[2019] JMSC Civ. 213

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 01497

BETWEEN	**HANNAH-KAY JAMES**	**CLAIMANT**
AND	**JAMAICA URBAN TRANSIT COMPANY LIMITED**	**DEFENDANT**

IN OPEN COURT

Miss Nicola Allison instructed by Bignall Law for the Claimant

Mrs. Camille Wignall-Davis and Ms. Kathrina Watson instructed by Nunes, Scholefield DeLeon & Co for the Defendant

HEARD: 29th, 30th July & 1st November, 2019

Negligence - Personal Injury -– Claimant injured at work – determination of Liability-Occupiers Liability Act 1969 – Res Ispa loquitur.

WOLFE – REECE, J.

INTRODUCTION AND BACKGROUND

[1] The Claimant Ms. Hannah-Kay James initiated this claim against the Defendant the Jamaica Urban Transit Company Limited, her former employer seeking damages for Negligence and breach of their statutory duty under the Occupiers Liability Act. She alleges that on or about the 12th October 2011 she suffered

injuries to her foot when she slipped and fell down a flight of stairs whilst at her place of employment.

[2] At the time of the incident, the Claimant was employed as a Human Resource Clerk by the Defendant who is a limited liability company incorporated under the laws of Jamaica as a Government run public transportation company.

[3] The Claimant asserts that the Defendant was negligent and breached their statutory duty by:

a) Failing to take any adequate precautions for the safety of the Claimant while she was at her place of employment owned and/or operated by the Defendant;

b) Exposing the Claimant to risk of damage or injury of which they knew or ought to have known;

c) Failing to provide or maintain a safe working environment for the Claimant;

d) Failing to provide the Claimant with special instructions for using the slippery stairs

e) Failing to provide any proper caution and/warning signs of the danger or take reasonable safety precautions to prevent the claimant from falling on the ground while descending the stairs

f) Failing in its duty to take such care as in all circumstances of the case is reasonable to see that the Claimant was reasonably safe in using the premises for which she was there;

g) Failing to take any or any adequate or effective precautions for the safety of the Claimant whilst she was a lawful visitor to said premises;

h) Failing to provide the necessary caution signs in an effort to warn employees of the danger of the staircase;

i) Failing to provide an adequate or adequately trained staff to maintain the safety of the said company;

j) The Claimant will rely on the doctrine of Res Ispa Loquitur.

[4] As a result, the Claimant alleges she sustained serious personal injuries, suffered loss, damages and incurred expenses. She particularized her injuries as follows

a) Right Ankle Sprain

b) Chronic secondary to a chronic contusion to the right ankle/talus medially

c) Tarsal tunnel Syndrome to the right foot.

[5] The Defendant argues that their premises were reasonably safe for the purpose for which the Claimant was permitted to be there and advanced that the injuries arising from the Claimant's slip and subsequent fall were caused and/or contributed to by the Claimant's negligence.

[6] The Defendant particularized the negligence of the Claimant as:

a) Failing to use the handrails provided;

b) Descending the staircase without using the handrails provided;

c) Descending the stairs in a manner which was unsafe;

d) Failing to heed and/or observe the presence of cautionary/ warning signs located on the staircase;

e) Failing to take any or any adequate regard for her own safety when descending the flight of stairs;

f) Failing to take any or any adequate measures to prevent a fall down the flight of stairs;

g) Failing to keep any or any proper lookout whilst descending a flight of stairs;

h) Failing to keep her balance whilst descending a flight of stairs.

CLAIMANT'S CASE

[7] The Claimant's evidence is that on the 12th of October 2011 between 1:00pm and 2:00pm, she was descending the stairs at the corporate offices of the Jamaica Urban Transit Corporation when she slipped, fell three stairs down and hit her right leg on the bottom of the stairs. The Claimant asserts that she twisted her ankle while going down the stairs resulting in her right ankle being swollen and in severe pain.

[8] She contends that following her fall, she was on the ground for about 5 minutes unable to get up. A fellow co-worker came to her assistance and made an attempt to get her on her feet. When she was finally on her feet, the co-worker assisted her to the nearest area where she could sit. A nurse later came and rubbed ointment on her ankle.

[9] The Claimant says that she later went to Dr Prakash who recommended and X-Ray and gave her some analgesics and a muscle relaxant. She was also given sick leave.

[10] Her evidence is that she did an MRI which revealed that she had moderate bone contusion of the right talus bone and soft tissue injury. She states that she did not want to get crutches or a stick and so she hobbled around with the assistance of her daughter when she was at home.

[11] When she returned to work, her foot started to swell and as a result, she had to return to the doctor who gave her additional sick days. She was unable to wear shoes, unable to stand up on both feet and whenever it got cold, her feet would pain. She had to elevate her right leg in order to reduce the swelling. She asserts also that she went to physiotherapy two times a week for approximately 20 times.

[12] The Claimant gave further evidence that on the 10th of December 2012, over a year later, she visited Dr Waite sometime later and made a complaint of pain in her right ankle and her right big toe. She alleges that to assist with the swelling, she would bathe her foot in warm water and use icy hot to rub the area which would normally reduce the swelling. She described the pain as feeling like someone was sticking her with needles and says it was associated with spasm and numbness.

DEFENDANT'S CASE

[13] Mr. Lloyd McCalla who was employed as a Safety Officer to the Defendant Company at the relevant time. He had been working in this capacity since 2010 gave evidence on their behalf.

[14] He says that on the 12th October 2011, the Claimant made a complaint that she had slipped and fell while in the process of descending a flight of stairs at the Defendant's office.

[15] He gave a description of the staircase in question, and gave evidence that the staircase was fitted with handrails on both sides. He says that prior to the Claimants fall there were caution signs placed in prominent positions along the walls of the staircase. He described the warning signs in place on the wall, his evidence is that these signs said "Use Handrails" and "Watch your Steps".

[16] He asserts that there were about 16 steps that made up the staircase. Each step being 3 feet 3 ½ inches in width and the length of the top step is 6 feet and 7 inches while the length of the bottom step is 10 feet and 11 inches. He adds that the steps were made from aluminum type material and had a rough finish.

[17] He avers that on the day in question the staircase was free and clear of debris and was not wet nor were there any reports of anything being wrong with the steps on the particular day.

[18] Mr. McCalla also gave evidence with regard to the maintenance of the staircase by the Defendant company. He stated that the staircase was erected in or about

September 1998 when they commenced operations at the depot. Further to that it is his evidence that the location was reviewed and audited for safety purposes on an annual basis and has been certified as safe over the years.

[19] He states that there is nothing inherently wrong with the staircase and that there were warning signs alerting persons to use the handrails for safety. It is his evidence that the only changes made to the staircase since the Claimants fall are that additional signs saying “Watch your step” that were printed and placed on the staircase.

[20] The Defendant denies the allegations of negligence and breach of statutory duty made by the Claimant and states that at all times they provided a safe place of work, adequate plant and equipment which would ensure that that the Claimant was not exposed to any unnecessary risk injury or damage.

[21] They state that the premises were reasonably safe for the purposes for which the Claimant was permitted and the Defendant has a safe system in place for its operations which was executed with due care and attention.

CLAIMANT’S SUBMISSIONS

[22] Counsel for the Claimant, Miss Nicola Allison submitted that the issues for the Court’s consideration are:

(i) Whether the Defendant breached his duty to the Claimant as her employer?
(ii) Whether the Defendant has breached their statutory due under section 3 of the Occupier’s Liability Act? and;
(iii) Whether the Claimant is entitled to damages and the quantum thereof.

[23] She submitted that from the evidence, it is for the Court to determine the state of the staircase when the Claimant slipped and fell on the 12th day of October, 2011. She submitted that the Claimant described the stairs she fell from as metal, shiny and said there is no grit to hold your feet when you go up or down the stairs. When

asked what she meant by no grit, she said 'there is nothing to hold you, it is also shiny, so there is a possibility that you may slip or fall, because there is nothing to hold you.'

[24] Counsel pointed out that the witness for the Defendant on the other hand, in his evidence described the staircase as being made of aluminium material and having a rough finish. She advanced that both witnesses agreed that the staircase was made of aluminium/metal however the contention and the difference in description that arises where the Claimant describes the stairs as metal and shiny with nothing to "hold you" and, the Defendant's sole witness describes the said stairs as having a rough finish. This she submitted is an issue the Court would have to determine

[25] Counsel advanced that from the photographic evidence, it is clear to the viewer that the said staircase in fact had a shine finish. It was submitted as a result that the shiny finish of the staircase caused it to be slippery which resulted in the Claimant's slip and fall. Counsel added that to make the matter more complex, there were no warning signs along the staircase cautioning its users to avoid unfortunate situations like the one the Claimant found herself in.

[26] Miss Allison went on to submit that the court must determine as a matter of fact whether the staircase in question had a shiny or rough finish and if so whether either or both constituted a dangerous state of affairs which triggered a breach of common law duty of care.

[27] Counsel argued that the Court is to consider the evidence as set out in Mr. McCalla's evidence-in-chief where he stated that, "two additional signs saying, "Watch your Step" were printed on the steps. It is the Claimant's case that the Defendant was not being truthful when he said two signs were added to the staircase, instead these two signs were introduced to the said staircase after the Claimant fell down the said staircase. Based on this evidence, Counsel posed the question as to why these 'additional' signs placed along the staircase if there was no inherent defect to the staircase.

[28] Miss Allison placed on the case of **Renay Bryan v Sugar and Spice Limited** [2016] JMSC Civ 110, at paragraph 8 where the Claimant *"accepted that the staircase had a rail and that she did not use the rail, but reached for it when she was falling. She acknowledged that the shoes she was wearing were slippery because they were plastic"* It was held by the Honourable Tie J:

> *"I am of the view that the Claimant assumed a risk in descending the stairs in admittedly slippery shoes and without utilizing the handrail to her detriment."*

[29] Counsel made the comparison to the case at bar and sought to distinguish it. She submitted that besides the unproven allegation that there were warning signs on the staircase at the time of the Claimant's fall, there was no evidence presented by the Defendant to substantiate any claims of negligence on the part of the Claimant. Counsel added that she was descending a flight of stairs while holding on to the handrail, she assumed no risk because she did all she was reasonably required to do in the circumstances. She urged on the Court that the Defendant on the other hand failed to properly maintain the said staircase and mount warning signs to ensure its employees were safe in their work environment at all times.

[30] Counsel submitted that the Claimant demonstrated that she was a credible witness. That when questioned as to what she told the doctor as to which stair she fell from, the Claimant was honest and admitted that she did not remember what she told the Doctors regarding which particular staircase she fell from.

[31] In addition to this, Counsel added that based on the evidence of the Claimant during cross examination, she agreed that the staircase had handrails and said she was using the said handrails at the time she fell down the staircase, even though she did not say so in her witness statement. This omission Counsel submitted, should not be taken as detrimental to the Claimant's case as, aside from stating that she was using the handrails, there were no signs directing her to utilize same to ensure her safety which is a duty which ought to have been discharged by the Defendant.

[32] Counsel contends that every employer owes a duty to his employee(s) to provide inter alia a safe place of work. There is no dispute that the Claimant was at the material time of the incident the Defendant's employee. Therefore, the duty clearly extends to the Claimant (**Davie v New Merton Board Mills Ltd**. [1959] 1 ALL ER 346), "The common law duty of care owed by an employer to an employee is to take reasonable care for their safety."

[33] Counsel drew the Courts attention and relied on Clerk **& Lindsell on Torts**, which states at page 915, *"The key question is whether it was in breach of the duty of care".* And at page 919, it goes in to state *"There is a duty to see that a reasonably safe place of work is provided and maintained. The place of employment should be as safe as the exercise of reasonable care and skill permits; it is not enough for the employer to show that the danger on the premises was known and fully understood by the employee… In considering whether the place of work is safe or not, regard must be paid to its nature… A place which is safe in construction may become unsafe through some obstruction being placed on it or through the presence of something on the floor which makes it slippery. In such cases the test to be applied is whether a reasonable employer, in the circumstances of the case, would have caused or permitted the existence of the state of affairs complained of."*

[34] It is submitted that the Claimant acted with due regard for her safety and did not contribute in any way to the accident as she had exercised reasonable care for her own safety by making use of the hand rails that were provided.

[35] It is the Claimant's contention that the Defendant owed her a duty of care as her employer, to provide a safe place of work. The stairs in question was located on property that is owned by the Defendant and as such was in the care of the Defendant. At the material time of the incident the stairs were in a state where they were smooth, shiny and slippery and as such caused the Claimant to lose her balance and slip and fall down the stairs.

[36] The Claimant attorney at law relied on section 3 of the **Occupiers' Liability Act** which states that the owner/occupier of premises owes a duty of care to ensure that all visitors are reasonably safe whilst on those premises. She referred to the case of **Devon Harris v E & R Hardware Ltd** [2016] JMSC Civ. 228, where Jackson-Haisley, J at paragraph 40 sets out the extent of an occupier's ordinary duty. At paragraph 41 she stated:

> *"The Occupier's Liability Act imposes on an occupier of premises a duty of care to all his lawful visitors, which is to take such care to see that a visitor is reasonably safe in using the premises for the purpose for which he was invited. From an assessment of the case law it does appear that the duty owed in respect of both torts [negligence and occupiers' liability] is essentially the same and so I will apply the same considerations in assessing this case. What is also evident is the fact that ultimately it is a question of fact for a judge to determine based on an overview of the relevant evidence. It is a mixed question of fact and law and it is for the Court to consider whether the injury caused was reasonably foreseeable and whether it is in the view of this Court fair and reasonable to impose a duty of care."*

[37] Miss Allison submitted that the stairs in question can reasonably be said to have been unsafe for visitors/users at the material time of the incident. She adds that the injuries the Clamant sustained were caused by the unsafe physical condition of the stairs and it is not being disputed that the Claimant's use of the premises was for the purpose for which she was invited to the premises, that is, she was an employee and was descending the stairs to access the pantry to have her lunch.

DEFENDANT'S SUBMISSION

[38] Counsel for the Defendant Miss Katrina Watson and Mrs Camille Wignall-Davis submitted on the issue of liability under the Employers Liability Act by relying on the case of **Davie v New Merton Board Mills** [1959] All E.R. which established the employers common law duty to his employee to take reasonable care for their safety in providing (a) competent staff of men (b) adequate plan and equipment (c) a safe place of work (d)a safe system of work with effective supervision.

[39] Counsel relied on the case of **United Estates Ltd v Durrant** (1992) 29 JLR 468, P 470 per Wolfe JA, where it was accepted that under the common law, employers have a general duty of care imposed upon them to protect their employees. However, this duty is not absolute and can be discharged by the employer's exercise of due skill and care.

[40] In **Charlesworth &Percy on Negligence**, 9th Edition at 10-16, it was stated that:

> *"Moreover, the duty to provide a safe place of work is <u>fulfilled by providing a place as safe as care and skill can make it, having regard to the **nature of the place**</u>…. As long as the employer makes the working place as safe as it can <u>**reasonably**</u> be made, he has satisfied his obligation."*

[41] In regards to Occupiers Liability, Counsel relied on section 3 of the Occupiers Liability Act, and referred the Court to the case of **Anatra v Ciboney Hotel Limited et al** Suit No. C.L. A-196/1997 where Reckford, J found that the Defendant occupier was not liable for the Claimants fall and resultant injury. He stated at paragraph 9 that:

> *"The unchallenged evidence of Mr Duffus for the Defendants is that this was a top class hotel which has maintained high ratings over the years. They have lived up to international standards… the construction was by reputable builders and the stairways received daily maintenance. A non-skid material was on the edge of each step."*

[42] In using this case, Counsel submitted that the Defendant ought not to be held liable for ordinary incidents of life and based on the evidence, the Claimant's alleged fall would have at best be nothing more than an ordinary incident of life which occurred without fault or beach of duty on the Defendant's part.

[43] In respect of the Claimant's fall, Counsel submitted that the Claimant's explanation was that she slipped because the staircase was shiny but there was no explanation as to what she slipped on. Counsel added that there was no evidence to suggest that there had been any debris or liquid or obstacle that could have caused the Claimant's fall.

[44] They submitted that there was no evidence led that the stairs were unsafe and not built properly and as such, the Claimant had not proven that the Defendant was negligent. Further to that there was no evidence to suggest or establish that there some inherent defect in the staircase that occasioned the alleged slip and fall which caused the resulting injuries.

[45] Counsel advanced that the stairs were safe and that all reasonable care was taken to ensure the safety of the said staircase. It was their opinion that slipping was a common incident of life and they place reliance on two cases: **Bell v Travco Hotel Ltd**. (1953) 1 AER p. 638 where Lord Goddard stated that:

> *"This is one of those cases in which the injury caused was due to a slip, and as everybody knows, slipping is one of the most usual incidents in the changes and chances of this mortal life."*

and **Dave v DeHavilland Aircraft Co. Ltd**. (1950) 2 AER 583 where Sommerville, L.J said:

> *"It would be impracticable to maintain passages and roads and pathways so that there was never a slippery place, especially after rain, on which a man might slip. **Slipping is quite a common incident of life**, and usually no harm is done. The victim usually suffers no permanent injury, but, unfortunately, the plaintiff received serious damage to his ankle."*

[46] Lord Goddard C.J. in the Court of Appeal in the **Bell** Case mentioned above said:

> *"This idea that whenever an accident occurs from which an injury is sustained somebody ought to be liable is becoming far too common. A person can recover compensation, not for every injury sustained in everyday life, but only for an injury which is due to the fault of some person who owes him a duty."*

[47] Counsel submitted that a slip and fall does not automatically assume or give rise to a finding of negligence or breach of duty. **Pamela Minor v Sandals Resort International Limited (Trading as Beaches Negril Resort and Spa)**, **Real Resorts Ltd. and Beaches Management Ltd**, [2015] JMSC Civ 256 and **Joy Hew v Sandals Ocho Rios Limited** [2013] JMSC Civ 42. The onus of proof is on the Claimant and it is not enough for him to say that the incident occurred but there

must be evidence presented to prove on a balance of probabilities that such an incident resulted from a failure of the Defendant to take reasonable care.

[48] It was submitted that the Claimant in this case had failed to discharge the onus of proof as the evidence presented was insufficient to establish that the staircase on which she fell was unsafe or that there was any want of care on the part of the Defendant that caused the fall.

[49] The position of the Defendant is that they did not breach their common law or statutory duty of care to the Claimant as her employer and took reasonable care for the Claimant's safety.

[50] Counsel added that the Claimant was silent on her witness statement as to the description of the staircase and her use of the handrails. It was suggested that the lack of candour on the part of the claimant indicates that she is not being forthright with the Court.

[51] It was submitted that if the Claimant was using the handrails, she would not have slipped and/or twisted her ankles as she alleges. The Court was asked to reject this aspect of the Claimant's evidence.

[52] The Defendant submits that the court can accept on a balance of probabilities based on the evidence that at the time of the Claimant's alleged fall, the staircase was free from debris liquid or obstacles and was in fact safe for use. However even if the Court accepts that the staircase was slippery, or had some inherent defect, that as an adult who worked at the premises prior to the date of the fall and who would have been familiar with the staircase, the Claimant should have taken extra care in descending what she alleges to be a staircase that had no grits or nothing to hold onto.

[53] Counsel added that the Claimant's case remained silent on the issue of signs and/or any signs specific to the use of the staircase. The Claimant it was submitted failed to satisfy the legal and evidential requirements of her case. She has not been

able to disprove the assertions or otherwise challenge the Defendant's assertions that the premises were certified safe and audited annually.

[54] Miss Watson and Mrs. Wignall-Davis went on to submit that the Claimant was not a credible witness and appeared to be quite furtive, argumentative at times and unsettled while the questions were being posed to her. She did not present herself as a witness of truth and it is submitted that notwithstanding the passage of time, there were simple details that the Claimant ought to have remembered.

[55] In view of the evidence as a whole it was submitted that the evidence does not establish on a balance of probabilities that the staircase was unsafe and that there was a breach of the duty on the part of the Defendant Company. Accordingly, it was submitted that the Defendant is not liable to the Claimant for the injury sustained in her slip and fall.

ISSUES

[56] The issues that arise on the facts are:

a) Whether the Defendant owed the Claimant a duty of care and, if so, whether this duty was breached resulting in damages?

b) Whether the Defendant breached its statutory duty of care under the Occupiers' Liability Act?

c) Whether the Claimant contributed to the accident by her negligence?

d) If the Defendant has breached its duty of Care to the Claimant what if any is the quantum of damages is to be awarded to the Claimant?

LAW AND ANALYSIS

[57] At common law, employers owe employees a duty to take reasonable care for their safety. In **Paris v. Stepney Borough Council** [1951] A.C. 367 at 384 Lord Oaksey said:

> *"The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case. The fact that the servant has only one eye if that fact is known to the employer, and that if he loses it he will be blind, is one of the circumstances which must be considered by the employer in determining what precautions if any shall be taken for the servant's safety. The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances. As the circumstances may vary infinitely it is often impossible to adduce evidence of what care an ordinarily prudent employer would take. In some cases, of course, it is possible to prove that it is the ordinary practice for employers to take or not to take a certain precaution, but in such a case as the present, where a one-eyed man has been injured, it is unlikely that such evidence can be adduced. The court has, therefore, to form its own opinion of what precautions the notional ordinarily prudent employer would take".*

[58] According to the case of **Davie v New Merton Board Mills Ltd**., [1959] 1 All ER 340, this duty extends to providing a competent staff of men, adequate plant and equipment and a safe place and a safe system of work with effective supervision.

[59] For the purposes of this discussion, a safe place of work is one which requires an employer to ensure that the premises where his employees are required to work is reasonably safe. In the case of **Watson v Arawak Cement Co Ltd** (1998) High Court, Barbados, no 985 of 1990 (unreported), Chase J said:

> *"Another aspect of the employers duty to exercise reasonable care and not to expose his servants to unnecessary risk is his duty to provide a reasonably safe place of work and access thereto….."*

[60] In light of this requirement, **Blyth v Birmingham Waterworks Ltd**., (1856) 11 Ex. Ch. 781) states that a Defendant will be said to have been breach of this duty if his conduct is such that it falls below the standard of care. This standard being that of a reasonable and prudent man.

[61] The onus is on the Claimant therefore to persuade the Court on a balance of probabilities that the Defendant's conduct was such that it fell below the standard of care in the circumstances. As stated by Harris JA in **Glenford Anderson v George Welch [2012] JMCA Civ.43:**

> *"It is also well settled that where a Claimant alleges that he or she has suffered damages resulting from an object or thing under the Defendant's*

care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities"

[62] Under section 3 of the Occupiers Liability Act:

> *"(1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.*
>
> *(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*
>
> *(3) The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing-*
>
> > *(a) an occupier must be prepared for children to be less careful than adults;*
> >
> > *(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.*
>
> *(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances."*

[63] In the case of **Marie Anatra v Ciboney Hotel Limited and Ciboney Ocho Rios Limited** Suit No. C.L. 1997/A 196 (delivered on the 31st of January, 2001) the Courts held:

> *"Long before the statutory provisions came into effect McBride J in MacLean v. Segar (1917) 2 KB 325 at page 329: "The occupier of premises to which he has invited a guest is bound, as a matter of common law duty, to take reasonable care to prevent damages to the guest for unusual danger which the occupier knows or ought to have known of."*

[64] Based on the principles laid down in the authorities, and the evidence before this Honourable Court, it is irrefutable that the Defendant owed a duty of care to the Claimant who was at the material time both an employee and a visitor to the Defendant's premises.

[65] There is no debate that the Claimant was injured during the course of her employment but the parties are arm's length away as to the circumstances surrounding to the Claimant's fall. The question then is whether the Claimant's fall and subsequent injuries are as a result of the Defendant's negligence and/or breach of statutory duty under the Occupiers Liability Act? In answering such a question, I agree with Counsel for both parties that an assessment of the credibility of the witnesses has to be undertaken.

[66] The claimant having brought the defendant has a burden to prove her case. In her witness statement the claimant indicated that whilst she descended the stair she slipped and fell three stairs down and ended up hitting her right leg on the bottom of the stairs. She made no mention of any adverse condition of the stair case. It was whilst she was in the witness box that she gave evidence that the stairs were shiny and had no grit.

[67] It is apparent that the Court is being asked to conclude that the evidence of a shiny stairs is a basis for a conclusion that it was slippery. I am not of the view that this a reasonable conclusion to be drawn from this evidence. The use of the sense of sight that something is shiny by itself is not indicative of a conclusion that is in fact slippery. Having so asserted that the stairs were shine based on the accepted evidence that they were metal by itself is not a basis on which the Court could reasonably find as a fact that they were slippery. I am of the view that the Claimant has not proved that that the stairs were slippery.

[68] On the Claimant's account, when asked to describe the stairs from which she fell, she stated that they were metal, shiny and had no grit to hold your feet whenever you went up or down the stairs. She asserted that there was nothing on the stairs to hold you and the possibility existed that you may slip or fall. When cross-examined, the Claimant contradicted this position by affirming that there were handrails on both sides of the staircase. When asked by Counsel for the Defendant if she mentioned the handrails in her Evidence- in-Chief, she states that she did not. Conflictingly, as cross-examination progressed, the Claimant went on

to say *"let me explain to you, there is a landing at the top, and then there are steps going down with handrails, which I was using on the day of the incident."* When Counsel pursued the issue further and asked the Claimant if she had mentioned that she was using the handrails on the date of the incident, she said she did not.

[69] I am of the view that the failure on the part of the claimant to mention the existence of handrails and her use of same until it was raised in cross examination is a challenge to her creditability, as the circumstances surrounding her fall is indeed critical to a determination of liability.

[70] In addition to this, the Claimant contended that there was only one flight of stairs. She gave evidence that once you came down the first flight of stairs, there was a landing. The Defendant's description of the staircase is that they were fitted with handrails on both sides and caution signs were placed in prominent positions along the walls of the staircase. Mr. McCalla stated also that there were two flights of stairs. Having observed Mr. McCalla in the witness box I accept that spoke the truth that caution signs were in place on the walls at the time of the incident. I also accept his evidence that additional signs were put up after the Claimant fell on the stairs.

[71] Pictorial evidence was advanced by the Defendant who says that the stairs were blue and had grit on them. The picture having been tendered into evidence. The evidence of the Defendant is that the steps were 3 feet 3 $^{1/2}$ inches in width and the length of the top step is 6 feet and 7 inches while the length of the bottom step is 10 feet and 11 inches. From all the evidence before the Court, I accept as true the fact that the staircase in question had handrails on both sides and the obvious inconsistency in the Claimant's evidence has led me to accept that on a balance of probabilities she failed to utilize the handrails on the day of the incident. I also accept from the picture and the evidence led that the stairs were blue appeared to have grits on them and were wide enough for the Claimant's feet to fit comfortably.

[72] Pursuant to a court order the Claimant was examined by Dr. Konrad Lawson in March 2017, a doctor of the Defendants choice. The Claimant's evidence under examination-in-chief is that she fell three stairs down when she hurt her leg. Counsel for the Defendant however questioned this evidence by asking if what she had told Dr Lawson was that she had fallen from the second to last step of the stair case to which the Claimant replied no. When shown the medical report of Dr Lawson, she agreed that she did in fact tell him that her fall was from the 2nd to last stair. When asked again if she recalled saying that to the doctor however, she said she did not.

[73] It is to be noted that the medical reports of Dr. Sangappa and Dr. Waite tendered into evidence by the Claimant in support of her injuries examined her in 2011 and 2012 respectively reflect that she reported to them that she fell the penultimate step and the second to last stair. I am not the view that it is significant to the issue to be determined whether it was the second to last stair from which she fell or whether she fell three stairs down. This especially so when one considers length of time between when the reports were made to the doctors and when she gave the witness statement.

[74] However, the Claimant also stated in her witness statement that she was experiencing pain in her ankle and right big toe. When cross-examined by Counsel however, she was asked if she said this to her doctors and her response was no. The suggestion was put to her that she was not experiencing pain in her toe, she agreed by saying "*no mam, never made any complaints*. The suggestion was again made that the first time she had mentioned pain in her right big toe was when she saw Dr. Waite in 2012 and she replied by saying she does not recall saying that she had numbness in her right big toe. Further, when it was suggested to her that there was no injury to her toe resulting from the injury, she agreed with Counsel. Her evidence- in-chief however was that she injured her right big toe. The issue of the injury sustained and the reports made of same goes to her creditability and whether the Court can rely on her as a witness of truth. I am of the view that this inconsistency is material and affects the Courts ability to rely on her account.

[75] The Claimants case that there were no signs on the staircase. When cross-examined by Counsel, her account did not change and she maintained throughout the trial that there were no signs on the wall. When the Defendants witness was cross-examined by Counsel for the Claimant he was asked Q. "You are aware of an arrow on the same wall?" His reply was "yes". He was also asked Q. "You are aware on that same wall, there is a sign that says evacuation route" His reply to this was "yes". The suggestion was then put that "...at the time [the Claimant] fell down the staircase, those were the only two signs on the wall" to which he disagreed. It is trite that suggestions are not in fact evidence. It is however curious this line of questions when the Claimants case is that there were no signs.

[76] In the case of **R v Webber** [2004] UKHL 1, it was held that

> *"While it is of course true that questions put by counsel are not evidence and do not become so unless accepted by a witness, the effect of specific, positive suggestions put by counsel on behalf of a defendant is to plant in the jury's mind the defendant's version of events. This may be so even if the witness rejects the suggestion, since the jury may for whatever reason distrust the witness's evidence.*

[77] The onus is on the Claimant to prove on a balance of probabilities that the Defendant did not provide a safe place of work however, from the evidence, she failed to show that the premises were reasonable unsafe and not maintained as a reasonably prudent employer would. In essence that they breached their duty of care. I find that the cumulative effect of the inconsistencies on the Claimants case and omissions of crucial evidence without any acceptable explanation makes the Claimant an unreliable witness.

[78] The evidence does not support that the Defendant breached the duty of care owed to the claimant. Neither does it support any breach the duty owed under the Occupiers Liability Act.

Res Ipsa Loquitur

[79] In **Shtern v Villa Mora Cottages Ltd and Another** [2012] JMCA Civ 20, Morrison JA, addressed the doctrine of res ipsa loquitur and stated as follows *at paragraph 57*

> *"Res ipsa loquitur therefore applies where (i) the occurrence is such that it would not normally have happened without negligence (the editors of Clerk & Lindsell, [19 Ed], para. 8-152 provide an illustrative short-list from the decided cases: 'bales of sugar do not usually fall from hoists, barrels do not fall from warehouse windows, cranes do not collapse, trains do not collide and stones are not found in buns'); (ii) the thing that inflicted the damage was under the sole management and control of the defendant; and (iii) there must be no evidence as to why or how the accident took place. As regards this last criterion, the editors of Clerk & Lindsell (op. cit. para. 8-154) make the important point, based on Henderson v Jenkins & Sons [1970] RTR 70, 81 – 82], that 'Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine'." (Emphasis supplied)*

[80] From this definition, I conclude that the staircase was under the sole management of the Defendant company. There is no evidence as to what caused the Claimants fall I do not accept that the evidence presented is prima facie proof of negligence on the part of the Defendant. This is especially so in circumstances where it has not been established what act or omission on their part constituted a breach of the duty owed. I also find that in these circumstances it cannot be said that the claimants fall could have only occurred due to the negligence of the Defendant. Therefore, the claimant cannot rely on the doctrine of Res Ipsa Loquitur.

[81] There was no evidence led with regards to the staircase being faulty, I find that there is no evidence as to satisfy the Court on a balance of probabilities that the Defendant was in breach of their duty of care owed to the Claimant or that the damage caused was as a result of a breach of the duty owed to her.

DISPOSITION

[82] In light of the foregoing it is ordered:

a) Judgment in favour of the Defendant.

b) Costs of this claim are awarded to the Defendant to be taxed if not agreed