[2021] JMSC Civ 23

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009HCV05501

BETWEEN	**IMOGENE MORRISON**	**CLAIMANT**
AND	**ROMAN CATHOLIC ARCHBISHOP OF KINGSTON t/a ST. HELEN'S PREPARATORY SCHOOL**	**DEFENDANT**

IN OPEN COURT

Mr. Sean Kinghorn instructed by Kinghorn and Kinghorn appeared for the Claimant.

Miss Jacqueline Cummings instructed by Archer, Cummings & Company appear for the Defendant.

Heard: 28th and 29th September; 11th December 2016 and 28th January 2021

Tort – Negligence – Employer's Liability – Occupier's Liability – Breach of Duty – Slip and Fall Accident – Whether there was a safe system of work – Whether the cleaning system or any system in place would have prevented the accident – Whether the Defendant is a proper party to the Claim – Occupier's Liability Act, section 2

L. PUSEY J

BACKGROUND

[1] The Claimant Miss Imogene Morrison (hereinafter called Ms. Morrison) has been employed as a trained teacher at the St. Helen's Preparatory School in the parish of Saint Catherine since September 1992. Ms. Morrison alleges that on the 12th day of June 2008 she suffered a fall in a bathroom on the school premises thereby injuring herself.

[2] Ms. Morrison describes the school's premises in June 2008 as comprising of two (2) buildings. One building housed the grades one (1) to six (6) classrooms, while the other housed the Principal's and Secretary's office. She said both buildings housed bathrooms and as a teacher she had access to both buildings. Her evidence is that there was a bathroom adjoining the Principal's office that was assigned to members of staff, while the bathroom on the other building was assigned to children. She noted, however, that the children's bathroom was sometimes used by members of staff, as the other bathroom was often out of use.

[3] In the moments leading up to her injury, Ms. Morrison said she had stayed behind to do after school duties which included monitoring the children who remained on the school premises after the school day had ended. She alleges that some children were in the children's bathroom and she instructed them to stay outside until the persons picking them up arrived. Thereafter, she entered the same bathroom and made her way towards the sink to wash her hands. She noted in her affidavit, "*as I made my way towards the sink I slipped and fell on the wet bathroom floor."*

[4] Ms. Morrison's evidence is that after her fall, she was not able to get up immediately. She eventually managed to make her way back to the classroom, while experiencing severe pain. She further noted that she visited Dr. Naik, who operates an office some metres from the school, however, she found that he had already closed for the day. She went home feeling pain over her entire body. On the following day, the 13th of June 2008, Ms. Morrison was treated by Dr. Naik and given five (5) days sick leave.

[5] Ms. Morrison says she wanted to return to care for the children of her classroom and thus returned to work, deciding not to make use of the sick leave. Upon her return she was told by the school Principal that the Chairman, Mr. Lafayette, requested that she not return until she was given further notice. She noted that she received correspondence on the 13th day of June 2008 signed by Sonia Burke (on the Defendant's letter head) confirming the instruction not to return to work until

further notice. Ms. Morrison further alleges that the pain was so much that she really could not have returned to work (even if she had been allowed to return). She says she was incapacitated for a period of at least six (6) months and saw a number of medical practitioners (from whom she received medical reports) during her period of injury, notably; Dr. Naik (General Practitioner), Gaynor P. Downer (Registered Physical Therapist) and Dr. R. E. Christopher Rose (Consultant Orthopaedic Surgeon).

[6] As a result of the foregoing, Ms. Morrison has brought a claim against the Defendant for damages for "*Negligence and/or Breach of the Occupier's Liability Act and/or Breach of Contract"* including Interest and Costs.

[7] The Defendant denies the claim and puts the Claimant to strict proof that an injury took place. The Defendant also contends that the St. Helen's Preparatory School is not operated by the Roman Catholic Archbishop of Kingston, and that it is instead run by the Board of Governors of the school.

ISSUES

[8] There are three main issues for consideration, namely;

a. Is the Defendant liable through their negligent acts and/or omissions for the injury of the Claimant, if it is found that an injury took place?

b. Has the Defendant breached the Occupier's Liability Act causing injury to the Claimant, if it is found that an injury took place?

c. Is the defendant a proper party to the claim?

[9] Firstly, before discussing the issue of negligence, the court finds, on the evidence of Ms. Morrison, including medical reports before the court, that a fall did in fact take place, whereby she sought medical care

LAW & ANALYSIS

Negligence/Employer's Liability

[10] In **Blyth v Birmingham Waterworks** (1856) 156 ER 1047, Anderson B defined Negligence in the following way:

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."*

[11] In order for a claim of negligence to be successful certain elements must be present, most notably it must be established that the defendant had a duty of care to the claimant and further that that duty was breached in such a way that it caused injury to the claimant. The issue of remoteness must also be addressed, and it must be shown that the damage was reasonably foreseeable.

[12] In **Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (Wagon Mound No.1)** [1961] 2 WLR 126, Viscount Simonds delivered a unanimous judgment for the Board, he noted at page 140-141:

> *It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the plaintiff must prove a duty owed to him by the defendant, a breach of that duty by the defendant, and consequent damage. But there can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. ... Who knows or can be assumed to know all the processes of nature? But if it would be wrong that a man should be held liable for damage unpredictable by a reasonable man because it was "direct" or "natural," equally it would be wrong that he should escape liability, however "indirect" the damage, if he foresaw or could reasonably foresee the intervening events which led to its being done.*

[13] Two English law cases that have contributed significantly to the jurisprudence concerning what exactly is a duty of care are **Donoghue v Stevenson** [1932] AC 562 and **Caparo Industries plc v Dickman** [1990] 2 AC 605. In **Donoghue v Stevenson** *supra*, Mrs. Donoghue, the claimant, found a dead snail in a bottle of

ginger beer she had consumed, she sued the ginger beer manufacturer and the House of Lords found in her favour. Lord Atkin established liability on the basis of the neighbour principle, he asserted at page 580:

> *The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions that are called in question.*

[14] The test widely used today to establish a duty of care was seen in **Caparo Industries plc v Dickman** *supra***.** Lord Oliver summarised it at pages 632-633 as follows:

> *"The harm which occurred must be a reasonable foreseeable result of the defendant's conduct;*
>
> *A sufficient relationship of proximity or neighbourhood exists between the alleged wrongdoer and the person who has suffered damage;*
>
> *It is fair, just and reasonable to impose liability."*

[15] Of course, as already noted, it is not enough to find that there is a duty of care, it must also be established that that duty was breached. The general principle has been that the action of the Defendant, must fall below the standard of care likely to be taken by the reasonable man, for it to be deemed negligent. Where cases between employers and employees are concerned the court will often look at the employer's general practice or the system they have in place. It has also been established that the standard of care should take into account the special circumstances of a particular employee.

[16] In **Paris v Stepney Borough Council** [1950] UKHL 3, Paris, serving as a garage hand, only had sight in one eye. He was hitting bolts when a piece of metal pierced his good eye, rendering him completely blind. The defendant argued that they did not provide protective goggles to garage hands, the court found that because of

the claimant's special circumstance the standard of care required would include providing him with protective goggles to protect his only functioning eye. The defendant would not have been found liable if he had sight in both eyes, the court found that not providing garage hands with protective goggles was an acceptable standard of care, their role did not pose a particular and foreseeable danger to their eyes.

[17] The court must also show that the defendant's negligence caused injury to the claimant. The basic test for establishing causation is the "but-for" test in which the defendant will be liable only if the claimant's injury would not have occurred "but for" his negligence. The defendant will not be liable if the injury could have, on a balance of probabilities, occurred in the absence of his negligence. Lord Hoffman provided a classic example in **South Australia Asset Management Corp v York Montague Ltd** [1997] AC 191 at page 214:

> *"A mountaineer about to undertake a difficult climb is concerned about the fitness of his knee. He goes to a doctor who negligently makes a superficial examination and pronounces the knee fit. The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee."*

[18] In order for the claimant to recover, the damage must not be too remote and indeed a foreseeable consequence of the defendant's negligent act or omission. The rule still in place today emanated from the decision in ***Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd*** **(Wagon Mound No. 1)** *supra* where a large quantity of oil spilled into the Sydney Harbour and drifted under the wharf where the claimants were welding, the resulting fire caused extensive damage to the wharf and vessels nearby. Viscount Simonds asserted at page 139:

> *"A man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour."*

[19] In the classic judgment of **Scott v London and St Katherine Docks Co** (1865) 3 H & C 596 at page 601, Erle CJ asserted:

> *"where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care."*

[20] Where the duty of an employer to his employee is concerned, the common law prescribes that reasonable care must be taken for the safety of employees. In **Davie v New Merton Board Mills Limited** [1959] 1 All ER 346, Viscount Simmonds asserted, with approval, the words of Lord Herschell in **Smith v Baker & Sons** [1891] AC 325 in which he describes the duty of a master at common law as the duty:

> *"…of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk…"*

There must be a safe system of work

[21] There are some unique factors that the court generally takes into account in so called "slip and fall" cases such as the instant one. This surrounds the system the defendant had in place and notably how long the liquid or other material (if there was one present) was left on the floor before it caused the injury.

[22] In **Richards v White & Co** [1957] 1 Lloyd's Rep 367, Devlin J asserted at page 369:

> *"If there had been evidence which showed that there was some danger, not perhaps of oil but some other danger, which was being left on the ship for two or three days, or anything of that sort, which the shipowners were doing nothing about, a prima facie case of negligence would be made out; but to make out a prima facie case of negligence in a case of this sort, there must, I think, be some evidence to show how long the oil had been there, some evidence from which it can be inferred that a prudent shipowner, who*

> *had a reasonable system of inspection for the purpose of seeing that dangers of this sort were not created, ought to have noticed it."*

[23] In **Turner v Arding & Hobbs Ltd** [1949] 2 All ER 911, Goddard CJ outlined the defendant's duty, had they shown that they took reasonable care to prevent the injury, in the following way:

> *"The duty of the shopkeeper in this class of case is well-established. It may be said to be a duty to use reasonable care to see that the shop floor, on which people are invited, is kept reasonably safe, and if an unusual danger is present of which the injured person is unaware, and the danger is one which would not be expected and ought not to be present, the onus of proof is on the defendants to explain how it was that the accident happened."*

[24] In **Ward v Tesco Stores Ltd** [1976] 1 All ER 219, the plaintiff slipped on some yogurt while shopping in the supermarket, the judge at first instance found in her favour, the Defendants appealed and the appeal was dismissed. In his discussion Megaw LJ, agreeing with Lawton LJ, referring to the Defendants, asserted as follows:

> *They could escape from liability if they could show that the accident must have happened, or even on balance of probability would have been likely to have happened, irrespective of the existence of a proper and adequate system, in relation to the circumstances, to provide for the safety of customers. But, if the defendants wish to put forward such a case, it is for them to show that, on balance of probability, either by evidence or by inference from the evidence that is given or is 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.*

[25] The question the court must answer in this case therefore is, is the presence of water in the bathroom at the time of the injury attributable to the negligence of the defendant in not providing a safe workplace? To put it another way, can the Defendant escape liability by showing that had a reasonable system of cleaning been in place, the accident would likely still have occurred? If we recall Ms. Morrison's evidence she asserted that in the moments leading up to her injury, she had stayed behind to do after school duties which included monitoring the children who remained on the school premises after the school day had ended. She alleges

that some children were in the children's bathroom and she instructed them to stay outside until the persons picking them up arrived. Thereafter, she entered the same bathroom and made her way towards the sink to wash her hands. She noted in her affidavit, "*as I made my way towards the sink I slipped and fell on the wet bathroom floor*."

[26] It is the evidence of Ms. Morrison that children were congregating in the bathroom and making use of it, when they should have been waiting outside. The clear inference is that a particular child or a number of children had caused the water present on the bathroom floor. In essence there is no contrary evidence. In this sense it is hard to see where a particular cleaning system could have prevented the presence of this water. In other words, there is no evidence that the water present at this particular time was owing to the negligence of the defendant. This is due to the fact that the evidence shows that the injury occurred immediately after the children were in the bathroom.

[27] There is no evidence of any other factor causing the accident, which can be attributed to the defendant's negligence, lack of care, or lack of a reasonable cleaning system. It is important to note that negligence of this sort must be shown on the evidence as it is not a strict liability tort. The fact that an accident or injury is unfortunate is not in itself reason enough to apply blame to any defendant.

[28] The defendant's evidence is that they did have maintenance staff responsible for the bathroom, a number of times per day; the court accepts the Defendant's evidence in this regard. Though there is no evidence as to precisely how this staff went about their cleaning duties, it is clear that because of the nature of the accident, it is extremely unlikely that any such system would have prevented it.

[29] In this regard and in line with the reasoning in the aforementioned case law, the court finds that the Defendant was not negligent in this particular circumstance.

Occupier's Liability

[30] In **Wheat v E Lacon & Co Ltd** [1966] 1 All ER 582, the term occupier was defined in law. Lord Denning defined the "occupier" as a person who has sufficient control over the premises to the extent that he ought to realise that lack of care on his part can cause damage to his lawful visitors. It is clear that the school is an occupier in law where its employees are concerned.

[31] **Section 3** of the **Occupiers' Liability Act** ("**OLA**") is instructive. It states as follows:

> *(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.*
>
> *(5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all circumstances it was enough to enable the visitor to be reasonably safe.*

> *(6) Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.*
>
> *(7) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).*
>
> *(8) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.*

[32] It is clear that the **OLA** places a duty on the occupier to make certain the visitor is reasonably safe and the occupier is expected to show how they have done so.

[33] In the instant case the defendant has not provided detailed evidence as to the system in place. In cross examination the principal, Sonia Burke, noted however, that it was the duty of the maintenance staff to wipe the bathrooms and this is something that was done periodically, she said this included cleaning before lunch, after lunch and then after dismissal. The court accepts this evidence and accepts that the Defendant took reasonable care to make sure the bathroom was safe for use by wiping it three times a day.

[34] The circumstances of this accident are that a number of children were using this bathroom immediately before the incident, the inference being that a reasonable system of cleaning and maintenance would not have prevented the presence of water on the floor at the time that the Defendant slipped. The court does not find in the circumstances that the Defendant breached the **OLA**.

Is the Defendant a proper party?

[35] Having found that the Claimant's claim must fail, it is of little relevance whether the Defendant as named, Roman Catholic Archbishop of Kingston trading as St. Helen's Preparatory School, is the correct party to the Claim. Nonetheless, for completeness, the Court will address this issue.

[36] This issue arose as a result of the submissions of Ms. Cummings on behalf of the Defendant. Ms. Cummings' submissions highlight the following:

1. The Claimant was paid by the School Board and employed by the School Board.

2. There is no evidence to indicate how the Roman Catholic Archbishop of Kingston trades as St. Helen's Preparatory.

3. The Roman Catholic Archbishop is the legal persona of the Roman Catholic Church in Jamaica.

4. St. Helen's Preparatory is not a registered company; it is an independent school governed by statute and registered with the Ministry of Education.

5. The premises upon which St. Helen's Preparatory is situated is "technically" owned by the Roman Catholic Archbishop of Kingston.

6. The Roman Catholic Archbishop of Kingston established St. Helen's Preparatory. However, a School Board was appointed to govern the operations of the school.

[37] The Defendant's Amended Defence filed the 22nd day of August 2014 also highlights the above. Additionally, Monsignor Michael Lewis in his witness statement filed August 14th 2014 asserts at paragraph 16:

> *"Although the St Helens' Preparatory School is not a body corporate and cannot be sued in its own name the proper party to this action should have been a named person as representative of the school and that person(s)*

> *ought to have been the Principal and the Chairman of the school board as representative of school."*

[38] The Claimant addressed the issue in its Addendum to Claimant's Submissions on Liability, filed on January 14th 2016 and noted that the Defendant in its Acknowledgment of Service indicated categorically that its name was not properly stated, and in response to the question "*If not, what is your full name"* stated "*ROMAN CATHOLIC ARCHBISHOP OF KINGSTON – There is no legal entity known at* (sic) *The St. Helen's Preparatory School."* Additionally, the Claimant noted, in the same document, that:

> *"In its original Defence filed on the 20th January 2010 and again in its amended Defence the Defendant indicated that it was the owner and operator of the St. Helen's Preparatory School."*

[39] To put it simply, the Claimant's argument is that the Defendant joined issue with the Claim and sought to clarify their name after the suit was initially brought in the name of the school. It is on this basis, that the Claimant amended her claim to name the Roman Catholic Archbishop of Kingston trading as St. Helen's Preparatory School as the Defendant.

[40] The name of the Defendant was corrected in the Acknowledgment of Service to the "Roman Catholic Archbishop of Kingston." The Claimant amended the Claim to have him named, but trading as the school. This is drastically different from what the Defendant indicated in the Acknowledgment of Service. The capacity of the Roman Catholic Archbishop of Kingston was modified by the Claimant with the inclusion of "trading as St. Helen's Preparatory." It implies that the Roman Catholic Archbishop of Kingston has registered the school as a business and operates said business in the name "St. Helen's Preparatory."

[41] The court accepts the argument of Ms. Cummings, that the school is not registered as a business and in those circumstances the Roman Catholic Archbishop of Kingston cannot be trading as the school. The school is registered as an independent school with the Ministry of Education. Therefore, the court is of the

view that in these circumstances, it is of no moment that the Roman Catholic Archbishop of Kingston was named as the proper name in the Acknowledgment of Service.

[42] Further, when the court looks at the gravamen of the case it is one whereby the Claimant is suing for damages for negligence in relation to occupier's liability and/or employer's liability. The court is reminded that the School Board is the Claimant's employer and the School Board is in occupation of the premises as appointed by the Roman Catholic Archbishop of Kingston. This, coupled with the fact that the school is not a registered business, persuaded the court to come to the conclusion that an action could not be maintained against the Defendant herein. The court finds therefore, that the Defendant herein is not a proper party to the Claim.

[43] Additionally, the Court agrees with the submissions of Ms. Cummings that the proper party to this suit should have been a legal person being sued in their capacity as a representative of the school and/or the school board.

ORDERS

[44] Having found that the Defendant is not liable by way of Negligence nor under a breach of the Occupiers Liability Act in the circumstances, the Court makes the following Orders:

1. Judgment for the Defendant against the Claimant.

2. Costs to the Defendant to be taxed if not agreed.