement of Claim, the Claimant alleged that "the Defendant its servants or agents owed the Claimant a duty of care to exercise reasonable care to prevent damage to her from an unusual danger known to it or of which it ought to have known" while she was a guest at the Defendant's Hotel. The Claimant further alleges in paragraph 5 of her Statement of Claim that "further and/or alternatively it was an implied

term of the reservation of holiday contract between the Claimant and the Defendant's Hotel that the services supplied would be of reasonable quality and that the Defendant and the Hotel would have taken all reasonable steps to ensure that the accommodation was safe and free from defects likely to cause harm to its customers, such as the Claimant was."

[18] The Defendant does not deny that it owed a duty of care to the Claimant to "provide safe accommodation and to take reasonable care to avoid exposing the Claimant to any foreseeable risk of harm," but states that it fulfilled its duty and standard of care to the Claimant. The Defendant further submits that the use of the entryway and exit way to the bungalow occupied by the Claimant is not inherently dangerous, nor does it, on the face it, present such dangers that would require the Defendant to take more than reasonable precaution to prevent foreseeable risk of harm.

THE LAW

NEGLIGENCE

[19] According to Clerk and Lindsell on Torts[1] at page 415, paragraph 8-04, there are four requirements of the tort of negligence, namely:-

1. the existence in law of a duty of care situation, i.e., one in which the law attaches liability to carelessness,
2. breach of the duty of care by the defendant, i.e, that he failed to measure up to the standard set by law,
3. a causal connection between the defendant's careless conduct and the damage,
4. that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

[20] Gilbert Kodilinye in Commonwealth Caribbean Tort Law[2], at page 64 states that:-

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[1] 20th edition
[2] 3rd edition

"There are a number of common situations in which it is well established that a duty of care exists, for example:
(a) .....
(b) the occupier of premises owes a duty of care to lawful visitors to ensure that the premises are reasonably safe."
(c) .....
(d) .....
(e) ....."

[21] Once the determination is made that a duty of care is owed to the Claimant, the Court's next task is to determine whether the Defendant was in breach of that duty. The applicable test is as enunciated by Alderson B in **Blyth v Birmingham Waterworks Co.**[3]:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

[22] The Claimant needs to satisfy the Court that the ingredients of duty, breach and resulting damage are made out in order for the Defendant to be held liable in negligence.

OCCUPIER'S LIABILITY

[23] There are no statutory provisions in Antigua and Barbuda with respect to occupier's liability; the liability of occupiers is governed by common law principles. According to Gilbert Kodilinye in Commonwealth Caribbean Tort Law, " At common law, the occupier of premises owes an invitee a duty to exercise reasonable care to prevent damage to the invitee from an unusual danger known to the occupier or of which the occupier ought to have known." It is undisputed that the Claimant, as a paying guest of the Hotel, clearly falls within the definition of an "invitee" based on the leading case of **Indermaur v Dames**[4]. In that case, an "invitee" was defined as a person who enters premises upon business which concerns the occupier, and upon his invitation, express or implied.

[3] [1843-60] All ER Rep. 478; (1856) 156 E.R. 1047
[4] (1866) LR 1 CP 274

[24] What constitutes an UNUSUAL DANGER was defined in **London Graving Dock Co. v Horton**[5] as follows:-

> "I am not conscious that it has been stated in plain terms, but it is noticeable that what is declared to be the duty is not to prevent unusual danger but to prevent damage from unusual danger... I think 'unusual' is used in an objective sense and means such danger as is not usually found in carrying out the task of fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises..."

[25] To ground an action for breach of duty owed by the Defendant as operators of the Hotel, the Claimant must prove that the Defendant/occupier failed to take reasonable care that the Hotel is in such a state of repair that would not expose the Claimant to any hazards that the Defendant ought to be aware of. The Defendant must take reasonable care to ensure that the Claimant was not injured by an UNUSUAL DANGER on the premises of which the occupier knows or ought to have known, and of which the Claimant did not know or of which she could not have been aware.

[26] In the Bahamian case of **Cox v Chan**[6], Sawyer J. pointed out that the occupier's duty is "not an absolute duty to prevent any damage to the plaintiff, but is a lesser one of using reasonable care to prevent damage to the plaintiff from an unusual danger of which the defendant knew or ought to have known, and of which the plaintiff did not know or which he could not have been aware."

FINDINGS

[27] Despite the discrepancies in their testimony, I accept the evidence of Ms. Leonard and Mr. Michelin in preference to that of the Claimant and her husband. I did not find the Claimant or her witness Mr. Barrett to be straightforward or forthright in their evidence. Their testimony is inconsistent and contradictory. This, in the view of the Court, militates against their credibility. I will first deal with the evidence of the Claimant as to what caused her to

[5] [1951] 2 All E.R. 1
[6] (1991) Supreme Court, The Bahamas, No. 755 of 1988 (unreported)

fall. I find it necessary to reproduce the salient parts of the correspondence from and on behalf of the Claimant to the General Manager of the Hotel, Mr. Richard Michelin.

[28] The Claimant left Antigua on the 23rd May 2008, and returned to Canada. By letter dated 10th July 2008, the Claimant wrote to Mr. Michelin with respect to compensation regarding her injury. Part of the letter reads as follows:-

> "As you will remember, at 7 00 p.m. on May 19, I fell down the stairs outside our Room 140 on the grounds at Hawksbill. This was a direct result of a malfunctioning wall switch that did not allow me to light the entry stairs of our unit upon my departure."

[29] On 17th July 2008, Mr. Michelin responded to the Claimant's letter. The relevant part of the letter reads as follows:-

> "...I have noted the contents of your letter and am most concerned not only for your well being but that you attribute this fall "as a direct result of a malfunctioning wall switch that did not allow me to light the entry stairs of our room upon my departure."
>
> I have subsequently looked into this with the other members of my team who you were in contact with and neither they nor myself recall you making any report on your patio light switch not working for the duration of your stay either before or after the accident. Since your letter, we have checked the switch to find same in working order. ..."

[30] By letter dated 20th July 2008, again addressed to Mr. Michelin, the Claimant's husband Roger Barrett wrote:-

> "... Further to your letter of July 17th, we do believe Audrey's fall was a direct result of a malfunctioning wall switch. In fact, we did advise you of this when you (accompanied by Agatha Leonard) first visited on May 22. We had no reason to use it as the staff had left the lights on each night to light our way but, on the night in question, lights had been turned off and we were unable to relight the breezeway.
>
> In addition, one light in the balcony area of our unit that faced the door was completely filled with a bird's nest cutting off the light that might have spilled through the door from the balcony."

[31] With respect to the above letters, Learned Counsel for the Claimant has submitted that "it may be argued by the Defendant that the Claimant's statement contained in letter dated July 10 and 20, 2008 (referred to in paragraphs 28 and 30 above) was an indication that

the Claimant knew that she was responsible to turn the light on." Learned Counsel then goes on to say that " taking these two letters into context, it illustrates that the Claimant and her husband use light as an adverb (i.e. – having a considerable or sufficient amount of light) and not as a verb as may be intimated by the Defendant ... therefore, ... there is no ambiguity arising on the face of the letters."

[32] A further letter, dated the 8th October 2008, from the previous Attorneys for the Claimant, namely Messrs Roberts & Co, was forwarded to Mr. Michelin. This letter reads in part:-

> "Our client instructs us that she fell down the stairs outside her room, unit 140, at the Hawksbill Hotel on the night of May 19th 2008. Our client fell because the area immediately outside the only exit from her room was unlit. The wall switch to turn on the lights to the stairs malfunctioned. Our client received no warning about this condition... In addition there were no hand rails along the steps from the exit/entrance of the room."

[33] On 18th February 2009, the Claimant's new Attorneys, Rika Bird and Associates wrote to Mr. Michelin. Noticeably absent from their letter is any reference to "the malfunctioning light switch." What is stated in this letter is, among other things, as follows:-"

> "Our client advises that the accident occurred because the area immediately outside her room was not lit in order to allow her to safely depart..."

[34] In the letter of 20th July 2008 referred to in paragraph 30 above, Mr. Barrett states, in relation to the issue of the "malfunctioning light switch", that "we did advise you of this when you first visited on the 22nd May 2008." However, the Court notes that there is no evidence to support this, either in the Witness Statement of the Claimant or of Mr. Barrett. There is also no mention of this in the Witness Statement of either Mr. Michelin or of Agatha Leonard. The Court is therefore of the view that, contrary to what is stated in the letter of 20th July 2008, that Mr. Barrett did not make mention of a "malfunctioning light switch" to Mr. Michelin on the 22nd May, 2008. In fact, according to the evidence before the Court, the first mention of the "malfunctioning light switch" was made after the Claimant and her husband had left Antigua.

[35] We now move from the correspondence about the "malfunctioning light switch" to the evidence of the Claimant on the issue. In paragraphs 45 and 46 of her Witness Statement, the Claimant states:-

> Parag. 45 - "From the onset the term malfunctioning has been interpreted out of context to mean that the light switch was not working, which prompted the Defendant to carry out checks to the switch."
>
> Parag. 46 - "The word malfunctioning as used by me was in reference to the failing of the system of lighting rather than to the specific light switch not working properly. Furthermore, I could never have checked the light switch to discover that it was not in working order when I was not aware of the existence of the light switch and further that my husband and I were solely responsible to turn it on to light the common area leading to the private patio of our room, since at all material times the lights were on except on the day of the accident."

[36] The Court is of the view that, notwithstanding the linguistic manouvering of Counsel for the Claimant as well as that of the Claimant and her husband, the attention of the Court is not deflected from the evidence, nor from an elementary understanding of the English language. The evidence of the Claimant is that her fall was a "direct result of a malfunctioning wall switch." The Court is of the view that, based on the words that follow namely, "which did not allow me to light the entry stairs upon my departure", a reasonable and logical inference is that the Claimant was well aware, first of the existence of the light switch and secondly, that she was responsible to turn on the lights prior to her departure from the room.

[37] The statement contained in the letter of Mr. Barrett dated 20th July 2008 is also significant. After re-iterating that "Audrey's (the Claimant's) fall was a direct result of a malfunctioning wall switch", the letter goes on to state: - "We had no reason to use **IT** (my emphasis) as the staff had left the lights on each night to light our way, but, on the night in question, lights had been turned off and we were unable to relight the breezeway." The Court is

again of the view that the highlighted **IT** refers to the light switch. Further that it is reasonable to infer from the rest of the sentence that Mr. Barratt was also aware of the existence of the light switch, of its function in illuminating the area outside their unit, and the fact that either himself or the Claimant were responsible for turning on the light before leaving their Unit. The Court accepts the submission of Counsel for the Defendant that the statements contained in the above letter are inconsistent with the assertions by the Claimant and Mr. Barratt that they were unaware where the light switches to light the interior and exterior of their room were located and therefore how to operate the same. The Court also notes that there is only the word of the Claimant and her husband that the lights had been turned on by persons other than themselves on the two evenings prior to the accident. There is no corroboration of that fact.

[38] I now turn to the Claimant's account of where and how she fell. In her Witness Statement (at paragraph 10), the Claimant stated thus:-

> "On Monday, May 19 at approximately 7:00 pm, I proceeded to leave Room 140 by opening our patio door which lead to stairs between our bungalow and the next, but upon entering the doorway found myself in complete darkness as the area was not lit. I **THEREAFTER FELL IMMEDIATELY DOWN THE STAIRS**, injuring my left ankle." (my emphasis.)

[39] Under cross-examination, the Claimant testified:-

> "Yes, I left my room, went outside, walked across the balcony to the stairs **AND STARTED TO DESCEND THE STAIRS** when the area was dark and unlit." (my emphasis).

[40] In paragraph 6 of the Statement of Claim, the Claimant pleads that:-

> "On May 19, 2008 at approximately 7.00 p.m., the Claimant who was leaving her room for dinner at the restaurant of the Hotel and walking down the stepped pathway of around two steps immediately outside her room, the steps aforesaid was the only means of entry and egress to the Claimant's room in the hotel complex, **AND AS SHE WALKED DOWN THE STAIRS** the lights that usually lit the stepped pathway did not come on, and the said pathway was unlighted and dark and as a result she slipped and fell and suffered serious personal injury to her foot and ankle." (my emphasis.)

[41] The Court is of the view that the Claimant had commenced walking down the stairs, when she fell. She says so in her pleadings and she is bound by her said pleadings; this is trite law. Further, the Claimant stated that the area was "dark and unlit" at the time. The Court is also of the view that the version as recounted in the Claimant's Witness Statement (paragraph 38 above), namely that as she (the Claimant) entered the doorway she "fell immediately down the stairs", is not accurate and is deliberately misleading. The Court does not accept the submission of Counsel for the Claimant that the Claimant "fell immediately down the steps." The further contention of Counsel for the Claimant is that, "It can be noted from the pictures of the accident that as you open the door and take a one quarter or a half stride you would have entered the first step of the stairs. Consequently it is submitted that there would not be enough time and space for the Claimant to avoid the danger and/or avoid stepping in the dark as can be seen there is no other room to step, and she would have already been in motion down the stairs with the expectation that the light would be on." The Court does not accept that submission. It is inconsistent with the Claimant's evidence under cross-examination that "she walked across the balcony to the stairs and started to descend the stairs when it was dark and unlit." Further, the Claimant gave no evidence that she took either a quarter stride or a half stride upon opening the door prior to descending the steps.

[42] In any event, the Court is also of the view that the Claimant would have been aware of the general anatomy of the Unit as the accident occurred on the third day of her vacation at the Hotel. The uncontroverted evidence before the Court is that the stairs were the only means of entrance and exit to the Unit. The Claimant would therefore have used those stairs on that day and on the two days prior to her accident. She would therefore have been aware of the height and width of the steps. She would also have been aware that there were no handrails. She could not have been unaware of these matters prior to her accident.

[43] Despite what is pleaded by the Defendants, that upon her arrival and prior to the accident the Defendant explained to the Claimant the operation of the light switch, the Court finds that there is no evidence before the Court that this is so. The evidence before the Court is

that the Claimant and her husband arrived at the hotel at 11 p.m. that evening. They were taken to their room by S. Sam, who did not give evidence at the trial, since it is alleged that he was no longer in the country. There was no evidence from any of the other witnesses for the Defendant to substantiate the Defendant's above contention.

[44] I accept the evidence of Ms. Leonard as to what was told to her by the Claimant and her husband regarding how the Claimant fell in preference to that of the Claimant and her witness. According to the Defendant, the Claimant's fall was caused by the failure of the Claimant to put on the lights prior to leaving her room and descending the steps in darkness. Ms. Leonard, together with another employee of the Hotel, Ms. Samoza, were the first persons to have seen the Claimant after her fall. This is not disputed by the Claimant. The evidence of Ms. Leonard as to what she was told about the circumstances of the accident as contained in her Witness Statement, is that on arrival at the Claimant's bungalow, herself and Ms. Samoza met the Claimant and her husband on the patio of their bungalow. Upon enquiring what had happened, the Claimant informed her that "she had missed a step on the stairs and fell down" and that Mr. Barrett explained that the Claimant "had proceeded outside before he had turned on the outside lights. "Mr. Barrett commented that "it was stupid of them to go outside before turning on the lights."

[45] The Claimant and her husband Mr. Barrett categorically deny Ms. Leonard's testimony. It is significant that nowhere in the evidence of either the Claimant or Mr. Barrett is any mention made of the fact that Ms. Leonard enquired about how the Claimant sustained her fall. The Court is of the view that this omission by both the Claimant and Mr. Barrett is not accidental and is in fact quite deliberate, given their denial that they informed Ms. Leonard that they did not turn on the lights or that it was stupid of them to go outside before turning on the light.

[46] The Court is also of the view that the evidence of Mr. Barratt as to what transpired immediately after the Claimant fell is revealing and significant. In paragraph 6 of his Witness Statement, Mr. Barratt states as follows:-

"My wife and I began making preparations to leave for dinner that evening, it was dark by then and my wife proceeded ahead of me as I closed our bungalow door, at which time I heard her scream. I rushed to the doorway to the pathway between both our bungalow and the next to find my wife sprawled at the bottom of the stairs of our private patio area, which I noted was in complete darkness due to the fact that the light mounted on the outside wall of our bungalow was off. This was the first time this had occurred during our stay."

[47] The witness continued in paragraph 7:-

"I assisted my wife back into the bungalow, at which time she expressed that her left ankle was giving her great pain."

[48] It would appear from the above evidence that, since the testimony of Mr. Barratt is that he was not aware of the existence of the light switch and did not know how to operate the same, that he was able to make his way to the bottom of the stairs of their private patio area which was "in complete darkness", and assist the Claimant back up the stairs, again in complete darkness. The evidence of Ms. Leonard is that when she arrived at Unit 140 after learning of the Claimant's fall, the Claimant and her husband were on the patio of their bungalow. The evidence of the Claimant and Mr. Barratt is that they were inside the room at the time. Ms. Leonard further states that, on her arrival, she noticed that the light in the passage leading to the bungalow and the two (2) lights on the patio of the bungalow were on. Neither the Claimant nor Mr. Barratt dispute the fact that the patio lights were on at that time. The Claimant acknowledged in her evidence the fact that the first persons who came to her room were Agatha Leonard and "another person." She further testified that "when Agatha and the other person came immediately after the accident, I know that the lights in the balcony were on." However, the Claimant added that "she could not tell whether the other lights were on." Mr. Barrett also stated that when Ms. Leonard visited the bungalow at that time, that the lights on the patio were on. He added that "he did not know" whether "the lights between the two buildings "were on, but that they (the lights) were not on when his wife fell. As stated above, the evidence of the Claimant and Mr. Barrett also differed as to exactly where they were (namely whether on the patio or inside their room) when Ms. Leonard arrived.

[49] How did the lights come on? Or, to put it differently, who turned on the lights? It is not disputed that the light switches were located either on the patio or inside the room, and further that the Hotel did not provide a "turn down service," meaning that it did not provide a service for turning on the lights for the guests. If the Court accepts the evidence of Ms. Leonard, the reasonable and logical conclusion to be drawn is that all the lights, namely the lights on the patio and the lights in the passage leading to the bungalow could only have been turned on by the Claimant or Mr. Barratt. But that seems improbable, if as is their evidence, they did not know of the existence of the light switches and did not know how to turn on the lights until they were advised of this fact by Mr. Michelin two days later when he came to visit the Claimant. Based on the mathematics of probability, we are left with Ms. Leonard and Ms. Samoza. Although Ms. Samoza did not give evidence, Ms. Leonard's evidence is that the lights were already on; the implication being that the Claimant and/or Mr. Barratt had already done so.

[50] The two versions cannot both be correct. Based on the Court's finding in paragraph 36 above that the Claimant and her husband were not unaware that they were to turn on the lights before exiting the room, as well as the Court's view that the Claimant and Mr. Barrett are not credible witnesses, the Court is of the view firstly that all the lights , namely those on the passage leading to the units and those on the patio, were turned on when Ms. Leonard arrived, and secondly , that they were turned on not by Ms. Leonard or Ms. Samoza, but by either Mr. Barratt or the Claimant. Indeed, the Claimant and Mr. Barrett both gave evidence that the patio lights were on when Ms. Leonard arrived. With respect to the lights in the passage leading to the Unit, the evidence of the Claimant and her husband is that they did not know whether the said lights were on when Ms. Leonard arrived. The Court does not find this evidence very convincing. Implicit in my above finding is my further finding that on the night of the accident, the Claimant, as is the evidence before the Court, proceeded ahead of Mr. Barratt, opened the patio door and neglecting either to turn on the lights herself or else to ensure that her husband had done so, began descending the stairs while the area was unlit.

ANALYSIS

[51] The First Issue to be determined by the Court is as follows:-

WHETHER OR NOT THE CLAIMANT'S FALL WAS CAUSED AS A RESULT OF THE NEGLIGENCE OF THE DEFENDANT AND/OR A BREACH BY THE DEFENDANT OF AN IMPLIED CONTRACT TERM?

[52] The first question therefore for the Court is whether the Defendant was guilty of a breach of the duty to take reasonable care that the premises were safe.

[53] Whether or not reasonable care has been taken is to be determined as a matter of fact.

[54] The Claimant in paragraph 7 of her Statement of Claim under the heading "Particulars of Breach of Duty and Breach of Contract By the Defendant", has pleaded that "the said accident was caused by the negligence and/or breach of contract of the Defendant, its servants or agents. She has pleaded, among other things that the Defendant failed:-

a) ...to take any or any proper and reasonable steps to ensure that the means of access to the Claimant's room was safe;

b) ...prior to the Claimant purchasing the vacation and subsequent occupation of the hotel room, to warn the Claimant that the means of access may be unsafe and that hence failing to take reasonable precautions to ensure the safety of the holidaymakers, such that the Claimant was, when she was entering and leaving her room;

c) ...providing accommodation which was not of reasonable quality in that there was no safe means of access to it;

d) ...failing to have any or any proper and adequate system of lighting of the stepped pathway that led to the Claimant's room;

e) ...failing to fix hand rails and/ or banister to the stepped pathway on either side and / or causing or permitting the steps to have no hand-rails and/or banister;

f) ...failing to provide safety and or emergency lighting to the steps and/ or stepped pathway;

[55] Counsel for the Claimant submits "that the fact that the stepped pathway lacked the critical features namely, railings, banisters and emergency lights must be considered as presenting unusual danger to the Claimant."

[56] Counsel for the Claimant further submits that "... from the photographs (AB3), it is evident that there is (sic) no handrails and / or banisters attached to the stepped pathway nor is there any safety or emergency lighting seen on the steps or anywhere on the stepped pathway. "Counsel submits that "the Claimant was a holiday maker who was naturally in a carefree spirit in anticipation of a relaxing and comfortable surroundings at highly rated Resort Hotel. The Claimant at all material times was not a tradeswoman or other skilled personnel in the sense that the fact that the stepped pathway lacked these critical features must be considered as presenting unusual danger to her." It is the further submission of Counsel for the Claimant that:-

> "... The Defendant ought to have known of this defect on its premises and that its invitees may be put in unusual danger if they are not afforded the opportunity to grasp at a railing if they loose (sic) their balance going down steps if the lighting becomes inadequate for any given reason. The Defendant at the trial did not establish that any measures were put in place by them to alleviate the foreseeable damage to the Claimant while she descended the stairs and may have slipped, tripped or lost her footing. Consequently the court is asked to find that the Defendant has failed to discharge its duty owed to the Claimant to use reasonable care to prevent damage to the Claimant from an unusual danger known to it."

[57] It is the further submission of Learned Counsel for the Claimant that the fact that the Defendant did not offer a "turn down service" is evidence in and of itself that the Defendant in breach of the duty owed to guests, failed to institute or enforce any or any adequate system and or measures whether by way of periodic examination, inspection, test,

maintenance or otherwise to ensure that the lights and the stepped pathway leading to and from the Claimant's room were in a reasonably safe condition.

[58] The undisputed evidence before the Court is that there were only two (2) steps leading to and from the Unit. There is no evidence before the Court that these steps were built in non-compliance with any building code in Antigua and Barbuda. Further, no evidence is adduced that the steps were broken or slippery, or that they were in a state of disrepair. There is also no evidence that anyone had fallen down the stairs on that night or indeed on any other occasion.

[59] As to the submission of Counsel for the Claimant that "the fact that the stepped pathway lacked the critical features namely railings, banisters and emergency lights must be considered as presenting unusual danger to the Claimant", the Court is of the view that the absence of railings and banisters cannot of itself be considered an unusual danger. While an unrailed gangplank might be an unusual danger for a passenger on a ship, it cannot be said that lack of railings and banisters on either side of the steps between two units of a hotel which is not built on a cliff or does not overlook a precipice constitutes an unusual danger. Further, given the fact that, based on the undisputed evidence before the Court, the Unit was equipped with two wall lamps on the patio and one light affixed to the side of the bungalow, the Court is of the view that the absence of emergency lights cannot of itself be considered an unusual danger.

[60] The Court rejects the submission of Counsel for the Claimant that the Defendant is liable in negligence or otherwise for "failing, prior to the Claimant purchasing the vacation and subsequent occupation of the hotel room, to warn the Claimant that the means of access may be unsafe". In the view of the Court, that submission is totally without merit. What Counsel is in fact implying is that the Defendant should have advertised in its brochure or by other means the fact that the Hotel was "unsafe." This is totally unrealistic, and from even a common sense point of view, almost absurd. The Defendant, as the invitor, is bound to take the kind of care which a reasonably prudent man in his place would take,

neither more nor less. No reasonably prudent businessman would advertise in a brochure or otherwise the fact that his or her hotel was "unsafe."

[61] In the case of **Lewis v Six Continents PLC**[7], the Claimant and a fellow employee went on a course which required them to stay in a hotel, which was owned and occupied by the Defendant. They shared a twin room on the second floor which had the benefit of a window. The fellow employee gave evidence that during the night, he was woken by a loud bang. He saw that the window was open, looked out and saw that the Claimant was lying on the ground below. The Claimant suffered a severe brain injury. The Claimant filed proceedings for damages, arguing, among other things, that the distance from the floor to the base of the opening was 750 mm. which was 50 mm. less than good modern practice would require and/or that the window should have had bars or limiters to prevent a person falling out. The Court ruled, dismissing the claim, that "on the evidence, the Defendant had exercised its duty to take such care as was reasonable in the circumstances to see that the Claimant was reasonably safe."

[62] The Court also ruled that "it did not follow that because good modern practice in new buildings or workplaces might be to comply with certain dimensions that the defendant was required so as to make the bedrooms in the hotel complaint. Moreover, there was no evidence to suggest that the difference of 50 mm. would have been crucial. Further, the consequence of the claimant's argument would be that virtually every window in every building in the land would have to be adapted so that no-one could fall out. That was not a reasonable precaution to be imposed on householders and hoteliers."

[63] It was acknowledged by Mr. Michelin that as far as he was aware, this was not the first time that the Hotel would have received a report that some of the guests did not know that they had to turn on the lights. Ought, then, the Defendant reasonably to have foreseen that the Claimant would use the stairs in the dark? I do not think that the Defendant would have foreseen that the Claimant or any other guest would have, in the evening, on opening the patio door, ventured down the stairs if the area was unlit. In the case of **Wheat v E.**

[7] [2005] 2WHC 316 QB

Lacon & Co. Ltd.[8], - a case cited by the Defendant - a lodger fell and died while descending the back staircase of the premises he occupied. The hand rail of the step ended before the bottom of the stairs and the electric light at the top of the stairs had no bulb resulting in the stairs being unlit. The claim against the occupiers of the building for negligence by the estate of the deceased failed at first and the appeal was dismissed. Viscount Dilhorne in that case quoted Lord Diplock:-

> "My neighbor does not enlarge my duty to care for his safety by neglecting it himself."

[64] I am therefore of the view that, on the evidence, the Defendant did not breach its duty to take such care as was reasonable in the circumstances to see that the Claimant was reasonably safe.

[65] If I am wrong in concluding that the Defendant did not fail in its duty of care to the Claimant, the next question to be asked is:- Did the Defendant's breach of duty in fact cause the Claimant's damage? The law is settled that it is only where this question can be answered in the affirmative that the Defendant may be liable to the Claimant.

[66] The Claimant must show that her injury resulted from the Defendant's negligence, because negligence without proof of damage is not actionable. Where the only effective cause of an accident is the Claimant's own negligence, the action should fail: see **Canadian Pacific Ry. v Frechette**[9].

[67] Charlesworth and Percy on Negligence[10], paragraph 6-14 states thus:-

> "In an accident claim the evidence must demonstrate both how an accident happened and how, as a result, injury and other damage was sustained. The evidence must also be sufficient to show that, on a balance of probabilities, the most likely cause of both was the negligence or breach of statutory duty of the defendant, or some person for whose negligence the defendant is responsible in law.

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[8] [1966] AC 552
[9] [1915] A.C. 871
[10] 12th edition at page 410

If the claimant fails to establish that the defendant caused the harm of which complaint is made, or some part of it, then the action will fail."

[68] In the case of **Norris v W. Moss & Sons Ltd.**[11], a scaffold was erected in breach of the building regulations in that one of the uprights was not vertical and the claimant, a scaffolder, tried to remedy the defect in a manner described as "fantastically wrong", injuring himself when the scaffold collapsed. It was held that there was no causal connection between the breach of statutory duty and his injury.

[69] In the case of **Rushton v Turner Brothers Asbestos Co. Ltd**[12], a factory worker put his hand deliberately into the moving parts of a crushing machine, in order to clean it, although the employers were in breach of a statutory duty to fence. It was held that they were not liable in damages because the actual cause of the accident, in the sense of the operative act and effectual cause, was their employer's own fault.

[70] Based on my findings that the Claimant's fall was the result of her descending the stairs prior to turning on the lights or else failing to ensure that her husband had turned them on, I find that the "operative act and effectual cause" of the Claimant's accident was the Claimant's own fault and not that of the Defendant .

[71] In light of the above finding, it is not necessary to consider Issues 2 and 3 further.

CONCLUSION

[72] On the evidence in its totality and based on the authorities, I find that the Claimant has failed to prove her case on a balance of probabilities.

[11] [1954] 1 WLR. 346
[12] [1960] 1 WLR. 96

ORDER

1. The Claimant's claim is dismissed.

2. The Claimant shall pay to the Defendant prescribed costs in accordance with the Civil Procedure Rules (CPR) 2000.

Jennifer A. Remy
High Court Judge