THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2009/0171

BETWEEN:

MICHELE JONES CLAIMANT

AND

THE SAINT VINCENT AND THE GRENADINES PORT AUTHORITY DEFENDANT

Appearances:
Mr. Emery Robertson Sr. with Ms. Samantha Robertson for the Claimant
Mr. Grahame Bollers and Mr. Sten Sargeant for the Defendant

2019: February 12
April 30

JUDGMENT

Byer, J.:

[1] The background to this claim is in fact quite simple.

[2] On 27 February 2008, the claimant, an employee of the defendant at the time, while traversing a staircase at the defendant's building alleges that she tripped, resulting in her falling down the stairs and injuring herself. The basis of the claim therefore is negligence and, breach of the statutory duty of the defendant to their servants or agents[1].

[1] Paragraph 3 of the Statement of Claim filed on the 3/6/09 as follows:
(a) Failed to take any or any adequate measures to keep the doorway free from obstacles;
(b) Failing to provide any or any sufficient safe means of access to and from the lower floor of the Administrative building and/or causing or permitting the Claimant to use the means of access when they knew or should have known that the same was unsafe;
(c) Failed to give the Claimant any or any adequate warning that the doorway was unsafe;
(d) Failed to keep the doorway free from any articles or objects which may cause a person to trip or fall;

[3] Although the claimant identified ten separate and distinct particulars of negligence in their Statement of Claim[2], I am in agreement with counsel for the defendant in their submissions, that the nub of these particulars can in fact be encapsulated into six particulars. These were:

a) Failure to take adequate measures to keep the doorway free from obstacles;

b) Failure to provide a safe means of access to and from the lower floor of the Port Building;

c) Failure to give the claimant any or adequate warning that the doorway was unsafe;

d) Causing the steps to and from the door to be unequally spaced steps and there was a metal strip crossing the pathway;

e) Failure to take any reasonable care of the claimant and other persons in their use of its premises; and

f) Failure to provide a safe system of work.

[4] In response to the claim, the essence of the defendant's claim was that the incident was wholly the fault of the claimant or in the alternative, that the claimant contributed to her injuries for failing to take her time and traverse the area with which she was familiar.

[5] Before I address my mind to the substance of this case, there appeared in the submissions filed by the parties' two issues which I must apparently lay to rest.

[6] In July 2010, the claimants filed an application for summary judgment on the basis that the defendant in their defence had failed to comply with Part 10.5 and 10.6 of the CPR 2000. It does not appear that the court ever dealt substantively with the application, given that there was no order on the court file or any notation as to what may have transpired on the same.

[7] In any event, the claimant on 8 February 2019 filed pre-trial skeletons and purported therein to make reference to the fact that the defence as filed was not in compliance with CPR 10.5 and 10.6[3].

(e) Failed to keep the Claimant or other persons away from the doorway, by locking the door or by some other means;
(f) Failed to give the Claimant any or any adequate warning that the steps to and from the door were unequally spaced and that there was a metal strip crossing the pathway;
(g) Caused or permitted the steps to the door to be unequal and/or remain unequal and a danger to persons lawfully using their premises;
(h) Caused or permitted a metal strip to be placed and/or remain in place obstructing the path and a danger to persons lawfully using their premises;
(i) Failed to take any or any reasonable care to see that the Claimant or any other person would be reasonably safe in using their premises;
(j) In the premises failing to provide and/or maintain a safe system of work and/or failing to discharge the common duty of care owed to the Claimant.

[2] See FN 1

[3] Paragraph 5 of the claimant's pre trial submissions filed on the 8/2/19

[8] This court has consistently made it clear that it is entirely inappropriate for matters to be raised in submissions that were not raised at trial or which were not matters that this court ordered to be dealt with as a preliminary matter.

[9] It is clear in this court's mind, that the concept of raising previously un-discussed issues by way of submissions is entirely inappropriate. In the case of St Kitts Development Limited v Golfview Development Limited and anr[4] Alleyne JA (as he then was) in speaking of an attempt by counsel for the Respondent in the case to rely on his own failure to take a point in limine at the trial of the matter, called such behaviour "trial by ambush which the CPR seeks to discourage"[5].

[10] In the case at bar, I consider that actions by counsel to make legal arguments that were not raised at trial or even before trial on an outstanding issue, but instead raised only on submissions, as being akin to trial by ambush. This court will not countenance the same. Counsel for the claimant did not seek to ensure that the application filed in 2010 should be disposed of before trial and as such *"may be taken to have waived [doing so] and lulled the [defendant's] attorney into acting on that basis"*[6].

[11] I therefore do not make any finding on that as a live issue.

[12] Additionally I also accept that the claimant having failed to file a reply to the defence failed to meet the allegations of contributory negligence on the part of the claimant.

[13] In the case of Daphne Alves v The Attorney General of the Virgin Islands[7], Hariprashad – Charles J had this to say about the issue of the purpose of pleadings in general under the CPR, *"… pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise."*[8] The learned judge then went on to consider the utility of a Reply. At paragraph 32 of the judgment she had this to say, relying on the learning from the book *Pleadings: Principles and Practice* by Jacob and Goldrein at page 161: "*The reply is the proper place for meeting the defence … thus … in order to defeat the defence of the Limitation Act the plaintiff must specifically plead in his reply any fact upon which he relies to take the case out of the statute". In this case, the reply pleaded no matters which constituted an effective legal answer to the defence".*

In the Daphne Alves case and relying on this learning the learned judge went on to conclude that the claimant there having failed to file a Reply it was now too late for her to say that the defence was improperly pleaded. I adopt that sentiment wholeheartedly and state that the claimant here is also so bound and the pleadings and the issues raised upon them must remain as they are before this court.

[14] I therefore determine that the issues for this court are simply two:

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[4] [2003] ECSCJ No 79(Civil App 24/2003)
[5] Op Cit at paragraph 15
[6] Op cit at paragraph 16
[7] BVIHCV 2007/0306
[8] Op cit at paragraph 27

1. Was the fall of the claimant caused by the negligence of the defendant or a failure to adhere to their statutory duty to provide a safe place of work and;

2. was there any contributory negligence on the part of the claimant if the defendant is found liable and if so, to what extent.

Issues

Was the fall of the claimant caused by the negligence of the defendant or a failure to adhere to their statutory duty to provide a safe place of work

[15] In the evidence of the claimant herself who was the sole witness for the claimant, this was her evidence in chief about what happened:

"4. On 27th February, 2008 at about 3pm while in the course of my employment and pursuant to an instruction by the Defendant, I went to the Lower floor of the Administrative Building and upon exiting the said lower floor I tripped on a metal strip placed in the doorway and fell down a set/flight of steps to the ground striking the left side of my head and knees and sustaining injuries."

[16] On rigorous cross examination, the claimant added to her statement and stated that she had been employed by the Defendant up to the date of the incident for a period of 9 months during which time she had traversed these steps several times a day while carrying out her tasks as part of her employment.

[17] Further she stated in cross examination that the door that she had entered, was fitted in a metal frame, it had glass but had no handle. It was one that had to be pushed as you enter or exit the door. On the day of the incident, the claimant said she had on heels, about 2 inches high, not thin heels but thicker heels and that when she stepped through the door, the same door that she had stepped moments earlier on her way to the Manager's office, she tripped and fell down the stairs on the other side of the door.

[18] The claimant further told the court, that the metal strip that she tripped over was not something that someone had put there but was rather a part of the doorway, but that there had been no notices to watch her step and that she had entered a darker space from a lighted area once she stepped through the door.

[19] On the basis of this, Counsel for the claimant submitted to this court, that the evidence of the claimant clearly showed that the defendant, by whom a duty was owed to the claimant had breached that duty and were therefore liable.

[20] In particularly unhelpful submissions which made no reference to the evidence and how it shored up the argument of liability on the part of the defendant, the claimant did submit that the defendant ought to have foreseen that an accident was likely to occur. In particular the claimants submitted that[9]: "*as a result of the installation of the raised door frame obstructing the pathway, the*

[9] Paragraph 11 of submissions of the claimant filed on the 21/2/19

installation of the door without handles which requires one to use their body to push open the door and fail[ure] to ensure the entrance and/or exit steps were properly spaced and/or height and/or equally spaced in terms of height and width" the defendants were to be held liable.

[21] The defendants on the other hand, made it clear that there was no doubt that the defendant owed a duty to their employees. They submitted however that in the reality of the situation that there did not exist a statutory obligation on an employer but rather that any duty was based on common law. This duty they submitted was simply a duty to take reasonable care for the safety of their employees.

[22] In quoting from the text *Commonwealth Caribbean Tort Law*[10] the defendant submitted that this *"duty is not an absolute one and can be discharged by the exercise of due care and skill, which is a matter to be determined by a consideration of all the circumstances of the particular case.*

It is well established that every employer has a duty at common law to provide:

(a) A competent staff of men;
(b) Adequate plant and equipment;
(c) A safe system of working, with effective supervision; and
(d) A safe place of work."

[23] In extensive submissions examining the duty owed to the claimant by the defendant and detailing the steps taken by the defendants, the defendant relied on the evidence of their witnesses to submit to this court that the defendant had discharged the burden placed upon them and that the claimant was the sole author of her fate on that day.

[24] The defendant brought two witnesses. The first was Mr. Lensky Douglas the defendant's civil works supervisor who actually became employed after the incident and could only speak to what had been reported to him and what he had seen of the doorway upon him taking up his employment.

[25] Mr. Douglas painstakingly told this court that the door through which this incident occurred was one that had no obstructions. The metal frame comprised of two upright parts and a piece that formed the base.

[26] In answer to questions from the court he admitted that this base did have several grooves in it but that they each measured 5mm width x 2/16" deep and that they were specially made so as not to capture a heel and that additionally the edge was tapered into the floor.

[27] This court was impressed with this witness and found that this was a witness of truth and credibility.

[28] Mr. Douglas was forthright, and this court was satisfied that his observations were candid and even tempered. Indeed, it was telling in this court's mind that this witness stated categorically that in the 10 years that he has been working with the defendant no one else had suffered the fate of the claimant.

[10] Gilbert Kodilyne at page 160 5th Ed

[29] The other witness was Mr. Glenford Stewart a civil engineer. On cross examination he admitted that it was his company that had been responsible as the overseeing engineer during the construction of the building.

[30] Indeed this construction included the installation of the doors and the door frames.

[31] This witness tried to convince this court that he was a witness of truth and forthrightness but that was not the impression that came across as he answered the hard and harsh questions on behalf of the claimant.

[32] The court was instead left with the impression of a witness who seemed to seek to justify the work done on the building as opposed to an expert witness. I therefore placed little weight to his evidence but he was able to tell the court that the metal strip or threshold was affixed to the concrete at the base of the door with screws but was not embedded in to the concrete so it in fact appeared approximately one inch above the concrete. In light of this evidence which in this court's mind, evinced a vested interest of this witness as to the construction of this building, there was very little else that was of value to the court from his evidence.

[33] Thus essentially in this court's mind, the real issue to be determined was how this accident happened and who was responsible.

Court's Analysis and Considerations

[34] It is not disputed that the three elements of negligence that a claimant has to prove are i) that the defendant owed a duty of care; ii) that there was a breach of that duty by the defendant and iii) that the claimant suffered damage as a result of that breach[11].

[35] In the case at bar it is also not disputed that an employer has an obligation to its employees. This obligation is that the employer has a duty to use reasonable care to provide a safe place of work and a safe system of work[12].

[36] So as the defendants recognized in their submissions, the duty that is owed by the defendant to the claimant is not an absolute one. The obligation of the employer is discharged once they had exercised due care and skill which must be assessed by a consideration of all the circumstances that obtained at the operative time[13].

[37] In the case of Clifford v Charles H. Challen & Son Ltd[14] Denning LJ said it this way, *"the question is whether the employers fulfilled their duty to the workman. The standard which the law requires is that they should take reasonable care for the safety of their workmen. In order to discharge that duty properly an employer must make allowances for the imperfections of human nature. When he asks his men to work with dangerous substances, he must provide proper*

[11] Gilbert Kodilyne Commonwealth Caribbean Tort Law 5th Ed page 68

[12] Joseph – Olivetti J in Lester Anderson v Penngor Limited BVIHCV 2011/102

[13] **United Estates Ltd v Durrant**[1992] 29 JLR 468 at 470 quoted in Commonwealth Caribbean Tort Law 5th Ed at page 160

[14] [1951] 1 KB 495 at 497

appliances to safeguard them; he must set in force a proper system by which they use the appliances and take the necessary precautions; and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become slack about taking precautions. He must therefore, by his foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself."

[38] Therefore, I have no difficulty in finding that the defendant did have a duty of care owed to the claimant as their employee.

[39] The next question must therefore be whether the defendant breached that duty as owed in all the circumstances.

[40] The evidence which this court accepts on a balance of probabilities is that this claimant having been employed by the defendants up to the date of the accident for a period of 9 months had frequently used this doorway and steps to fulfill the functions of the job as required.

[41] It was on one of those occasions that the claimant somehow missed her step and fell injuring herself.

[42] The obligation of the defendant was to ensure that they provided both a safe system of working and effective supervision and that they created a safe place of work.

[43] A safe system of work is defined as: *"…… the physical layout of the job; the setting of the stage, so to speak; the sequence in which the work is to be carried out; the provision in proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job, or it may be modified or improved to meet the circumstance which arise."*[15] (My emphasis added)

[44] In providing this safe system of work there is also an obligation to ensure that there is proper supervision and that any and all safety equipment is provided to the employee. Of course, in the instant case this is not relevant but the nature of a safe system of work must be provided.

[45] Additionally, the employer is under an obligation to provide a safe place of work. This is met by the employer ensuring that "the premises are maintained *in as safe a condition as reasonable care by a prudent employer can make them and if the employer "has an efficient system to keep (the workplace) clean and free from obstruction that is all that can be reasonably demanded from him"*[16].

[46] So in the case at bar, this court is satisfied that in fact what needed to be provided by this defendant given the nature of the work undertaken at the establishment was a safe place of work as so defined above.

[47] I make this determination even though it appeared from the pleadings of the claimant that what she was in fact pleading was that the defendant had failed to provide her with a safe system of work,

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[15] Commonwealth Caribbean Tort Law 5th Ed at page 163

[16] Op Cit at page 165 fn 24

that is, that they failed to provide her with a safe manner in which to carry out her work. These allegations are contained in paragraphs (b) and (e) of the particulars of negligence of the statement of claim:

"(b) Failing to provide any or any sufficient safe means of access to and from the lower floor of the Administrative building and/or causing or permitting the Claimant to use the means of access when they knew or should have known that the same was unsafe;

(e) Failed to keep the Claimant or other persons away from the doorway, by locking the door or by some other means."

[48] However the evidence of the claimant herself upon cross examination was what counsel for the defendants called a virtual tour of the plant/building. It was clear to this court that the claimant was well familiar with the layout and when one juxtaposes this with the evidence of Mr. Douglas who tells this court that since that day, 10 years ago, there was never any incident with an employee having an accident in the area where the claimant fell, this court is satisfied on a balance of probabilities that even though this may have been less of a concern, that the defendants had in fact provided a safe system of work.

[49] It was incongruous in this court's mind how the claimant sought to plead that the manner in which she was to carry out her duties was unsafe or that the door through which she passed should have been locked to prevent access when it was clear that this claimant was not the only person who accessed the building in the manner she did and that there were no other reported incidents up to or certainly after the incident.

[50] That being said, I am fortified that the main issue is with regard to the safe work place.

[51] The claimant pleaded in her statement of claim at the particulars of negligence eight different ways in which the defendant was alleged to have breached their duty to provide a safe work place[17].

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[17] Paragraph 3 of the statement of claim filed on the 3/6/09:

(a) Failed to take any or any adequate measures to keep the doorway free from obstacles;
(b) Failing to provide any or any sufficient safe means of access to and from the lower floor of the Administrative building and/or causing or permitting the Claimant to use the means of access when they knew or should have known that the same was unsafe;
(c) Failed to give the Claimant any or any adequate warning that the doorway was unsafe;
(d) Failed to keep the doorway free from any articles or objects which may cause a person to trip or fall;
(e) Failed to keep the Claimant or other persons away from the doorway, by locking the door or by some other means;
(f) Failed to give the Claimant any or any adequate warning that the steps to and from the door were unequally spaced and that there was a metal strip crossing the pathway;
(g) Caused or permitted the steps to the door to be unequal and/or remain unequal and a danger to persons lawfully using their premises;
(h) Caused or permitted a metal strip to be placed and/or remain in place obstructing the path and a danger to persons lawfully using their premises;
(i) Failed to take any or any reasonable care to see that the Claimant or any other person would be reasonably safe in using their premises;
(j) In the premises failing to provide and/or maintain a safe system of work and/or failing to discharge the common duty of care owed to the Claimant.

[52] Therefore the onus is on the claimant to show that the defendant breached their duty in this regard.

[53] When this court considers the evidence, there was no mention nor was any other witness presented who spoke to occurrence of other incidents. In fact, it was only the claimant in her evidence in chief that made bare bald statements of named individuals who had suffered a like fate in what appeared to be other parts of the building. Additionally, she even made claims that a former employee had informed her that the defendant had taken steps since her accident to make the steps more visible[18].

[54] It is trite law that the person who asserts must prove. It was the claimant who had to satisfy this court on a balance of probabilities that the defendants generally had breached this duty before and more particularly in relation to her. This court was not so satisfied. It was incumbent on the claimant to bring her best evidence as to what transpired with her and others that she mentioned for this court to get a proper sense of whether the defendant had breached their duty. This was not done.[19]

[55] It is not for the defendant to justify what was or was not done; it was for the claimant to say that the defendant having not done something required in order to fulfill their duty to her that the accident occurred.

[56] In a case out of The Republic of Trinidad and Tobago, De Verteuil and the Bank of Nova Scotia Trinidad and Tobago[20] Jamadar J in assessing a slip and fall incident which involved an employee of the Defendant bank, had this to say:

> *"... From the authorities, it is clear that the duty owed by the defendant to the plaintiff was not an absolute one. The duty is to ensure that reasonable care is taken to provide a safe place of work, and in this case, a safe kitchen. The duty is an objective one, the measure of which is stated in the cases as being 'to take reasonable care …as not to subject those employed … to unnecessary risk'. Thus, employers are not under a duty to prevent injury to their employees which arise out of the ordinary risks of normal daily life…*
>
> *Given the fact of no prior accident or circumstance having occurred and of no prior complaints having been made about the floor surface, the lighting or the system of maintaining and cleaning the kitchen, it is clear that the system employed by the defendant to keep the kitchen safe was effective prior to this accident."*

[57] In the case at bar, this court is satisfied that in this regard the claimant did not establish the breach as alleged.

[58] The claimant also raised by way of her pleadings the failure to provide step treaders that were equal in measurement and therefore safe.

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[18] Paragraph 25 of the Witness Statement of the claimant filed 30/6/10

[19] Compare the evidence that was relied on in the case of Anthony Bacchus v Bottlers St Vincent Limited SVGHCV2009/0066 Judgment of Bruce-Lyle J at paragraph 24

[20] H.C.A No 2121 of 1995 (Carilaw TT 2002 HC 85)

[59] The evidence of the defendant by Mr. Douglas, despite their pleadings to the contrary, admitted that the steps that led to this door were in fact of unequal measurements. However, Mr. Douglas went on to make a statement that these mismatched measurements did not make the steps unsafe and were in fact "comfortable" to use. This statement of opinion in this court's mind is purely subjective and can be of little use to the court in making a finding on this issue.

[60] However the difficulty that the court was faced with was that despite the clear burden lying on the claimant to prove this issue, the claimant once again did not state in evidence in chief or in answer to any question in cross examination that the steps made her trip or that she had always had difficulty traversing these steps. There is therefore a discrepancy between her pleaded case and the case as presented in this court. There was no evidence before this court that if in fact the steps had been built as they should have been – at uniform depth and height – that this accident would not have occurred. I agree with counsel for the defendant therefore in this regard that this pleading was of little assistance as this was not the reason given for the claimant's accident. There was no nexus established and I adopt the reasoning of the court in the case of Lewis v Six Continents PLC[21] which dealt with the height of windows from the floor where the defendant had been sued for the fall from one such window. There the court found 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 compliant. Moreover, there was no evidence to suggest that the difference of 50mm would have been crucial."*

[61] On a balance of probabilities, I therefore do not accept that the defendant's "failure" of proper construction in this regard created an unsafe place to work for the claimant.

[62] Overall, I accept on a balance of probabilities, that the Defendant took all reasonable steps to provide a safe place of work for the claimant and its other employees.

[63] The incident that resulted in the fall of the claimant was indeed unfortunate, but I do not accept that there was any failure of the defendant in these circumstances to warrant or equating the same to a breach of the defendant's obligations or duty to the claimant.

[64] For completeness the claimant also relied on the pleading of *res ipsa loquitur.* This doctrine sometimes assists claimants where it may be that the cause of the accident is unknown and they seek to rely on the facts of the accident itself.

[65] To rely on this doctrine the claimant must establish:

i) That the thing causing the damage was under the management or control of the defendant or his servants and

ii) That the accident was of such a kind as would not, in the ordinary course of things have happened without negligence on the defendant's part.[22]

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[21] [2005] 2 WHC 316 QB cited with approval in the case of **Audrey Barratt v Hawksbill Limited** ANUHCV2009/0343 per Remy J

[22] Commonwealth Caribbean Tort Law 5th Ed at page 99

[66] Indeed insofar as the accident did occur on premises that belonged to the defendant, the claimant thereafter had an uphill battle to show that the only way that the accident could have occurred was due to the negligence of the defendant. The claimant has in this court's mind not even put their foot at the bottom of the hill to make this climb much more reach anywhere on the hill at all.

[67] In the DeVerteuil[23] case Jamadar J in quoting from the case of Davies v De Havilland[24] stated quite clearly that "slipping is quite a normal incident of life". It just so happens that some falls can cause more damage than others.

[68] I therefore do not accept that the fall suffered by this claimant could not have happened but for the negligence of the defendant. As counsel for the defendant[25] so vividly stated if one were to consider that this applied to the claimant *"it would suggest that human beings do not fall while going through some other person's doorways unless it is the fault of the person who owns the property, his servants and/or agents. Any such proposition is unsustainable."*

[69] Therefore in the round, the claimant in this court's mind has not been able to prove her case on a balance of probabilities. I therefore do not have to address my mind to the second issue of contributory negligence. I dismiss the claim of the claimant and order costs to the defendant on an unvalued claim pursuant to Part 65.5 CPR 2000.

The order of the court is therefore as follows:

1. The claim is dismissed in its entirety with costs to the defendant on an unvalued claim pursuant to Part 65.5 CPR 2000.

Nicola Byer
HIGH COURT JUDGE

By the Court

Registrar

[23] Op cit
[24] [1950]2 ALL ER 582
[25] Paragraph 32 of the submissions of the defendant filed 22/2/19