COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2004/CLE/gen/00492

BETWEEN

ELVA LINDSAY

Plaintiff

AND

GOODMANS BAY DEVELOPMENT COMPANY LIMITED

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Sidney Campbell with Cyril Ebong for the Plaintiff**
Wynsome Carey for the Defendant

15 October 2020

DECISION

WINDER, J

This is a claim in negligence specifically alleging occupier's liability. The plaintiff alleges that her slip and fall injury at the defendant's building complex, known as Goodman's Bay Corporate Center, was due to its negligence. The trial, which was conducted remotely, was to decide the issue of liability only.

[1.] The plaintiff's claim is set out in her (Amended) Statement of Claim which provided, in part, as follows:

> …
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> 4. At all material times the Defendant was the owner and/or operator of the building complex called and known as Goodman's Bay Corporate Center.
> 5. At all material times the Plaintiff was employed in the services of Canadian Imperial Bank of Commerce (CIBC) Trust Company, tenants of the Goodman's Bay Development Company Limited.
> 6. On July 29th 2001 the Plaintiff and a fellow employee Carolyn Longley were nearing the exit of the corporate building when the Plaintiff slipped <u>on a wet spot on the tiled floor</u> and fell heavily twisting her ankle and hitting her head upon falling to the hard surface. The Plaintiff blacked out for a short while and was revived by a Security Officer and the said Carolyn Longley.
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> …
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> 7. The mishap was caused due to the negligence of the Defendant, its servants and/or agents
>
> PARTICULARS OF NEGLIGENCE OF THE DEFENDANT
>
> i. The Defendants its servants and/or agents <u>allowed surface water to remain on the floor of the building when the Defendant knew or ought to have known that such a condition was hazardous or unsafe to persons trafficking in and out of the building</u>.
> ii. The Defendant its servants and/or agents failed to warn the Plaintiff sufficiently or at all that it was hazardous and unsafe to walk on the wet surface.
> iii. The Defendant its servants and or agents were negligent in not indicating by posted sign or otherwise that it was hazardous to walk on the tiled floor when wet.
> iv. The Defendant its servants and or agents had a duty of care to the tenants and their employees using the building for ingress and egress and indeed the general public, to alert them to use care and caution

when walking on the tiled floor especially when due to surface water or other liquids used in its maintenance and upkeep.

(Emphasis added)

[2.] In response to a request by the defendant for further and better particulars of the plaintiff's claim, she responded that the incident occurred between 11:00 am and 12:00 noon and included a sketch of the lobby area showing the site of her fall near the entrance. The plaintiff also responded that she was unaware as to whether the security guard, identified as Mr Dean, witnessed the fall but indicated that she was revived by him following her blackout. Finally she also pleaded that she did not know how long the water came to be on the floor or how long it was there.

[3.] The filed Defence denied that the accident came about as a result of the negligence of the defendant but alleged, inter alia, that it occurred as a result of the plaintiff's own negligence in failing to keep any proper look out while walking on the tiled floor or to heed, act upon or avoid the wet spot she alleges existed. The Defence also pleaded, at paragraph 8, that:

> 8. The Defendant at all material times employed on a permanent full-time basis designated employees whose sole function was to patrol the premises and inspect the state of housekeeping therein. The said employees were and remained at all relevant times fully equipped to clean and clear or cover any spillage or slippery substance which may be found.

[4.] At trial the plaintiff was the only witness called in her case. At the close of the plaintiff's case the defendant elected not to call any witness and instead raised a no case submission, asserting that the plaintiff has failed to prove her case.

[5.] The witness statement of the plaintiff provided at paragraph 3 as follows:

> 3. As we headed out of the back door, I slipped on the wet tiled floor, twisting my ankle and hitting my head. They told me I blacked out for a split second… There was no visible sign of water on the floor, and there were no signs posted of floor being wet.

[6.] Under cross examination the plaintiff confirmed:

a) that she slipped and fell on the wet surface;

b) that there were no visible signs of water on the floor or signs warning of any danger; and,

c) there was water on her hands after the fall.

[7.] The defendant complains in its submissions that:

> 2. The oral testimony having been taken of the plaintiff… the plaintiff failed to prove that her alleged slip and fall on the Defendant's premises was a result of the Defendant's negligence.
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> ..
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> 5. At paragraph 6 of her Amended Statement of Claim, the Plaintiff pleaded that her slip and fall was as a result of a wet spot on the tiled floor at the Defendant's premises. The question the Court must determine, then is was there a wet or slippery substance on the said floor on 29 July 2001? And if so, did the Defendant know or ought reasonably to have known and therefore use reasonable care to prevent damage to the plaintiff therefrom?
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> …
>
> 7. The Plaintiff's evidence is that she was headed out the back door of the Defendant's premises, she slipped on the wet tiled floor twisting her ankle and hitting her head despite there being no visible sign of water on the floor and no signs posted of the floor being wet. During cross examination, the Plaintiff confirmed that there was no visible sign of water but alleged she noticed water on her hands after the fall. No other witnesses were called by the Plaintiff to support her version of events and no evidence was given to suggest that the water on her hands were as a result of a wet spot on the floor. She left the Court to make the inference that the fact of the accident itself is sufficient to infer that the Defendant, its servants or agents were negligent. No compelling or conclusive evidence was given by the Plaintiff to suggest that there was water on the floor amounting to an unusual danger of which the Defendant knew or ought to have known; and, of which the Plaintiff did not know or of which she could not have been aware.
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> 8. Additionally, the Plaintiff's evidence is inconsistent with her pleaded case. In her Amended Statement of Claim, she alleges that she slipped on a wet spot on the tiled floor; however, her evidence is that there was no visible sign of water on the floor. As a result of the same, the Defendant asks the Court to find that the Plaintiff has failed to prove her pleaded case. The burden of proof is on the Plaintiff and she has failed to discharge that burden.
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> …
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> 11. No evidence was adduced on behalf of the Defendant. It is the Defendant's submission that if an accident did happen because the floor was covered with spillage, then some explanation should be forthcoming from the Defendant to show that the accident did not arise from want of care on their

part. Considering the inconsistence between Plaintiff's pleaded case and her evidence, the Defendant did not have the evidential burden to discharge.

12. In the circumstances, it is the Defendant's submission that the Plaintiff has failed to prove her allegation that there was a wet substance on the floor on the Defendant's premises that caused her to slip and fall.

[8.] The plaintiff opposes the submission of no case, and in her written submission says:

8. In the premise, the knowledge of the incident is exclusive to the Defendant as it is especially within the range of its capacity to probe to investigate the facts, which it did but has yet to produce.
9. On the date and time of the accident, the Defendant had under its care and direction the supervision, control and maintenance of the said premises and had the duty to keep it free from wet spots and safe for travel for those lawfully traversing the said lobby. There is therefore a prima facie case that the Defendant is liable.
10. The Plaintiff submits the wet spot on the lobby floor was an unusual danger, one which she was not aware of and which ought not to be there.
11. Therefore the burden was and still is on the Defendant to either explain how the wet spot came to be on the floor or to adduce evidence to show that reasonable steps had been taken to avoid the accident. The Defendant has not discharged that burden.

Analysis and Discussion

[9.] A submission of no case to answer may be made by the defendant on the ground that the plaintiff's claim is bound to fail. Such a claim may arise either because:

(a) Even if the plaintiff's evidence is accepted, no cause of action is disclosed, or

(b) The plaintiff or her witnesses have been so discredited in cross-examination that their evidence cannot be believed, or

(c) The evidence led by the plaintiff is so unsatisfactory or unreliable that the Court should find that the burden of proof on the plaintiff has not been discharged. (See ***Yuill v Yuill*** **[1945] 1 All ER 183**)

The defendant, it would seem, relies on all of the above grounds.

[10.] Occupier's liability is not a strict or absolute duty to prevent any and all damage to an invitee or licensee. The state of the law was ably put by ***Sawyer J***. (as she then was) in the case of ***Cox v Chan [1991] BHS. J. No. 110***. At paragraph 21, of the decision, ***Sawyer J*** states:

> "[I]t is clear from the decided cases, including Indermaur v. Dames, that the duty of care which a person like the defendant owes to a person like the plaintiff is not an absolute duty to prevent any damage to the plaintiff but is a lesser one of using reasonable care to prevent damage to the plaintiff from an unusual danger of which the defendant knew or ought to have known and, I may add, of which the plaintiff did not know or of which he could not have been aware. If it were otherwise then the slightest alleged breach of such a duty would lead to litigation and could, perhaps, hamper the progress of quite lawful and needful businesses."

[11.] In the English Court of Appeal case of ***Ward v Tasco*** **[1976] 1 ALL ER 219**, the facts of which may be recited from the headnote: The defendants owned and managed a supermarket store. While shopping in the store, the plaintiff slipped on some yoghourt which had been spilt on the floor and was injured. She brought an action against the defendants claiming damages for personal injuries allegedly caused by the defendants' negligence in the maintenance of the floor. It was not suggested that the plaintiff had in any way been negligent in failing to notice the spillage on the floor as she walked along doing her shopping. At the trial the defendants gave evidence that spillages occurred about ten times a week and that staff had been instructed that if they saw any spillages on the floor they were to stay where the spill had taken place and call somebody to clear it up. Apart from general cleaning, the floor of the supermarket was brushed five or six times every day on which it was open. There was, however, no evidence before the court as to when the floor had last been brushed before the plaintiff's accident. The plaintiff gave evidence that three weeks after the accident, when shopping in the same store, she had noticed that some orange squash had been spilt on the floor; she kept her eye on the spillage for about a quarter of an hour and during that time nobody had come to clear it up. The trial judge held that the plaintiff had proved a prima facie case and that the defendants were liable for the accident. The defendants appealed, contending that the onus was on the plaintiff to show that the spillage had been on

the floor an unduly long time and that there had been opportunities for the management to clear it up which had not been taken, and that unless there was some evidence when the yoghourt had been spilt on to the floor no prima facie case could be made against the defendants.

[12.] The English Court of Appeal found that it was the duty of the defendants and their servants to see that the floors were kept clean and free from spillages so that accidents did not occur. Since the plaintiff's accident was not one which, in the ordinary course of things, would have happened if the floor had been kept clean and spillages dealt with as soon as they occurred, it was for the defendants to give some explanation to show that the accident had not arisen from any want of care on their part. Since the probabilities were that, by the time of the accident, the spillage had been on the floor long enough for it to have been cleared up by a member of the defendant's staff, the judge was, in the absence of any explanation by the defendants, entitled to conclude that the accident had occurred because the defendants had failed to take reasonable care.

[13.] According to ***Lord Megaw***:

> It is for the Plaintiff to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the Defendants than the absence of fault; and to my mind the learned Judge was wholly right in taking that view of the presence of the slippery liquid on the floor of the supermarket in the circumstances of this case: that is that the Defendants knew or should have known that it was not an uncommon occurrence, and that if it should happen and should not be promptly attended to, it created a serious risk that customers would fall and injure themselves. …
>
> If the Defendants wish to put forward such a case to escape liability, it is for them to show that, on balance of probability, either by evidence or by inference from the evidence that is given or not given, this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection to customers. That, in this case, they wholly failed to do.

[14.] ***Ward v Tasco*** has been followed consistently in this jurisdiction in cases such as ***Dorestant v City Markets Ltd 2002 BHS J No 119, Smith v Kelly's Home Center Ltd. 2009/CLE/gen/01924*** and ***Ferguson v. Island Hotel Company Limited - [2012] 1 BHS J. No. 112.***

[15.] In this case, I find that the plaintiff has proven, on balance that she fell as a result of a wet substance on the floor of the lobby of the defendant's premises. The danger posed by the wet substance was unusual in that it was not visible and the plaintiff says that she was only able to become aware of it when she fell and noticed it on her hands. I also find that the premises, where she fell, were under the control and management of the defendant, whose employee interviewed her on the day of the incident relative to the fall and undertook an investigation. No results of any investigation were placed before the court. Whilst there is no direct evidence from the defendant in relation to paragraph 8 of the Defence, leaving it unproven, the pleading confirms that spillage and slippery substances on the surface of the floor of the premises was not uncommon requiring permanent staff with the sole responsibility to clean, clear or cover any such spillage or slippery substance which may be found. No issue would be taken by the plaintiff on that aspect of the defendant's pleading. As indicated however, the question of whether it was in fact true that the defendant had so engaged such staff on the day of the incident remains unproven.

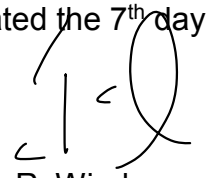
[16.] In my view, the plaintiff has shown that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendant than the absence of fault. In the language of ***Ward v Tasco:*** *the plaintiff's accident was not one which, in the ordinary course of things, would have happened if the floor had been kept clean and spillages dealt with as soon as they occurred*. There was the presence of the substance on the floor of the lobby of the defendant's premises which was utilized by all tenants, and their staff, to enter and exit the building. In the circumstances of this case the defendant knew

or should have known that it was not an uncommon occurrence, and that if it should happen and should not be promptly attended to, it created a serious risk that persons, such as the plaintiff, would fall and injure themselves.

[17.] It is for the defendant to show that, on balance, either by evidence or by inference from the evidence that is given or not given, this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection to customers. The defendants has chosen not to put forward a case to escape liability, and have made a no case submission. I am satisfied therefore that the no case submission must fail and as the defendant has not met its evidential burden, I give judgment for the plaintiff on the claim of negligence with damages to be assessed.

[18.] The plaintiff shall have her reasonable costs to be taxed in default of agreement.

Dated the 7th day of December 2020



Ian R. Winder
Justice