EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

[CIVIL]

SAINT LUCIA

CLAIM NO. SLUHCV2017 /0162

BETWEEN:

ARLETTE ANDREW

Claimant

And

CICERON MANAGEMENT LIMITED
Trading as
SANDALS LA TOC GOLF RESORT & SPA ST LUCIA

Defendant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini — High Court Judge

Appearances:

Mr. Horace Fraser for the Claimant
Mrs Shervon Pierre with Mr. Mark Maragh for the Defendant

2018: May 22
June 6 (Written Closing Submissions)
October 22

Negligence - Breach of statutory duty to provide a safe working environment - Res Ipsa Loquitor - Article 985, 986 917A and 1137 of St Lucia Civil Code

JUDGMENT

[1] **ST ROSE-ALBERTINI, J. [Ag]:** Arlette Andrew the claimant in this action is employed as a Shift Leader with Ciceron Management Limited trading as Sandals La Toc Resort & Spa St. Lucia. On 8th February 2016 at about 5:30pm she was at work and walking along a sidewalk on the defendant's property when she slipped and fell. She is seeking compensation from the defendant for the injuries, loss and expense occasioned by the fall. The defendant denies all allegations of negligence or breach of statutory duty as claimed.

The Issues

[2] The issues to be resolved are:-

1. Has the claimant pleaded a cognizable cause of action?

2. Was the defendant negligent or in breach of the statutory duty to maintain a safe working environment and is liable for the injuries, loss and expense arising from the fall?

3. Alternatively does the maxim "*res ipsa loquitor"* apply to the facts of the case?

The Claimant's Case

[3] The claimant averred in her statement of claim that on the day in question she was on duty, walking on a sidewalk in the vicinity of the drop off point and the Human Resource ("HR") Department on the defendant's premises, when she slipped and fell as a result of a slippery substance which was present on the sidewalk, on that day.

[4] As a result of the fall she sustained injuries to her left ankle, knee and back as chronicled in the medical reports provided by her Doctors. She currently walks with the aid of a walking stick and continues to suffer pain and loss of amenities. Her Doctors forecast that a period of two years will be required to attain maximum medical improvement.

[5] She asserts at paragraph 5 of her statement of claim that the defendant's failure to ensure that the sidewalk was safe for employees to walk on amounts to negligence and breach of the implied terms of trust and confidence in her contract of employment. She alleges further that the defendant has breached section 257 (1) (a) of the Labour Act[1] by failing to provide a safe working environment.

[6] She gave particulars of the special damages incurred as $7,241.11 for medication and doctors' visits and $450.00 in lawyer's fees, for preparation and service of a demand letter to the defendant. In support of her claim she exhibited various medical reports, sick leave forms, invoices and receipts.[2]

The Defendant's Case

[7] The defendant denies responsibility for the fall and avers that the claimant was returning from dinner break when she missed a step, fell and twisted her ankle. An investigation was conducted immediately after the incident which revealed that there was no slippery substance or obstacles in the area where the claimant fell. No mention was made of a slippery substance at the time of her initial account given on the same day or in her signed statement given a few weeks later. No wrongdoing was alleged until December 2016 in a letter from her lawyer demanding compensation and attributing responsibility for the fall and resulting injuries to the defendant's negligence. The defendant refused to pay compensation based on the internal reports prepared immediately after the fall, which included the claimant's own voluntary statement.

[8] The defendant also maintains that it has committed no act or omission amounting to negligence or breach of its statutory duty and has not acted in breach of any implied terms of trust and confidence flowing from the employment contract. At all times a safe working environment has been maintained and as such there can be no liability for the fall, resulting injuries, loss and expense.

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[1] CAP 16.04 of the Revised Edition of the Laws of Saint Lucia
[2] See Exhibits AA1-27

Has the claimant pleaded a cognizable cause of action?

[9] Mrs Pierre raised two preliminary points namely that the particulars of negligence were not sufficiently pleaded to permit the defendant to adequately defend the claim and that the claimant had failed to include her age or date of birth in the claim from or statement of claim as required by Civil Procedure Rules 2000 ("CPR") rule 8.9 (2) She contends that the claim should be dismissed on account of these failures.

[10] Counsel for the claimant offered no response to these points.

[11] It seemed to me unusual that adequacy of pleadings was being raised so late in the day having filed a defence, navigated case management and filing witness statements to refute the claim, then pre-trial review and scheduling a date for trial. Part 34 of the CPR permits formal requests for further and better particulars very early in proceedings to enable a party to clearly demarcate the issues being raised and the approach to be taken in relation to the claim. Additionally an application to strike out a claim for not disclosing a reasonable or sustainable cause of action should properly be made during case management and at the latest after standard disclosure has taken place.[3]

[12] It is commonplace that pleadings in a claim in negligence must indicate the duty owed by the defendant, the facts from which the duty flowed and how the breach of that duty came about. There is no requirement that pleadings be expressed in a specific legal format. Once the particulars are adequate to enable the opposing party to understand the nature of the claim, the facts on which it is based and the remedy being sought, this suffices for the purposes of the CPR[4].

[13] The claim form specifically stated that the claim against the defendant was for damages arising from negligence or breach of statutory duty, in failing to provide a safe working environment. Paragraphs 3 – 6 of the statement of claim stated the facts on which the

[3] See Blackstone's Civil Practice 2016 at para 33.6 to 33.11 on pages 555-558
[4] See CPR8.6 (1) and 8.7 (1) & (2).

claim is based namely that owing to the defendant's negligence or breach of statutory duty the claimant slipped on a slippery substance and fell while working at the defendant's premises and sustained personal injuries, loss and expense.

[14] It is settled law that with the advent of the CPR, pleadings comprising of extensive details and particulars are no longer necessary, since the introduction of witness statements serve the purpose of providing full details or particulars of the pleaded case. Such statements are designed to supply much of the details and particulars that were previously required to be contained in pleadings[5].

[15] Based on the above I consider the pleadings to be adequate and conclude that defendant's challenge at this late stage is without merit. Whether the claim is indeed established is a separate matter for the Court's consideration, at the close of trial.

[16] Regarding failure by the claimant to state her age or date of birth as required by CPR8.9 (2), while I note that the requirement is specific to claims relating to personal injuries the rules do not provide any sanction for failure to comply. Moreover CPR 26.9 (3) provides that where a party fails to comply with a rule for which there is no sanction, it does not invalidate any step taken in the claim unless the court so orders and the court may also make an order to put matters right. Once again this is a matter which should properly be taken at case management. In the circumstances I considered the point to be trivial and one which would only be of some import if a claimant is successful and the Court embarks on the exercise of awarding damages. In the absence of this information a claimant would simply be entitled to nominal damages only.

The Evidence

[17] At trial the claimant gave evidence on her own behalf and stated in her witness statement that she has been employed with the defendant for the past 12 years. At the time of the fall she was not suffering from any disease or medical condition which caused her to fall suddenly. She did not do anything wrong to cause her to fall and attributes the fall solely to

[5] East Caribbean Flour Mills v Ormiston Ken Boyea SVG Appeal No. 12 of 2006 (unreported)

a slippery substance which was on the sidewalk. Immediately following the fall she was unable to work for 8 months. As a result of the injuries sustained she continues to suffer from painful spells to her back and knees and experiences swelling of her ankle when she stands for prolonged periods. She is no longer able to enjoy sporting activities with her son or to continue engaging in regular daily exercises.

[18] In cross examination the claimant agreed that she was very familiar with the premises and did not see the slippery substance. She did not assume that it was there because the accident happened. She conceded that she did not ask for any substance to be cleaned from her body, clothes or shoes after the fall. She made no mention of a slippery substance on the day of the incident or in the medical report submitted immediately after the incident, or in her written statement submitted a few weeks later. She did not mention a slippery substance in the months following the incident and did not request compensation from the defendant throughout that time. She disagreed that the substance was never mentioned because it did not exist. She described the sidewalk as a rough uneven concrete pathway and stated that there was no repair work done to it after the incident but it is now pressure washed daily. She says she did not accidentally miss a step and did not have an MRI done to determine if the cause of the injury to her knee and back were related to the fall. She agreed that the slippery substance was first mentioned when her lawyer wrote to the defendant about the incident some 10 months later but maintained that she did not make up the notion of a slippery substance in the hope of receiving compensation from the defendant.

[19] Three witnesses of fact testified on behalf of the defendant. Johanne Calixte-Augustin (Johanna) who was employed by the defendant as Training Manager at the resort stated that she was walking outside the HR Department when she noticed the claimant on the ground and went to her assistance. She was the first person to arrive on the scene, when the claimant informed her that she had fallen and twisted her ankle whilst heading back to her department which is located in the resort's gift shop. The resort's resident nurse arrived soon after and the claimant was assisted onto a bench outside the HR department. At no time did the claimant indicate to her that she had fallen as a result of a wet or slippery substance or other obstacle on the ground. She did not notice any slippery

substance or other obstacle in the area where the claimant fell. At the time it was bright outside and the weather was dry. She did not notice anything else on the scene which appeared to be unsafe or which could have caused or contributed to the fall and concluded that it was simply an unfortunate incident. She left the premises after the claimant was placed on the bench.

[20] In cross examination Johanna reiterated that she was one of persons who assisted the claimant in getting off the ground and spoke to her when she helped her to her feet. She asked the claimant what happened, to which the claimant replied that she was not sure, she simply twisted her foot and fell. They had no conversation about a slippery substance and she did not go looking for any such substance. The claimant was right in the spot where she has fallen and was still on the ground when she picked her up and took her to the bench, which took about 2-3 minutes. She stated that she was trained to observe the surroundings and had observed the exact area where the claimant fell and there was nothing to look for. Though she took no deliberate action to examine the area she however observed the general surroundings. Part of her focus was to get the claimant out of harm's way and she left soon after the claimant was seated on the bench.

[21] Andre Cleghorn (Andre) the Training and Development Manager at the resort stated that he was on duty at the time of the incident and was in the vicinity of the HR Department speaking to another team member, when he saw the claimant walking along the pathway leading to the gift shop. She greeted, he responded and immediately thereafter she fell to the ground, causing him to look in her direction. She appeared to be in pain and the Training Manager (Johanna) who was nearby ran to her assistance. He followed and summoned another team member to lift her off the ground. The resident nurse came to the scene and examined the claimant's injury. She was assisted to a bench outside the HR Department where the nurse continued to assess her injury. He stated that no rain had fallen on that day and the irrigation system was not turned on. He did not see any slippery or other substance on the ground and there was no obstacle which would have caused the claimant to fall. He could not figure how the fall had occurred.

[22] In cross examination he maintained that he saw the claimant walking in a normal and casual manner and she fell in a split second. He was unable to say how she fell but was physically present at the scene and observed the area. He stood on his feet in the same area when he assisted in lifting the claimant from the ground. He agreed that the defendant has a maintenance and grounds department responsible for aspects of cleaning the premises, but as far as he was aware these departments would not be involved in an investigation into this matter. In his role at the resort, his first response in an emergency situation is to assess the scene and assist the patient to avert further injury. He emphasized that the defendant has always had a system of regular cleaning on the resort and to his knowledge nothing has changed since the incident.

[23] Annetta Popo-John (Annetta) testified that on the day of the incident she was a registered nurse, employed as resident nurse in the defendant's on-site nursing room. About 5:30pm she was driving off the defendant's premises at the end of her work shift when she had reason to park her vehicle and proceed to the scene of the incident. When she arrived there the claimant was standing and appeared to be in pain. The claimant informed her that she had fallen and twisted her ankle as she was about to turn onto the walkway leading to the resort's gift shop.

[24] She examined the claimant's foot and observed an injury to her left ankle, which was swollen. The claimant then told her that she was unable to bear any weight on her left ankle. A cold compress was applied to alleviate the swelling and she advised the claimant to take anti-inflammatory medication, rest the foot and visit Victoria Hospital for further treatment.

[25] She stated with clarity that when she arrived at the scene the area was well lit by daylight and the weather was fair and dry. She did not observe any wet or slippery substance or other obstacle in the area. The claimant did not indicate to her that she had fallen as a result of a substance on the sidewalk.

[26] Following her examination and discussion with the claimant and her assessment of the scene of the incident she prepared a medical and investigation report dated 22nd and 24th

March, 2016 respectively.[6] They were subsequently submitted to management. She concluded that the claimant's injury was caused by an unfortunate misstep because there was nothing to indicate that the defendant did or had failed to do anything which could have caused or contributed to the fall. Based on these findings she did not recommend any follow up action to management.

[27] In cross examination she stated that she looked at the area where the claimant fell and it was dry, with nothing there. She could not say for how long she observed the area but agreed it would not have been very long. She had a conversation with the claimant and others who were present and the claimant was the one who showed her the area where she fell. The procedure for such incidents is that as soon as one gets to the scene the area must be assessed. She did so and it was a nice dry day, the area was clean, well lit by daylight and there was no substance on the ground. She also observed that the claimant was wearing black flat shoes on that day.

Was the defendant negligent or in breach of the statutory duty to maintain a safe working environment and therefore liable for the injuries, loss and expense arising from the fall?

[28] The applicable law in this jurisdiction is contained at Articles 985, 986, 917A and 1137 of the Civil Code[7] which states:-

> *"985. Every person capable of discerning right from wrong is responsible for damage caused either by his or act, imprudence, neglect or want of skill, and he or she is not relievable from obligations thus arising.*
>
> *986. He or she is responsible for damage caused not only by himself or herself, but by persons under his control and by things under his or her care……..*
>
> *The responsibility attaches in the above cases only when the person subject to it fails to establish that he or she was unable to prevent the act which has caused the damage.....*
>
> *917A. (1) Subject to the provisions of this article, from and after the coming into operation of this article the law of England for the time being relating to contracts,*

[6] See Exhibits AP1 & AP2

[7] Cap 4.01 of the Revised Edition of the Laws of Saint Lucia

quasi-contracts and torts shall mutatis mutandis extend to Saint Lucia, and the provisions of articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly; and the said articles shall cease to be construed in accordance with the law of Lower Canada or the "Coutume de Paris"……..

(2)……..

(3) Where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of this Code or of such statute shall prevail.

1137. Any question relating to evidence, which is not covered by any provision of this Code or of any other statute, must be decided by the rules of evidence as established by the law of England."

[29] Mr Fraser directed the Court's attention to the Court of Appeal judgment in **Northrock Ltd v Jardine and Another**[8] which considered the treatment of these provisions in relation to the tort of negligence in this jurisdiction. I deduced the following from the case:-

1. As a precondition to a defendant's tortious liability under Article 985 the claimant must prove that the damage suffered was caused by the defendant through his own action or use of a thing, so that proof of causation and fault is necessary to establish such liability.

2. As a precondition to a defendant's liability under Article 986 a claimant must prove that the damage suffered was caused by a person or thing under the control or care of the defendant. However if the damage was caused by the independent self-directed act of a thing under the defendants care and control without intervening human action, it is not necessary to prove fault on the part of the defendant. In this scenario proof of damage gives rise to a rebuttable presumption of liability and the burden shifts to the defendant to establish that the damage could not have been prevented, by any reasonable means.

3. Articles 917A (1) and 1137 require that both Article 985 and 986 be interpreted by reference to the English law of tort. Accordingly when the cause of action is negligence, the claimant must prove that the defendant owed a duty of care, was negligent or in breach

[8] (1992) 44 WIR 160 at 161-162, 165-167

of that duty and the damage suffered by the claimant was caused by such negligence or breach of duty.

[30] In the English law of tort an employer also has a duty to take reasonable care for the safety of all employees which includes inter alia a duty to provide a safe place of work. Failure to fulfill this duty may amount to negligence on the part of the employer[9]. That duty is similar to the stipulation in section 257 (1) (a) of the Labour Act, which is invoked by the claimant. It states:-

> "*257. General duties of employers*
>
> *(1) An employer shall ensure that—*
>
> *(a)* ***a safe****, sound, healthy and secure* ***working environment is provided and maintained as far as is reasonably practicable****;" [Emphasis added]*

[31] It is accepted that an employer discharges the duty to provide employees with a safe working environment when he has done all that a reasonable employer could be expected to do for the safety of his workers, having regard to the degree of risk posed to the workers by the nature of their work.[10]

Claimant's submissions

[32] Mr Fraser submits there is no dispute that the claimant slipped and fell on the defendant's premises whilst at work and was injured. It was not a normal injury as shown in the medical reports and she continues to suffer as a result of this injury. The defendant's witnesses all say what they observed about how the incident occurred but this must be examined against the claimant's medical reports which records severe injuries. She was walking in a casual manner and the defendant's own evidence says that she slipped and fell and this corroborates the claimant's evidence on this issue.

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[9] See Abdul Woodley v East Caribbean Metals/ Plastic Industries Ltd Claim No. 163 of 2003 (unreported); Craig Wallace et al v Anguilla Development Corporation Limited Claim No. AXAHCV2009/ 0038 (unreported)

[10] O'Carnie Sharpe v Gibson Construction Limited SVG Civil Appeal No. 18 of 2001 (unreported) per Byron CJ at para 10

[33] Counsel contends that the injury could not have happened in the way the defendant says because there are two departments namely Maintenance and Grounds Personnel which could have assisted the Court, yet there is no report from either of these departments.

[34] He submits further that the claimant has not said what the slippery substance was, only that the ground was slippery and she slipped and fell. The defendant's witnesses were not qualified in such matters and could not say categorically that she missed a step and fell. He urged the Court to ascribe greater weight to the Doctors' reports which shows the injuries to be severe and could not be derived from walking casually. It is not conceivable that she was having a casual walk, not in high heels but in flat shoes, suddenly falls and sustains such severe injuries. All the defendant's witnesses came to the scene after the fall and although they all say that they inspected the area, their focus would have been on assisting the claimant. Counsel suggested that human beings are one dimensional and the witnesses could not be focusing on the area while assisting the claimant off the ground. He maintains that the duty to provide a safe working environment was breached when a slippery substance remained on the side walk which caused the claimant to fall and sustain injuries and loss.

[35] Counsel argued further that the burden of proof was not so strict as to require the claimant to establish her case with a degree of exactitude or to prove precisely how the accident occurred. If her explanation of what happened is the more probable one, the Court is expected to accept it and find in her favour. He cited the decision in **Hoyte v Kirpalani Ltd**[11] where a court in Trinidad held that the owners of Kirpalani's Supermarket were responsible for the claimant's fall and the injuries sustained while she was shopping at the supermarket because a substance called 'Sweep Clean' had been left on the supermarket floor. Kirpalani was found liable on the premise that 'Sweep Clean' posed an unusual danger, because the claimant slipped and fell on it.

[36] In my view the case was unhelpful to the court and the claimant's case considering that the decision was subsequently overturned on appeal, on the ground that the claimant had not adduced evidence to prove that 'Sweep Clean' was slippery or that it caused her to fall and

[11] [1972] 19 WIR 310

the fall was not in and of itself proof that 'Sweep Clean' was an unusual danger on the defendant's premises.

Defendant's Submissions

[37] Mrs Pierre correctly stated in relation to negligence and breach of the statutory duty that it is the claimant who must prove all the elements of her case by establishing that (i) there was a slippery substance on the ground which caused her to slip and fall; (ii) it was there by virtue of an act or omission on the part the defendant company's servants or agents; (iii) the defendant ought to have safeguarded against the act or omission (iv) the defendant failed to take reasonably practical steps to provide and maintain a safe working environment and (v) the danger which flowed from the defendant's failure was reasonably foreseeable.

[38] She submits that the claimant has been employed at the premises for 12 years and the area was well known to her. In her witness statement she stated that she fell on the side walk but in her voluntary statement she stated that she fell near the sidewalk. She has not established that there was a slippery substance in the area where she fell and has not identified what this substance was. She gave no indication of the texture, colour or smell. It is reasonable to expect that if there was such a substance she would at the very least have mentioned it to the defendant. The claimant conceded in cross examination that she did not make mention of a wet or slippery substance immediately after the fall, or while she was assisted from the ground or in her written voluntary statement given a few weeks later. She made no mention of this for several months after the fall and the first such reference was in the demand letter from her lawyer some 10 months later. Counsel argued that the claimant has not pointed to any particular act or omission on the part of the defendant's servants or agents which would have caused a wet or slippery substance to be present or remain on the sidewalk and the Court cannot be left to speculate on what such acts or omissions might have been.

[39] Counsel submitted further that it was not within the purview of the maintenance or grounds department to conduct the relevant investigations and it was clear from the defendant's

witnesses that as a matter of training and protocol, when such incident occurs, the area was specifically examined for wet or slippery substances or other likely cause of the accident and none was found on that day. Annetta in particular expressly stated that an investigation was immediately conducted and her report was completed on the same day albeit submitted several weeks later.

[40] Mrs Pierre urged the Court to attach greater weight to the defendant's account that there was no slippery substance or obstacle, the area was well lit and dry and the claimant missed a stride and fell. That the area was frequently traversed by guests of the resort and regularly cleaned. Thus in the absence of evidence of a substance on the sidewalk the claimant has not established a causal link between the fall and a slippery substance being left on the sidewalk and there can be no breach of a duty of care.

[41] She referred the Court to the case of **Thomas Flemming** v **Glendoick Gardens Limited**[12] which turned on similar facts. There the claimant, an employee of the defendant claimed damages as a result of a slip and fall incident which occurred whilst he was on duty at the defendant's premises. He claimed similarly that he had slipped on an onion peel which was present on the floor and as such the defendant company was negligent in failing to provide a safe place of work and had breach of a statutory duty owed to him. Three witnesses testified that they saw no onion on the floor and though one other witness said she saw onion peels the court found that the claimant had failed to discharge the burden of proof because certain aspects of the testimony of the only witness who spoke to the presence of onion on the floor, was found to be unreliable.

[42] In the present case, Counsel says that the evidence is even more untenable as the claimant herself expressly stated that she did not see any slippery substance. Added to that he defendant's evidence is that the sidewalk is regularly cleaned by pressure washing, which discharged the duty to do all that a reasonable employer is expected to do, having regard to the degree of risk posed to this employee.[13]

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[12] **[**2016] CSOH 42
[13] Supra note 10

[43] Counsel also relied on the case of **Samin George v Admiralty Transport Company Limited**[14] in which the court in dismissing a similar claim took the view that it was impracticable to maintain passages, roads and pathways so that there was never a slippery place on which a person might slip and slipping was considered to be quite a common incident of life. Mrs Pierre opined that apart from regular cleaning there was nothing more that the defendant could have reasonably done to prevent foreseeable risk or provide a safe working environment for the claimant.

[44] Regarding the severity of the injuries Counsel submitted that a causal link between the fall and the injury to the claimants back and knee has not been established. The contents of the medical reports are inconclusive and could not be tested as the doctors were not called as expert witnesses and their expertise was not in the relevant area required to diagnose the extent of the claimant's injury or a causal link between the fall and those injuries. For these reasons she urged the Court to accord little weight if any to the medical reports.

[45] In concluding Mrs Pierre submitted that the claimant has failed to establish the elements of negligence or breach of the statutory duty to provide a safe working environment in the absence of evidence which proves some act or omission on the part of the defendant company which caused the presence of any slippery substance on which the claimant could have slipped. She invited the Court to accept the defendants witnesses as reliable and truthful, that more likely than not the claimant missed a step and fell and it was not the defendant who was in breach of its duty of care.

The Court's Findings

[46] There is no dispute that the claimant was employed by the defendant on the day of the incident and to date continues in such employment. The fact that she fell on or near a sidewalk on the defendant's premises during working hours and sustained an injury to her left ankle is also not in dispute. What is disputed is the cause of the fall and whether it is attributable to the defendant for want of care or breach of statutory duty.

[14] SVG Civil Suit No. 522 of 1999 (unreported) at para 17

[47] The claimant having specifically pleaded negligence and breach of a statutory duty on the part of the defendant places the claim within the scope of Article 985. Consequently it is for the claimant to satisfy the court on a balance of probabilities that the duty of care owed to her by the defendant was breached by the defendant's own action or lack thereof, which resulted in the fall and led to the injuries, loss and expense that she suffered.

[48] There is no question that the defendant owed to the claimant a duty to provide a safe working environment. As stated earlier that duty is discharged if the defendant does all that a reasonable employer could be expected to do for the safety of the claimant, having regard to the level or risk which flows from the nature of the work undertaken by the claimant.

[49] The claimant says there was a slippery substance on the sidewalk and the defendant says there was no such substance or any other obstacles to cause the claimant to fall. The claimant herself accepts in her initial account and written voluntary statement that she made no mention of a slippery substance. In the voluntary statement dated 1st March, 2016 this is what she wrote:-

> "*The incident occurred about 5:30pm Monday 8 February, I was on my way back to my department after dinner, walking along when I fell down near the sidewalk to security. When I fell I landed on my butt and felt my left leg twist and could not get up because my leg was in pain. I was lifted up by two coworkers and brought to HR's office where Jimmy was told by the nurse to get ice to apply to my leg. I was given instructions from the nurse, which I followed and also I was given a leg brace by security for my leg. I was dropped home by Luverlee and Jimmy. Jimmy helped me up the steps because I was unable to walk up by myself."*

[50] The defendant's witnesses who were all present at the scene, some of whom assisted the claimant after the fall were consistent in their testimony that the weather was fair and dry with no rainfall, it was daylight and there was no visible slippery substance in the area where the claimant fell. Johanna who assisted the claimant from the ground saw no slippery substance. Andre who was nearby and saw when the claimant fell, immediately went to the area to ascertain what had happened. He saw nothing which could have

caused the claimant to fall. He described the ground as dry and the area well lit from the daylight. Annetta's testimony was similar.

[51] These witnesses maintained their version of the events and description of the area in cross examination and while Mr Fraser says that it is nothing more than singing from the same hymn book, with evidence which appears be orchestrated, I considered them to be credible witnesses who gave a truthful account of what had transpired on that day and what they observed about the area where the claimant had fallen. Their accounts were consistent with that of the claimant in all respects, save that some 10 months later the allegation of a slippery substance arose and has since formed part of the claimant's case.

[52] Apart from making the bare assertion that there was a slippery substance not a scintilla of evidence was provided by the claimant to establish the existence of a substance or what she believes may have caused her to slip and fall. It is her own testimony that she did not see any substance which accords with the uncontroverted evidence that it was dry and bright, no rain had fallen on that day and no slippery substance was observed by any one on that day. In cross examination Andre clearly stated that the defendant maintained a system of regular cleaning on the resort and to the best of his knowledge nothing has changed since the incident. The sidewalk is frequently used by staff and guests alike and there has been no history of any such incidents. I had the opportunity to observe all the witnesses at trial and had no reason to doubt the veracity of their evidence.

[53] I found nothing in the evidence to show that the fall was occasioned by a direct act or omission on the part of the defendant which caused a slippery substance to be present on the sidewalk. Moreover from the claimant's own account she was unable to confirm that she saw any substance. The evidence did not reveal any fault which was directly attributable to the defendant to constitute the requisite causation or fault required to maintain an action in negligence, whether under Article 985 or in relation to breach of the statutory duty.

[54] I gave credence to the evidence of Johanna, Andre and Annetta over that of the claimant considering the length of time which had elapsed before the allegation of a slippery substance was raised and accepted their explanations as sufficient to rebut the allegation

of negligence or failure by the defendant to maintain a safe working environment. In so doing I concluded that the defendant had taken all reasonable steps to secure the premises for its employees and was unable to avert further danger to the claimant, by any reasonable means.

[55] Assuming on the other hand that the claimant is asserting that the incident was caused by a thing (the sidewalk) in the care of the defendant pursuant to Article 986, applying the reasoning in **Northrock Limited** the burden would shift to the defendant to demonstrate that it was unable to prevent the cause of the fall, by any reasonable means.

[56] My conclusion would be no different if the claim was maintained under the said Article for the reasons already given in paragraph 54 above. It seemed more likely than not, in the absence of proof of a slippery substance the fall could have resulted from a mis-step.

Res Ipsa Loquitor

[57] Mrs Pierre in oral submissions suggested that the claimant could not rely on the doctrine of res ipsa loquitur, unless specifically pleaded, however in written closing submissions she conceded that the doctrine applies so long as it arises from the facts of the case. I agree with the later position as the authorities repeatedly state that it is not necessary to plead the doctrine and what is required is that application of the maxim[15] flows directly from the facts which are pleaded and proved. It has also been said that the rule is to be treated as one of fairness and common sense. It should not be applied mechanically but rather in a way which reflects its underlying purpose namely that "*the facts speak for themselves*".[16]

[58] Mr Fraser asked the Court to consider whether the cleaning of the side walk became regular after the claimant fell or was this an ongoing feature on the premises, because what comes to mind is that there is a reason why the area should be cleaned and by this very fact it is implied that whatever is the causal factor for regular cleaning posed an unusual danger to persons on the resort and to the claimant on that day. He argued that

[15] *Bennett v Chemical Construction (GB)* [1971] 1 WLR 1571, CA.
[16] *Smith v Fordyce* [2013] EWCA Civ 320, Toulson LJ at [61]

the slippery substance alleged to be the cause of the fall was apparently not visible to the naked eye and no professional investigation was undertaken by the defendant to negative the claimant's evidence in that regard.

[59] In response Mrs Pierre submitted that the defendant has rebutted the presumption of negligence by showing that (i) there was another more probable cause of the fall which is that the claimant may have missed a step, (ii) there was no foreseeable risk to the claimant against which the defendant ought to have protected her; and (iii) even if there was such a risk the defendant had taken all reasonable steps to afford such protection by regularly cleaning the area.

[60] In my view the absence of an explanation for the cause of the fall does not necessarily mean that the defendant is automatically liable for the harm suffered by the claimant. It is for the claimant to prove that more likely than not some act of omission of the defendant or its servants or agents amounted to a failure to take proper care for her safety. The presumption is rebutted if the defendant can show that all reasonable care had been taken to prevent damage to the claimant while on the premises for the purpose of carrying out her duties.[17]

[61] In the **Northrock** case the Court of Appeal explained how the maxim assisted the respondent in discharging the onus of proof based on the presumption of negligence enshrined therein. In that case the respondent had been able to prove by way of un-contradicted evidence (direct and expert) that it was reasonable to infer that it was the resultant vibrations from explosions from the defendant's nearby quarry which had caused or substantially contributed to the damage to the respondent's house. The onus was on the appellant to rebut this presumption by simply proving that irrespective of the ground vibrations and even if they were inexplicable, all reasonable care and precaution had been taken to avoid damage to the respondent's house and for this reason the appellant was not negligent. Having failed to do so, the court held that the presumption of negligence survived because the proper conclusion invited by the evidence was that the damage to

[17] Halsbury's Laws of England Vol. 78 (2018) at para 64 and 65

the respondents' dwelling-house was caused by the negligence of the appellant or its servants or agents.

[62] I do not believe that a similar outcome can be reached in the present case. The Court is being asked to infer that from having slipped on or near the side walk, it is more likely than not that there was a slippery substance which the defendant failed to take all reasonable care and precaution to prevent, caused of the claimant to slip and fall. Having fully examined the evidence and determined that the defendant has rebutted any inference of negligence or breach of statutory duty, by taking all reasonable steps to prevent foreseeable danger through a regular system of cleaning the premises, Additionally I agree with the reasoning of Alleyne J in the **Samin George** case that it is "*impracticable to maintain passages, roads and pathways so that there was never a slippery place on which a person might slip and slipping can be considered to be quite a common incident of life".* I therefore conclude that the doctrine does not avail in the circumstances of this case.

Conclusion

[63] It is hereby ordered that:-

1. The claim against the defendant for negligence and statutory breach is dismissed.

2. The defendant is entitled to prescribed costs, unless otherwise agreed.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar