IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. A-196/1997

BETWEEN	MARIE ANATRA	PLAINTIFF
A N D	CIBONEY HOTEL LIMITED	1ST DEFENDANT
A N D	CIBONEY OCHO RIOS LIMITED	2ND DEFENDANT

Miss Sandra Johnson, Attorney-at-law for the plaintiff instructed by Sandra C. Johnson and Company.

Mrs. Sandra Minott-Phillips, Attorney-at-law for the defendants instructed by Myers, Fletcher and Gordon.

HEARD: May 29, 30, 31, 2000, June 1 and 2 2000, September 18, 19, 20 and 21 2000 and January 31, 2001

JUDGMENT

RECKORD, J.

By Writ of Summons dated the 31st of July, 1997, the plaintiff, through her attorneys-at-law claimed against the defendants, damages for breach of statutory duty under the Occupiers Liability Act and for negligence.

The plaintiff complained that on or about the 12th day of November, 1991, while she was a lawful visitor and guest of the defendants' hotel and spa, which were owned and operated by the defendants' companies, whilst ascending the steep stair case with exceptionally smooth and round railways, which connects the upper level pool to the lower level, slipped and fell down the said stair case.

As a consequence whereof the plaintiff suffered serious injuries to her right toe and back.

The Plaintiff's Case

In November, 1991, the plaintiff was a 57 year old American Travel Agent visiting the island along with her husband. On the 12th November they were both staying at Ciboney Hotel. After breakfast that morning they went to the pool on the upper level about 11:00 o'clock. Because the sun was brighter on the lower level and she needed a suntan, she decided to go to the pool on the lower level.

The plaintiff approached the stair ahead of her husband who was folding up the towels. Looking down the stairway she thought it was very steep. She held the railing on the left. She found it was too wide for her to grab, so she grabbed the outside. "The next thing I know I was sliding down the stairs and was thinking I was going to die – my life went before me. I have two children, it came to my mind that I would not see them again. I also worried about my back as I thought I would be crippled at that point. At one point I stopped falling. I tried to grab something to stop my fall and hesitated – stopped for a second and continued falling again and landed on my coxit bone at end of my spine – landed on my back. I was coming down on my back and head – every step there was I hit my head and back and continued bouncing down."

The plaintiff complained that the railing was too wide, she could not wrap her hand around it, it was about 6 inches wide. The steps were made of concrete with very smooth edges. The railings were wood painted white which made it very slippery. As far as she could recall the steps were straight down.

The surface of the railing was continuously smooth all the way down. She was wearing rubber thongs on her feet which she had purchased at the hotel gift shop. It had rubber on the bottom. The steps were steep. Although it had rained between 4 and 5 a.m. she could not recall if the steps were wet or dry.

It was the first time she was using the stairs in that area. She saw no sign saying "slippery when wet." She subsequently was shown photographs of the stairway by her husband.

After the incident they went to the nurses station and spoke to a nurse there. She called Dr. Weider who came to the hotel. She was in lots of pain, her toe had fallen. She waited for 15-20 minutes for the doctor who gave her prescription for pain. Her toe was x-rayed at an x-ray unit in Ocho Rios. She gave a statement to a security guard at the hotel. The doctor never gave her any treatment for her fallen toe.

The plaintiff returned to New York on the 13th of November, 1991, saw her foot doctor on the 14th, he took x-rays. Doctor operated on the toe on the 15th . She went to other doctor about her back. Prior to this incident she had back problem, described as a herniated disc.

Before this accident in Jamaica she could walk five miles per day. She can no longer walk that distance. She can't stand or sit too long from 1991 to 2000. Can't stand too long and cook, or vacuum. Can't lay on her back or belly, only on her side, or she gets pain. She can't wear closed shoes, only shoes that allow her feet to spread. During cold weather her foot gets black and blue, she never had this problem before.

Before this accident, the plaintiff said she ran her own office as a travel agent. In 1994 she sold the business and went to live in Florida. In January, 1999 she had surgery to take out pins that were holding the broken toe. Since the accident she has been walking differently. The big toe and one next to it were not straight, they were growing away and had to be straightened.

The plaintiff incurred expenses arising from this incident. Traveling to Jamaica for trial, hotel expenses, meals, taxi cab, medical expenses, correspondence (the application of Miss Johnson the statement of claim was amended to read that the plaintiff was descending instead of ascending the staircase, also to include special damages claim).

The plaintiff returned to Jamaica for the trial and saw Dr. Blake on the 25th of May, 2000. She did x-ray for which she paid U.S.$70.00. She also paid $20,000.00 to Dr. Blake and obtained a receipt, $2,950 for lab services. She spent about U.S.$60.00 per day for meals for herself and her husband. About $400 per day for taxi fare to court and back to the hotel. From hotel to Dr. Blake for x-ray and back to hotel U.S.$42.00. Transportation to see lawyer 26/5/2000 $1,500. From airport to hotel U.S. $22.00.

The plaintiff regarded Ciboney Hotel as unsafe and the steps on which she tripped as too smooth, the banister too wide. As a travel agent she would not send anyone to Ciboney.

The area in which the pool is at Ciboney is not covered, it is open to the elements. All of her medical bills have been paid and her insurance paid some. Airfare to Jamaica U.S.$345.00.

Under cross-examination the plaintiff admitted going up and down the stairs to the witness box every day she testified. She always held the banister. She stayed at Ciboney four days and three nights. Sunday to Wednesday. She fell on the third day and the sun was shining when she went to the pool. She had on her swim suit with a short top over it. She had spent about one hour at the pool at the top level before moving to go to the bottom, but never went into the pool. She don't recall if she was wearing sun glasses. She would not be carrying a bag when re-locating, her husband carried the bags and towels.

There was no one in front of her on the steps and her husband was next behind her. There were no objects on the stairs. She did not miss her steps going down the stairs. She was descending the steps, not going from lower level to top level. She did not agree that it was her fault that she slipped and fell. She blamed the steps and the banister for her fall and breaking of her toe. She told Dr. Weider that she slipped and fell on the stairway. She told him where she was having pain. She denied that she did not have any injury to her back as a result of the fall.

The plaintiff admitted that she had a previous bump on her right big toe. She did a bunion operation on her right big toe about ten years before this accident. She did not know she had three procedures during the operation on the 15th of November, 1991. She knew of operation for broken toe. She also had operation in 1980 to remove bunion on both feet.

The plaintiff denied all suggestions put to her that she did not take care when descending the stairway and that brought about the fall.

Under cross examination the plaintiff said that she had won a prize trip at a trade fair in the United States of America for three nights at Ciboney. She was not invited to any orientation at Ciboney. She has had high blood pressure for 36 years.

The husband for the plaintiff Mr. Lewis Anatra testified as to his wife's accident on the 12th of November, 1991, in his presence. They and another couple were on the upper level of the pool at the Ciboney Hotel. There was no sun there, while the lower level was sunny. They decided to go to the lower level using a flight of stairs. "My wife started to go down the steps and tripped and fell down on her backside all the way down the steps breaking her large toe and injuring her back, aggravating back injury. She tried to grab the hand rail, it was very wide. She could not grip it. The steps had no friction; it was slippery, smooth."

Mr. Anatra went down the stairs, his wife had fallen all the way down the curved steps. He looked at her toe. It was at a 45 degree angle. A nurse and a doctor were called. They took her to get x-rays in Ocho Rios. He took pictures of the area where his wife fell. There were railings on both sides of the stairs. The railings were very wide, over 6 inches wide, rounded on both sides, wooden rails painted white. The steps made of concrete were very steep, it was smooth, it had no non-skid surface. They were no signs in the pool area saying 'slippery when wet'. No one told them to be cautious in that area. Sun was out at that time although it had rained that night. He could not recall if the steps were wet or dry. Security came to their room and took a statement from himself and his wife.

The following day they left the hotel and returned to New York and his wife visited her doctor. His insurance paid for most of the medical expenses.

Mr. Anatra and his wife returned to Jamaica on the 24th of May, 2000. They went and saw Dr. Blake on the 26th. She was sent to get x-ray. They paid doctor U.s.$500.00 and U.S.$70.00 for x-rays. They incurred other expenses for traveling, meals and hotel accommodation.

Under cross examination Mr. Anatra said that the stairs must have been slippery because she slipped and fell. "My best recollection is that I went to get the towels and my wife fell." He was not carrying a bag at all when he negotiated the stairs. He took pictures. The railings on the banister were wide, at best 6-7 inches. The steps were steep and smooth. He did not have to be told to be careful when negotiating stairs. There were no obstruction on the steps. He would not say that the place was reasonable safe for use.

(At this stage the hearing was adjourned for a date for continuation to be fixed by the Registrar).

The hearing resumed on the 18th of September, 2000 with Dr. Warren Blake, orthopedic surgeon testifying. He examined the plaintiff in May, 2000. He prepared a report dated 29th of May, 2000. The complaints of the plaintiff related to her neck and lower back and big toe. She had presented him with documentary evidence that she had a pre-existing problem with her lower back. He could not categorically state that her category two findings at the lumbar spine level were specifically related to her latest injury.

When cross-examined the doctor said that susceptibility to fall is not a recognized complication to bonectomy except in the immediate post operation period.

This was the case for the plaintiff.

The first witness called by the defendants was Dr. Herbert Wieder, a registered medical practitioner, a graduate of New York University, Bellevue Hospital Medical Center since 1945. He has been a casualty officer at St. Ann's Bay Hospital for 20 years. He has experience in trauma cases involving fracture accidents.

In November, 1991, he was available on call from guests at the Ciboney Hotel. On the 12th of November, 1991, he saw the plaintiff on a professional basis. She complained of pain in her right big toe. He did a physical examination of her focusing on the big toe of the right foot which seemed to be deformed and painful suggesting to him a fracture. He had her x-rayed and also did a general examination including a cursory neurological. She did not complain of any trauma or pain other than in her right big toe. His examination never revealed any injury other than her right big toe. There were no evidence of bruises other than the right big toe which was why at that moment the x-ray was limited to the toe.

The x-ray revealed a fracture of the toe with displacement. The plaintiff told him she would be trying to leave the island the next day. He gave her the x-ray and extra medications for the toe and he advised her to see her doctor in the United States of America. In his opinion that fracture could take between 6-8

weeks to heal. He agreed that the doctor who sees her immediately is in a better position to diagnose the injury than one seeing her nine years later. Looking at exhibit 5, it showed that the plaintiff had pre-existing problems and some degree of disability prior to November, 1991. The problem is a degenerative progressive disease; that is, it does not get better, it gets worse. If she had impairment in her spine the impairment would be more likely to result from her pre-existing condition rather than from her fall in November, 1991.

When cross-examined, Dr. Wieder said he had extensive experience both here and in the U.S.A. in emergency fracture work. At the time he saw the plaintiff he never took notes of his findings. Apart from her big toe he did a physical examination and cursory neurological physical examination involved taking blood pressure, listening to heart and lungs, talking to make sure she was conscious or without head injury, looking in the pupils with light to see how they react, having her move her limbs voluntarily, palpating areas, stomach, legs, back. He checked for pathological reflexes and asked if there were pains or other complaints. Just the one x-ray for the toe was ordered. Had it not been for the previous medical reports he would have had no way of knowing of her previous problems. The medical examination he carried out did not reveal that she had any pre-existing condition. If there was a reaction to the palpitation of the back he would have ordered x-ray of the back.

The general manager for finance and operations at Ciboney, Mr. Theodore Duffus next testified for the defendants. He began working there in March, 1993. He had information on the hotel's history dated pre-opening. He

was aware of the construction. There had been no change in the stairway from the upper level pool to the lower level pool. The steps were made of semi-porus concrete so that it dries faster, it absorbs the water. Each step carries a non-skid strip rubbery material. When you step on it, it prevents you from sliding, it is on the outer end of each step. He had measured the width of the railing, it was 1½" thick and approximately 4" wide, made of wood from top to bottom. One can grab it by the side or by placing the hand on the top. He had walked up and down these stairs many times. It was very easily graspable.

Since Mr. Duffus has been at the hotel no one has ever complained to him about difficulty in grabbing the stair. He has not seen any complaint in the records about the stairs. He could not recall anyone reporting falling down those stairs. The flight of stairs was easily manageable. Lunch is had in that area; snack bar is there. He personally has observed guests activities and uses of the stairs by them. He observed the guest easily walking, some not holding the rails, used by about 80% of the users of the pool. They were the main pools. Each step was 8" deep and approximately 12" wide.

The property is checked and certified by the Jamaica Tourist Board. Tourist Property Development Company is responsible for annual checks on all resort properties. They check for safety and any other factors they think needs to be checked. Ministry of Health does check relating to food and cleaning every year since he has been there. The Radisson Organization carry out their safety checks using incident reports every two years.

The hotel opened as a five star resort hotel one of the highest ratings in the hotel trade. It was granted the four Diamonds Status in 1992. In his opinion the stairway is not dangerous. One can free walk the stairs.

Travel Agents are brought in familiarization trips free of charge.

Caribbean Construction Company built the hotel. It was not true that everything at Ciboney is ceramic. He was aware of action against the hotel in the United States of America.

Under cross-examination Mr. Duffus said that in preparation for coming to court he took some measurements of the stairway, he never counted the steps, nor the width or length of the stairway. The synthetic strip is about 1½ to 2" wide and it runs from one end of the step to the other near to the edge of the step. There is no non-skid material on the banister. It is smooth to touch. The landing just before going on the stairs is concrete.

The records he looked at goes back to 1991. He saw report from the plaintiff. No structural changes took place on the stairway. In terms of maintenance, the area has been repainted including the stairway. As soon as the synthetic non-skid material wears out it is replaced, it is cleaned and washed daily. He did not agree that the steps were shiny. He observed guests using the stairway for hours.

Case for the defendants.

Submissions

Miss Johnson for the plaintiff submitted that no distinction ought to be drawn between an invited and contractual guest. The plaintiff had slipped when she made first step. She could not wrap her hand around the railing which was slippery, smooth and steep. There was evidence of rain in the early morning, no warning signs at the pool that steps were slippery when wet. She incurred injuries and expenses.

The evidence of her husband in support was uncontraverted. He saw her stepped and slipped. Steps not safe.

The evidence of Mr. Duffus for the defendants was self serving. He produced no documentary evidence. The defense had brought no witness in support of its case that no one has ever fallen on those stairs before.

On the question of liability Counsel referred to the following cases:

Macknam v. Segar (1917) 2 K.B. 325

Wheat v. E. Lakon Ltd. – H/L

Appleton v. Cunard Steam Ship Co. Ltd. (1969) Vol. 1 – Lloyd's Law Reports

Bell v. Travco Ltd. (1953) 1 AER 638

Section 3(4) of the Occupier's Liability Act imposes a duty of care on the occupier – a burden of proof lies on the occupier. The defendant had failed to discharge its duty of care.

Mrs. Phillips on behalf of the defendant, submitted her closing address in writing.

The sole injury suffered by the plaintiff is a fracture of her toe. Her current back problems derive from pre-existing condition. When Dr. Wieder saw her on the very day of her fall she had no complaint other than of pain in her toe. The plaintiff has a tendency to exaggerate. She reported to doctors in the U.S.A. that the stairs were wet at the time of her fall and also that she fell down two flights of stairs. There is no evidence to support these. The plaintiff had contributed to her injury by wearing rubber thong sandals well knowing of her prior problems with her feet requiring more than one surgery before her accident. She ought to have worn proper shoes. In the absence of any object on the stairs to explain her fall, suggests that the plaintiff simply missed her step and in so doing, wholly contributed to her mishap.

The plaintiff's general statement that the Ciboney Hotel was unsafe is contradicted by Mr. Duffus evidence that it was a Five Star and Four Diamond ratings and the extent of measures taken by Raddison International Tourist Board, Ministry of Health and the Hotel Insurers that the premises were safe for visitors. The evidence suggest that at the time of her fall the sun was shining brightly. There was no evidence that the stairs were wet. No object on the stairs to hamper her progress. Her hands were completely free. There was no evidence of anyone else having fallen on those stairs. Her husband, laden with bag and towels went to her immediate assistance down those same stairs without incident.

It was submitted that the plaintiff merely missed her step and fell.

In commenting on the ***Wheat v. Lakon*** case (supra), Counsel said that the facts showed that:

1. The person who fell down the stairs, fractured his skull, and died.
2. The accident happened at night and the stairs were unlit at the time.
3. The handrail stopped short of the last two steps.
4. The staircase was steep and narrow.
5. The width of each tread was 9". Yet, with all that, the House of Lords affirmed the decision of the Court of Appeal that there was no liability on the part of the occupier.

The defendants in the instant case submit that there is ample evidence of their having taken reasonable care to see that the premises were reasonably safe, in that:

1. Construction by reputable contractors.
2. Easily graspable rails on the banister.
3. Steps with threads approximately one foot wide.
4. Evenly spaced steps made of semi-porus material so as to absorb water quickly.
5. Non-skid strips on the steps.
6. Regular safety inspections of the property.

In the premises the defendants submit that they have discharged their duty of care to the plaintiff and based on both facts and law, judgment ought to be in their favour.

FINDINGS

The plaintiff has based her claim under the occupiers Liability Act and in negligence.

Under the Act, the common duty of care imposed by section 3(2), "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."

This section has placed a burden of proof on the defendant.

Long before the statutory provisions came into effect McBride J. in ***MacLean v. Segar*** **(1917) 2 K.B. 325** said at page 329:

> "The occupier of premises to which he has invited the guest, is bound, as a matter of common law duty, to take reasonable care to prevent damage to the guest for unusual danger which the occupier knows or ought to know of."

Once the duty of care is imposed, the question whether the defendants failed in that duty becomes a question of fact in all the circumstances.

The plaintiff in going from the upper to the lower level pool attempted to do so by using the flight of stairs in the area of the pool. She was dressed in bathing suit with rubber thongs on her feet and had nothing in her hands. She was 57 years of age at the time. She gripped on the outside of rails as it was too wide to get a good grip. She made the first step and then she was sliding down the stairs. What was the cause of her fall. She says that first step on which she placed her foot was slippery. She slipped and fell. From the evidence no other

guest or employee either before this incident and up the time of trial some nine years later, has ever reported falling on the stair. There was no form of obstruction on the stair, no evidence of any water or any cleaning liquid on the stair. On the evidence of Mr. Duffus, this stair is cleaned and washed daily. Both the plaintiff and her husband cannot recall if the steps were wet or dry. Surely, if it was wet it would be reasonable to say she slid because the step was wet. It would be the reason for her fall. This would not be something they would likely forget.

In ***Bell v. Travco Hotels Ltd*. (1953) 1 AER p.638** Lord Goddard said:

> "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."

He quoted with approval what Somerville L.J. said in ***Davis v. DeHavilland Aircraft Co. Ltd*. (1950) 2 AER 583:**

> "It would be impractible 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."

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

> "The 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."

In ***Wheat v. E. Lacon & Co. Ltd*. *(1966) 1 Q.B.335*** – Sellars L.J. found it most difficult to decide how the deceased fell. He said :

> "People of all ages and differing types do fall downstairs and elsewhere on occasions in circumstances where there is nothing to account for the fall except a stumble which may befall anyone."

Lord Diplock in the same case said "my neighbor does not enlarge my duty of care for his safety by neglecting it himself."

I too have found it difficult in determining how the plaintiff in the instant case fell.

The unchallenged evidence of Mr. Duffus for the defendants is that this was a top class hotel which has maintained its high ratings over the years. They have lived up to international standards. In their about ten years of operations this was the first report they had concerning the stairs. The construction was by reputable builders and the stairways received daily maintenance. A non-skid material was on the edge of each step.

It is therefore my considered opinion that the defendants are not shown to have failed in their duty of care.

Accordingly the plaintiff's claims against both defendants fail and there shall be judgment for the defendants with costs against the plaintiff in accordance with Schedule A.

N.B. In the ***Wheat v. E. Lacon*** case with all its faults three judges in the Court of Appeal and five Law Lords in the House of Lords held that the occupier was not liable.