

**THE EASTERN CARIBBEAN SUPREME COURT  
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE  
(Civil)**

**CLAIM NO. SLUHCv2015/0637**

**BETWEEN:**

**SAMANTHIA CHARMS JOSEPH**

Claimant

and

**DIGICEL (ST. LUCIA) LTD.**

Defendant

**Before:**

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

**Appearances:**

Mr. Henry Joseph for the Claimant

Mr. Peter I. Foster QC with Mr. Peter Marshall for the Defendant

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2018: December 5, 20;  
2019: August 2.

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**JUDGMENT**

[1] **CENAC-PHULGENCE J:** On 9<sup>th</sup> September 2014, the claimant, Ms. Samantha Charms Joseph, ("Ms. Joseph") was employed with the defendant, Digicel (St. Lucia) Ltd. ("Digicel") at one of its stores located at Baywalk Mall, Rodney Bay, Gros Islet when she had an accident, whereby she fell off a flight of stairs and sustained injuries. Ms. Joseph's case is that this accident was caused or contributed to by the negligence and/or breach of statutory duty by Digicel.

[2] Ms. Joseph initially filed her claim on 13<sup>th</sup> August 2015. That claim was amended twice, with the last amendment being filed on 28<sup>th</sup> March 2017, which

is the relevant claim for the purposes of this decision. In that amended claim, Ms. Joseph claimed the following relief for her injuries and loss sustained:

- (a) special damages in the sum of \$1,173,366.50
- (b) general damages in the sum of \$117,205.00
- (c) damages for breach of statutory duty
- (d) interest and costs.

### **The Pleaded Claim**

- [3] On 9<sup>th</sup> September 2014 at approximately 9 a.m. Ms. Joseph was returning from the stock room to the front of the store. As she descended the stairs a protruding screw from the metal strip at the top of the stairs went into the sole of her shoe causing her to fall off the stairs through an open gap on the side of the stairway, landing on the stairs below. As a result, Ms. Joseph was left unconscious for a few minutes and suffered post traumatic left sacroiliitis, right upper back pain due to soft tissue injury to the back and post-concussion headaches as a result of blunt head trauma. Two medical reports were referred to in the statement of claim, being a report of Dr. N A Dagbue, Consultant Orthopaedic Surgeon dated 2<sup>nd</sup> June 2015 and a report from Zhenya C. Allain, Chartered Physiotherapist dated 16<sup>th</sup> January 2015.
- [4] The claim alleges that Ms. Joseph is to undergo additional examination and treatment in Barbados and Miami in relation to blunt head trauma and back pain.
- [5] The statement of claim sets out a schedule of past and future expenses and losses, consisting of costs associated with medical reports, future loss of earnings, travel to and treatment in Barbados and the United States as well as future medical treatment for 24 months.
- [6] Subsequent to filing the amended statement of claim and standard disclosure, the claimant, without any warning or application, filed a list of exhibits on 11<sup>th</sup> April 2017. It is unclear what this list was meant to be as it did not accompany any

document filed, but it would appear to be documents supporting the expenses associated with treatment and travel to Barbados and the United States.

### **Preliminary Observations on the Claimant's Pleadings**

[7] Rule 8.9(3) of the **Civil Procedure Rules 2000** ("CPR") sets out the special requirements relating to actions for personal injuries. It provides that where a claimant intends to rely on evidence of a medical practitioner, the claimant must attach to the claim the medical report/s of the medical practitioner. I note that in the statement of claim, reference was made to two medical reports referred to at paragraph 3 above whilst there was attached to the amended claim form filed on 9<sup>th</sup> December 2015 two other reports from Dr. Curby Sydney and Dr. Segun Tobias. The rule also makes provision for other or additional medical evidence to be provided at trial.

[8] CPR 8.9(5) requires that the claimant include in or attach to the claim form or statement of claim a schedule of any special damages claimed. I note that the claimant has in the statement of claim what is termed schedule of past and future expenses and losses. What is required is a list of special damages claimed. The claimant has listed future loss of earnings and cost of future medical treatment as special damages but these are in fact general damages which the court is required to assess. It is important that counsel set out this information carefully as it forms the basis for any assessment of damages which may be carried out should the court find in a claimant's favour. It is also the basis for calculation of prescribed costs should the claimant not be successful on a claim. I cannot overemphasise this, as a litigant's case is severely compromised by the failure to pay adequate attention to detail when prosecuting a matter.

### **The Defence**

[9] Digicel's defence is that it was not negligent and neither did it breach its statutory duty to Ms. Joseph. It avers that Ms. Joseph's negligence caused the accident was caused, as ascending and descending the stairs was part of her daily routine

and something that she and other employees did several times a day. It therefore avers that Ms. Joseph's injuries were caused or contributed to by her negligence.

[10] In its defence, Digicel avers that:

- (a) it provided all its employees with information on general safety procedures and that this was contained in its Employee Safety Manual distributed to all employees, including Ms. Joseph, at the commencement of employment;
- (b) through its supervisors, employees were orally instructed to carry cartons under their arms instead of frontally when descending the stairs so as to avoid injury to themselves or damage to the products;
- (c) it provides adequate lighting and the stairs were carpeted and equipped with metal strips to avoid accidents including slipping and falling;
- (d) it ensures that there are no safety hazards present at the store and undertakes monthly official checks and assessments of the store to ensure that it is safe for use and occupation by employees and customers;
- (e) handrails are not equipment or protective devices as contemplated by the **Labour Act**,<sup>1</sup> and
- (f) it took reasonable and appropriate steps to reduce the risk of injury to Ms. Joseph as well as other employees;

[11] Digicel further contends that Ms. Joseph was not exposed to any risk which was foreseeable and denies that her injuries were caused by their negligence. In its defence Digicel also challenged the schedule of past and future expenses and losses in the statement of claim and aver that these are not properly pleaded and that these damages are not specified sums as contemplated by the Civil Procedure Rules.

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<sup>1</sup> Cap 16.04 of the Revised Laws of Saint Lucia.

## Issues

- [12] The issues for determination are:
- (a) whether Ms. Joseph can maintain a claim for negligence and for breach of statutory duty;
  - (b) whether Digicel was negligent;
  - (c) whether Digicel breached its statutory duty under the **Labour Act**;
  - (d) whether Ms. Joseph's injuries were caused by Digicel's negligence or breach of statutory duty; and
  - (e) whether Ms. Joseph is entitled to damages and if so, the quantum?

### **(A) Whether Ms. Joseph can maintain a claim for negligence and for breach of statutory duty?**

- [13] In relation to Ms. Joseph's claim for breach of statutory duty, counsel for the defendant submitted that breaches of the **Labour Act** result in criminal sanctions or an award by the Labour Tribunal if referred. A breach of the **Labour Act**, he argues does not in and of itself entitle Ms. Joseph to damages. Counsel refers to section 465 of the **Labour Act** which deals with the general penalty where an offence is committed but no penalty is provided.
- [14] Ms. Joseph's claim is grounded in a breach of section 257 of the **Labour Act** which section sets out the general duties of employers. Section 257 in effect sets the standard of care required by an employer. However, section 257 does not make a contravention of the section an offence. Section 465 is therefore not applicable to this case.

- [15] Section 459 of the **Labour Act** provides as follows:

#### **"459. Proceeding in tort and criminal proceedings**

Notwithstanding any provision made for redress of a contravention under this Act, nothing contained in this Act shall be taken to prohibit or prejudice any suit or proceeding in tort, or any criminal proceeding or any suit under any other law in force in Saint Lucia, existing or in the future, for any act or omission arising out of employment."

This section allows an individual to bring an action in tort despite the measures provided for redress in the **Labour Act**.

- [16] This question, which is clearly a vexed one, was addressed by Lord Wright in **London Passenger Transport Board v Upson**<sup>2</sup> where he said:

“The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant’s statutory duty ... It is not a claim in negligence in the strict or ordinary sense.”

- [17] The learned authors of **Charlesworth & Percy on Negligence**<sup>3</sup> say:

“The existence of a statutory duty does not necessarily relieve an employer of his common law duty of care to employees although “in very many cases, it would be difficult, if not impossible, to maintain that an employer who had complied with regulations had been negligent at common law.” Indeed, a statutory duty is likely to be higher than its common law equivalent: a claim based on a breach of statutory duty can succeed even though an employer is not liable in negligence.”

- [18] It is clear that a breach of statutory duty is seen as a tort that is equivalent to the common law action in negligence, but it is a distinct cause of action in tort. The question is whether a cause of action for breach of section 257 exists. In **X (Minors) v Bedfordshire County Council**,<sup>4</sup> Lord Browne-Wilkinson explained it in this manner:

“The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. ... If a statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory duty was intended to be enforceable by

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<sup>2</sup> [1949] AC 155 at 168.

<sup>3</sup> 12<sup>th</sup> edition, Sweet & Maxwell.

<sup>4</sup> [1995] 2 AC 633.

those means and not by private right of action:... However the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy.”

[19] The learned authors of **Charlesworth & Percy on Negligence** state that an important example of the latter situation identified in the paragraph above, (i. e. that there exists a private right of action although the legislation provides a statutory remedy for breach of the statutory duty) is the protection afforded to workers by duties imposed on employers, breach of which gives rise to an action for damages notwithstanding the imposition of criminal sanctions for breach.

[20] As stated above, the **Labour Act** does not provide any criminal sanction for breach of section 257 which is the relevant provision. It does make provision for a complaint to be made to the Labour Commissioner or Labour Tribunal if there is a contravention but that is the extent of any remedy provided.

[21] It must be that by section 459, Parliament intended to afford an employee the right to a private law action for breach of statutory duty where there is contravention of section 257. Therefore, Ms. Joseph’s claim for damages for negligence and/or breach of statutory duty is well grounded.

#### **(B) Whether Digicel was negligent?**

[22] Article 985 of the **Civil Code**<sup>5</sup> is the applicable provision as relates to torts. That article provides that:

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

[23] The case of **Northrock Ltd. v Desmond Jardine et al**<sup>6</sup> looked at what a claimant must prove to be successful in an action for negligence. The onus of proof in an action for negligence rests on the claimant. Ms. Joseph must therefore prove (i)

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<sup>5</sup> Cap. 4.01, Revised Laws of Saint Lucia.

<sup>6</sup> SLUHCVP1991/0012, (delivered 26<sup>th</sup> October 1992, unreported.)

that Digicel owed a duty of care to Ms. Joseph; (ii) that the duty was breached and (iii) that she suffered damage which was caused by the breach; in the words of Sir Vincent Floissac, Chief Justice in **Northrock** that the damage was caused by Digicel's fault. Fault is defined in article 989D to mean: negligence, breach of statutory duty or other duty or other act or omission which gives rise to a liability in tort or would, apart from this article, give rise to the defence of contributory negligence.

**(i) Did Digicel owe Ms. Joseph a duty of care?**

- [24] There can be no dispute that Digicel as Ms. Joseph's employer owed her a duty of care. Indeed, counsel for Digicel admits this in his submissions.

**What is the nature of the duty of care owed?**

- [25] In the case of **Stokes v Guest, Keen and Nettleford (Bolts and Nuts) Ltd.**<sup>7</sup> the duty owed by an employer to an employee was described by Swanwick J as follows:

“... the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.”

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<sup>7</sup> [1968] 1 WLR 1776.



### **What are the elements of the duty owed by the employer?**

- [26] The duty owed by an employer is said to include the following (i) providing a safe place of work, including a safe means of access; (ii) to employ competent employees and supervision; (iii) to provide and maintain adequate plant and appliances; (iv) to provide a safe system of work.

### **What does providing a safe place of work mean?**

- [27] The duty of employers to provide a safe place of work was said by Goddard LJ to be 'not merely to warn against unusual dangers known to them...but also to make the place of employment...as safe as the exercise of reasonable skill and care would permit.'<sup>8</sup>

### **(ii) Whether Digicel breached the duty of care owed to Ms. Joseph**

- [28] Ms. Joseph pleaded the following particulars of negligence; that Digicel:
- (a) exposed her to a foreseeable risk of injury;
  - (b) failed to provide a safe system of work in the area between the stock room and store in particular the stairs did not have any reasonable measures present to prevent an employee falling several feet onto a concrete floor, particularly, that the stairs did not have any rails or other alternative safety measure;
  - (c) failed to provide adequate lighting for the stair area;
  - (d) failed to display any signs warning employees of open stairs.

### **Evidence in Chief**

- [29] The only witness statement filed in support of the claimant's case was that of Ms. Joseph herself.

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<sup>8</sup> Naismith v London Film Productions Ltd. [1939] 1 All ER 794 at 798.

**Claimant**

**Ms. Joseph**

- [30] Ms. Joseph's evidence is that she went to the stock room on 9<sup>th</sup> September 2014 at approximately 9 a.m. to check telephone stock. The stock room was located at the back of the store and up two flights of stairs. She describes the stairs as having a first flight of two to three stairs which then turns left onto the main and second flight of stairs consisting of about twelve stairs. The stairs were all carpeted. At the top of the stairs, the carpet butted onto laminate flooring and there was a metal strip across the two surfaces which covered the edges of both these surfaces. The metal strip according to Ms. Joseph was secured using metal screws.
- [31] Ms. Joseph says that after she checked the telephone stock she made her way back to the store front and while descending the stairs, a screw which was protruding out of the metal strip went into the sole of her shoe causing her to lose balance and fall off the stairs through a void to the side of the stairs. She explains that she landed on the short flight of stairs at the bottom having fallen through the void.
- [32] When she fell, Ms. Joseph says she was carrying one sheet of paper which she had recorded the stock on and was wearing flat shoes. Ms. Joseph's evidence is that the stair area was always dimly lit with one light which she believed was a fluorescent light in the kitchen area which illuminated the whole space.
- [33] Ms. Joseph's evidence is that some three to four stairs from the bottom of the second flight of stairs, the wall on the right side ends creating what she calls a right angle void area which has no handrail or anything to prevent someone from falling through. This is exactly where Ms. Joseph says she fell through.
- [34] Ms. Joseph's evidence is that she was unconscious for several minutes. She says two or three days after the accident she began to have severe pain and what

seemed like paralysis to her right side. She says she contacted the store supervisor who took her to Tapion Hospital. Ms. Joseph says that as a result of the accident she sustained post traumatic left sacroiliitis, right upper back pain due to soft tissue injuries to her neck, post conscious headache, and concussion as a result of blunt head trauma. She says she continues to suffer a high degree of pain in her back which from time to time continues to swell. Ms. Joseph says she continues to have blurred vision from time to time. Walking any distance she says causes her right leg to lose strength resulting in it being dragged behind her. She also speaks to being advised by her doctor that she would have to undergo an operation to remedy the damaged disc in her upper back and as a result would have to wear a neck brace for several months to correct the alignment of her back.

[35] Ms. Joseph says that throughout the period of her employment at Digicel any and all monthly checks were of the store area only and only concerned stocks. To her knowledge there were never any checks to the stock area or kitchen.

[36] It is noteworthy that despite Ms. Joseph's detail of her injuries she presented no evidence in her witness statement to substantiate these. There is no evidence from any medical practitioner referred to in the statement of claim which would support Ms. Joseph's evidence that she would require surgery in the future or that she needed to travel to Barbados and the United States for treatment. These findings may be very material on an assessment of damages.

### **Defendant**

[37] The defendant filed three witness statements from Shenaaz McAnuff, Human Resource Manager of Digicel, Linus Rameau, Store Supervisor at the Digicel store and Mr. Michael Campbell, the security guard on duty at the time of the accident. On the day of trial however, only Linus Rameau attended the trial and was cross-examined. The other two witnesses failed to appear with the attendant consequence that their witness statements were struck out.

**Mr. Linus Rameau (“Mr. Rameau”)**

- [38] Mr. Rameau was a sales representative with Digicel at the time of the accident and worked with Digicel from about September 2007. Mr. Rameau says he took on an acting supervisory role occasionally. Mr. Rameau speaks to what he calls a storeroom which contains cartons of stock and consists of tables and chairs and other amenities for staff members to have meals and tea breaks. He speaks to access to that area being via a set of stairs which are carpeted consisting of twelve steps split into two tiers with a platform separating them. Mr. Rameau says the stairway was well lit and contained a clearly visible sign which read “watch your step”. For the most part, Mr. Rameau’s description of the stairway is consistent with Ms. Joseph’s.
- [39] On 9<sup>th</sup> September 2014, Mr. Rameau says he took on the supervisory role in the absence of the supervisor. He says that he gave Ms. Joseph instructions to retrieve a carton of stock from the stock room, a task which was part of the duties of staff like Ms. Joseph. Mr. Rameau did not witness the incident concerning Ms. Joseph but was informed of it. Mr. Rameau says he was on the ground floor when he heard what sounded like a ‘thud’ above but he was not alarmed as noises were generally heard as cartons were being moved or if someone stepped too heavily.
- [40] Mr. Rameau says when he went to the stairs area after being informed of the incident, he observed the security officer assisting Ms. Joseph. He says he saw a bag of ice pressed on her shoulder. At the time she was conscious.
- [41] Mr. Rameau says that after the day of the incident, he interacted with Ms. Joseph when she returned to work about a month later and in his estimation she appeared fully functional and normal. Her attendance at work he says was intermittent and after some time he got to know that Ms. Joseph was no longer employed with Digicel.

**Analysis**

- [42] It is clear from the evidence that at the date of the incident there were no handrails on the stairway leading to the stock room at the Digicel store at Rodney Bay. Ms. Joseph remained firm in her position that at the date of her accident there were no handrails. The evidence also revealed that Ms. Joseph had traversed the stairs over a four year period and had never complained that the lighting was poor. Counsel for Digicel suggested to Ms. Joseph that she had never complained about the stairs and in fact she was quite used to those stairs. She agreed that that was the case.
- [43] The evidence is clear and not disputed that there was a metal strip at the top of the stairs which was held down by screws. Counsel attempted to suggest to Ms. Joseph that the visible part of the screw would have had a flat head which she agreed with. However, Mr. Rameau in his cross-examination said that the when he went to check the screw after the incident, the head of the screw/nail was showing. He also said that it was enough to see. He also said that he banged the nail back in place which supports Ms. Joseph's version of events that there was a screw/nail which had come up out of the metal strip.
- [44] The evidence revealed some interesting details. When asked whether since he had banged the nail in place, it had come up again, Mr. Rameau said the metal strip was no longer there and that the entire area is now carpeted. Mr. Rameau said in cross-examination that after the accident, there was a handrail installed on the right side of the stairs if ascending. That handrail he said was installed along the longer flight of stairs. This is the same side where the void or empty space described by Ms. Joseph existed and through which she fell. From Mr. Rameau's evidence it is clear that all there was on the left side of the stairs at the time of the incident was a bannister but to the top of the stairs.
- [45] In his evidence in chief, Mr. Rameau speaks to a sign ("Watch Your Step") which he says was well lit and clearly visible but in cross-examination, he says that that sign was only put there after the accident. That is a significant inconsistency.

- [46] Ms. Joseph's evidence that there were no handrails to the side of the stairs which was open is supported by Mr. Rameau's evidence. There is no question that there was a void on the stairs and it is through that void that Ms. Joseph fell. It is foreseeable that someone may fall through an open area on stairs if there is nothing to allow them to break the fall or to hold on to. The mere fact that Ms. Joseph had traversed these same stairs over a four year period and had not complained or had any incident or that no other employee had ever had an incident or complained is irrelevant to a consideration of whether Digicel breached its duty of care to Ms. Joseph.
- [47] Counsel for Digicel made heavy weather of Ms. Joseph saying in her witness statement that the screw in the metal strip went into the sole of her shoe and then in cross examination saying that her heel got stuck on the screw. When asked whether she was saying that the screw did not go into the sole or the heel, she clarified that the screw did not go into the shoe but got stuck on it. Ms. Joseph seemed quite exasperated as she continued to say that the screw did not go into the shoe and further that she was under the impression that the sole includes the heel. Therefore, when she says the screw went into the sole it is not different from the screw getting hooked onto the heel. Whilst some time was spent trying to identify the difference between the screw going into the sole and the screw getting caught on the heel, I do not think that it is quite material, as whether it was one or the other, the root cause of Ms. Joseph's fall was the encounter with this screw.
- [48] Counsel for Digicel tried to suggest that there was no screw that tripped Ms. Joseph and caused her to fall on the day in question but that flies in the face of Mr. Rameau's evidence that he actually banged the screw back in place and that there was enough of the head of the nail showing to see it.
- [49] The Court believes Ms. Joseph that she tripped on the nail/screw in the metal strip, there were no handrails on stairs and that she fell off the side of the stairs.

[50] In the case of **Bath v British Transport Commission**,<sup>9</sup> the deceased was engaged in concreting the side of a dry dock when he slipped and fell to his death from an unfenced ledge, two feet six inches wide and approximately 40 feet above the bottom of the dock. The work had been ongoing for three years without complaint or mishap, but the employers were still held liable because the danger was such that some protection ought to have been provided.

[51] In **Kimpton v Steel Co. of Wales Ltd.**<sup>10</sup> the plaintiff was employed as a maintenance electrician in the defendants' factory, where a set of three steel steps led to a platform. The steps, which were three feet in height altogether, consisted of a solid structure of considerable weight. They were not built into the building, but there was an inset into the uppermost step of some part of the platform in order to prevent lateral movement. The treads of the steps, which were protected by studs, were somewhat worn, but not enough to condemn them. The width of each step was only eight inches, and the rises between the steps varied. There was no hand-rail on either side of the steps. While descending the steps hurriedly to deal with a breakdown in the electricity, the plaintiff slipped and injured himself. In an action by him for damages against the defendants, the trial judge held that, in failing to provide a hand-rail to the steps, the defendants were in breach of s 25(2)<sup>a</sup> of the Factories Act, 1937, the steps being a "staircase" within the meaning of the subsection, and, on the facts, the defendants were also in breach of their common law duty as the plaintiff's employers because, if there had been a hand-rail, the plaintiff might have been able to save himself when he slipped and thus have avoided his injuries. On appeal by the defendants, the Court of Appeal held that the trial judge was right to have found that the employers were in breach of their duty to take reasonable care not to expose their servants to unnecessary risk. The appeal against the finding of breach of statutory duty was allowed as the set of steps were determined not to constitute a staircase within the meaning of the Factories Act.

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<sup>9</sup> [1954] 1 WLR 1013.

<sup>10</sup> [1960] 2 All ER 274.

[52] In the case of **Jaguar Cars Ltd. v Coates**<sup>11</sup> it was held that it was not negligent to fail to provide a handrail to steps until after the claimant's accident because, on the facts, the steps were safe and the precaution taken after the event did not establish that they were unsafe prior to the installation of the handrail. What distinguishes this case from the case of **Kimpton** appears to be the nature of the particular stairs.

[53] In **Coates**, the stairs were only four. Each step was "47 wide, 19 1/2 deep and 6 3/4" high and surfaced with two substantial concrete paving blocks. On one side of the steps there was a chainlink fence. At the time of the accident the other side was open to a grass bank leading to the side of the nearby building. This is where the hand-rail was put after the accident. After the accident, the safety officer inspected the stairs and concluded that they were in good condition and did not need a handrail but decided because of the accident to install one anyway.

[54] In the instant case, the stairway consisted of about twelve stairs. What is clear is that there was an open space to the side of the stairs and there was no handrail at the time of the accident. The fact is that Digicel exposed its employees to a foreseeable risk (falling through the open space on the stairway) and the mere fact that there was no evidence of any previous accidents does not absolve them of being in breach of their duty of care to Ms. Joseph.

[55] I therefore find that Digicel breached its duty of care to Ms. Joseph.

### **(C) Did Digicel breach its statutory duty?**

[56] Ms. Joseph alleges the following as the particulars of breach of statutory duty. Ms. Joseph alleges that Digicel:

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<sup>11</sup> [2004] EWCA Civ 337.



- (a) failed to make a suitable and sufficient assessment of the risk to health and safety of their employees in relation to walking from the store room to the front of the store contrary to section 257(1)(a) and (b) of the **Labour Act**;
- (b) failed to provide information to the claimant on health and safety risks and protective measures that should be adopted contrary to section 257(2)(f) of the **Labour Act**;
- (c) failed to provide and or maintain adequate lighting in a confined space and therefore failed to provide a safe means of access to and from the store room contrary to section (1)(a) of the **Labour Act**;
- (d) failed to provide and maintain any hand rails on the open side of the stairs and therefore failed to provide the protective device as prescribed, to and from the store room contrary to section 257(1)(b) of the **Labour Act**;
- (e) failed to take appropriate steps to reduce the risk of injury to the claimant.

[57] Section 257 of the **Labour Act** sets out the general duties of an employer. The relevant sections which the claimant alleges were breached are as follows:

“(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;
- (b) the equipment, materials and protective devices and clothing as prescribed are provided;
- (c) -(g) ...

(2) In addition to the duties imposed by subsection (1), an employer shall—

- (a) -(e) ...
- (f) post or make available to the employee at a conspicuous location in the workplace a copy of the occupational safety and health policy;
- (g) -(h) ...”

[58] Counsel for Ms. Joseph submits that where a defendant wishes to rely on reasonable practicability, the onus is on him to call evidence to prove that it was not possible to have done more to prevent the injury. In Digicel’s defence they stated that the ‘defendant ensures as much as is reasonably practicable that there are no safety hazards present at the store and in keeping with its policy

undertakes monthly official checks and assessments of the store to ensure it is safe for use and occupation of employees..’

[59] Digicel however provided no evidence to support these averments made in its defence. Mr. Rameau, their only witness did not give any evidence of inspections being carried out at the store or what these inspections revealed. He only said he recalled there being checks, one every two to three months. He spoke in cross-examination to there being general tidying up of the store area. The defence also spoke to an Employee Safety Manual which Digicel says was given to all employees but no evidence of this manual was produced. Digicel also said that the employees were instructed as to how to carry cartoons but Mr. Rameau’s evidence does not even support this, though he says at the material time he acted as supervisor sometimes.

[60] It is clear that failure to provide hand rails and to carry out inspections of the stairway and the metal strip at the top of the stair is a breach of Digicel’s statutory duty to provide a safe working environment for its employees. There is no evidence to suggest that providing handrails on the stairway was not reasonably practicable. In such circumstances, where there was clearly an attendant risk to employees in having a stairway with an open side without handrails, Digicel cannot absolve itself from responsibility.

[61] In conclusion, I find that Digicel breached its duty of care to Ms. Joseph and also the statutory duty imposed by the **Labour Act**.

**(D) Did Digicel’s breach cause Ms. Joseph’s injuries?**

[62] The burden rests on Ms. Joseph to prove on a balance of probabilities that the breach of the duty of care to her or the breach of the statutory duty caused or materially contributed to her damage. At this point, Ms. Joseph’s claim falls apart. Although Ms. Joseph in her witness statement speaks to injuries which she says were as a result of Digicel’s breach, there is no medical evidence to support

the injuries she says she sustained. Ms. Joseph is not a doctor and cannot therefore speak to her diagnosis and would have had to have relied on the medical evidence to substantiate her claim. There is no evidence to suggest that the injuries which Ms. Joseph says she sustained are as a result of the fall from the stairs. That is indeed unfortunate. It is even more unfortunate when I consider that even if Ms. Joseph had established the causal link, I would be severely constrained in any assessment as Ms. Joseph has not placed one iota of evidence before the Court to support the damages being claimed. The witness statement does not make any reference to the damages being claimed nor is any reference made to any supporting documents such as receipts. By way of example, Ms. Joseph claimed a sum for future loss of earnings which while not being special damages requires proof of her earnings. There is no mention far less proof of her earnings.

[63] CPR 29.5(1)(g) requires that the witness statement sufficiently identify any document to which it refers. Ms. Joseph's witness statement does not do so and does not exhibit the said documents. A belated attempt was made one year later to file a list of exhibits but this was done without leave and it is uncertain what this document related to since none of the exhibits listed therein were referenced in the witness statement.

[64] There is no order for bifurcation of the trial made at case management, so it was incumbent on the claimant to ensure that she put all the evidence necessary to prove her claim both as to liability and quantum of damages. Support for this is found in the Court of Appeal decision of **St. Kitts Development Corporation v Golfview Development Limited and Michael Siminic**<sup>12</sup> where Rawlins JA said:

"In this case, no application was brought or Order made for a separate trial of the issues of liability and damages. Directions were given during the case management process for disclosure, inspection, the filing of evidence in chief by way of witness statements and the filing of documents to be used at the trial. In the absence of a bifurcating Order, these directions were for the purpose of the trial of both issues."

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<sup>12</sup> SKBHCVP2014/0016, (delivered 31<sup>st</sup> March 2005, unreported) at para 23.

[65] The case of **Emmanuel Rock v Theresa Jolly**<sup>13</sup> is instructive on the point. In that case the full court decided that:

“...it is desirable that, where no prior bifurcating order was made, liability and quantum of damages should be determined after one trial and in a single judgment or order. Notwithstanding that it lies within the discretion of a judge, a bifurcating order with directions to the parties to file additional evidence for a separate assessment hearing should very rarely be made at a stage as late in the process as was done in the present case. Such an order should not be made where a party would suffer prejudice thereby.”

[66] In light of the foregoing discussion, I am constrained to dismiss Ms. Joseph's claim. On the issue of costs, the general rule is that costs follow the event and the successful party is entitled to his costs.

### **Conclusion**

[67] The Order is as follows:

- (a) The claimant's claim is dismissed.
- (b) Prescribed costs to the defendant pursuant to CPR 65.5.

**Kimberly Cenac-Phulgence  
High Court Judge**

**By the Court**

**Registrar**

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<sup>13</sup> DOMHCVAP2006/0010, (delivered 17<sup>th</sup> May 2007, unreported) at para 39.