IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 00549

BETWEEN	**JOY HEW**	**CLAIMANT**
AND	**SANDALS OCHO RIOS LIMITED**	**DEFENDANT**

Catherine Minto and Stephanie Forte instructed by Nunes Scholefield, DeLeon & Company for Claimant

Charles Piper, and Marsha Locke instructed by Charles Piper & Associates for Defendant

Occupiers Liability Act – negligence – fall – hotel driveway - whether surface uneven – whether breach of duty of care- fractured metatarsals - damage

Heard: **9th & 10th January 2013 & 5th April, 2013**

CORAM: **JUSTICE DAVID BATTS QC**

[1] In this matter the claimant a travel agent, alleges negligence and breach of the Occupiers Liability Act against the defendant owners and operators of a hotel.

[2] The claim form alleges that she fell after her right shoe was "lodged" between an uneven interlocking pavement. The particulars of claim in paragraph 7 elaborates on that scenario by stating that:

> *"The outside interlocking pavement was uneven and her shoe became lodged between the gap created by the uneven interlocking pavement, causing her to fall forward on both knees and face."*

[3] The particulars of negligence are as follows:

(a) Failing to have any or any sufficient regard for visitors to the premises who may be unaware of the presence of an uneven interlocking pavement.

(b) Failing to take any or any reasonable care to see that the claimant would be reasonably safe in using the premises.

(c) Failing to provide any or any sufficient warning, indicating that the interlocking pavement was uneven and that visitors should proceed with caution.

(d) Causing or permitting the uneven interlocking pavement to be or to become or to remain in an unsafe and dangerous state, in that the uneven pavements would likely cause a visitor's shoe to become lodged therein and cause a sudden fall there from.

(e) Failing to repair the interlocking pavement, and thereby avoid risk to visitors such as the claimant.

(f) In the circumstances failing to discharge the common duty of care to the claimant, in breach of the Act.

[4] The claimant's evidence was by way of a witness statement dated 11th August 2011. That statement details that on the 21st March 2006 she was at the "Sandals Grande Ocho Rios Beach and Villa Resort" for a workshop. She is a travel agent and "sells" various properties to tourists; that is she persuades them to make reservations for the different Sandals properties. Her husband accompanied her to the workshop as she made it into a family outing.

[5] On the morning of the 21st March 2006, she was scheduled to check out of the hotel. At approximately 8:00 a.m., she left her hotel room and placed her luggage in the car which was in the hotel's parking lot. She then headed across the parking lot towards the hotel lobby. She had a plastic bag with an empty chicken box in her hand which she was planning to throw in the garbage bin located just outside the lobby area.

[6] She stated that as she walked towards the lobby and the garbage bin, "my shoe hit into edge of the pavement and I twisted my foot. I actually felt when my shoe bucked/hitched into the pavement because of the unevenness of the area, and I fell

forward and my face went straight into the wall." She described the area as uneven and stated that there were gaps in the tile spaces. Her witness statement details the injuries suffered and the treatment applied. She was assisted by a security guard and a nurse at the hotel and then was taken to the St. Ann's Bay Hospital. She describes in detail her further treatment and the pain and suffering she felt.

[7] When cross-examined by Mr. Piper, she admitted giving two statements in relation to the incident. She admitted her signatures but initially stated she could not recall the content of the statement and appeared reluctant to admit it was hers. She explained that the statements were given on the same date as the incident whilst she was in pain and under medication.

[8] The statements were tendered in evidence as exhibits 34 and 35. In exhibit 34 which subsequent evidence from the defendant's witness confirm was given to Orville McCalla, the claimant when describing the cause of the injury stated, "I was (sic) twisted the side of my right foot on the edge of the pavement. I fell on my left knee and injured my nose on the stone wall curb." In exhibit 35 which she admitting was in her own handwriting, the claimant stated when describing the incident, "I twisted my right foot and fell forward hitting my nose into the rock wall and the side of the garbage can."

[9] In cross-examination also the claimant maintained that the surface was uneven. She indicated that the statement in exhibit 35 had the word "bumped" crossed out immediately before the word "twisted". Also that the word "ankle" was crossed out and replaced by the word "foot". She indicated that the initials "AC" were placed there by the nurse who took the statement. The following exchange occurred:

> "Q. Which was it a buck or a hitch
>
> A. A buck sir
>
> Q. Word hitch should not have been there
>
> A. Yes sir, it buck
>
> Q. Are you saying when you say buck into pavement you meant lodged between the gap?
>
> A. No sir."

[10] The claimant in the course of its case put in evidence some 48 exhibits most were by consent or without objection. Of interest was exhibit 33 a statement signed by Kay-Ann Williams, the Environment Health and Safety Manager at the hotel. That statement ends as follows:

> *"On further investigation of the area and speaking with Mr. Coley, it was revealed that the area is indeed uneven and could have caused Mrs. Hew to trip and fall. The matter has been reported to the Engineering Department to be rectified."*

[11] Also of particular interest to the Court were exhibits 3(a), (b) and (c) being enlarged photographs of the area in question. Two other photos which were put in evidence showed a pair of brown sandals which the claimant described as wedge healed. The sandals were shown to the Court but were not put in evidence.

[12] Exhibit 3b was a security/surveillance video recording which captured the incident and shows the claimant approaching and then falling forward. It was not sufficiently clear or magnified to show the claimant's feet and exactly what caused the fall.

[13] In opening the case for the defendant, Mr. Piper stated there were two issues:

(a) The condition of the premises and whether it was uneven.

(b) The circumstance in which the claimant became injured.

He further submitted that even if there was some defect in the premises it did not amount to negligence or breach of the Occupiers Liability Act.

[14] The defendant's first witness was Clive Miller whose evidence was by witness statement dated 23rd October 2011. In that statement he says he is the hotel manager employed to Sandals Ocho Rios Limited and on the 21st March 2006 that was his position. He had been the manager since 2004.

[15] He states that in 2004, the hotel was refurbished and this included among other areas, the driveway at the front of the hotel which was enhanced using interlocking

bricks. The section under the Port Cochere was tiled. The work was supervised by a construction engineer. The areas remained in the same condition until "recently" when repairs were effected to the roof which involved installation of a drain to channel rain water away from the Port Cochere.

[16] Mr. Miller stated further that to the best of his knowledge no one had ever had a problem using the driveway with interlocking tiles as the tiles are evenly spaced with no gaps and the surface level. They have had no reason to dig up or repair the interlocking tiles. The witness then gave evidence as to the normal procedure, when an incident involving injury occurs at the hotel.

[17] He stated that in 2006 at the time of the claimant's incident the nurse on duty was Annette Campbell. She is no longer employed to Sandals and may have migrated. Neither is Kay-Ann Williams who was the Health and Safety Manager.

[18] He stated that having seen the report prepared by Nurse Campbell and Kay-Ann Williams he, "did not see it necessary to take any corrective action as recommended by Miss Williams because in my view the surface of the driveway was not uneven and did not require any repairs."

[19] The defendant's counsel sought and obtained permission to lead further evidence by way of amplification and to comment on evidence given of this witness. This elicited evidence that as regards the incident on the 21st March 2006 the usual procedure was followed. He received an incident report. That report comprised statements from the nurse and security officer who was first on the scene and who took a statement from Mrs. Hew. Mrs Hew's statement as well as notes from the Health and Safety Manager tendered as Exhibit 49 (a) (b) and (c) were documents entitled the incident report, the nurses/doctors' report and security officer's report respectively. The witness indicated that Exhibit 33 report of the Health and Safety Manager, formed part of the report to him, so too were Exhibits 34 and 35 (both statements from the complainant).

[20] Mr. Clive Miller was then crossed examined. He stated his training and qualifications. He had no training in engineering beyond high school engineering workshop. He admitted that he could not say whether the incident or the recommendation of the Health and Safety Manager had been passed on to the engineering department. The following exchange occurred:

> "Q. Did you take any steps to determine whether Mrs. Williams's re-commendation was carried out
>
> A. I went to the scene inspected and realised that there was no need for corrective action
>
> Q. No report was made to engineering department
>
> A. I cannot say
>
> Q. Did you find out whether it was done?
>
> A. I did not make any check with engineering department
>
> Q. Is it fair to say that you vetoed any further investigation because you were of opinion that no corrective action was necessary
>
> A. Yes madam"

[21] He stated there were 45 people in the hotel's engineering department. The team is headed by an engineer. Mr. Miller denied that there were gaps in the pavement leading to the driveway, or that the surface of the pavement was uneven. The witness maintained this position even after being shown the photographs (Exhibit 31 (a) 31(b) and 31 (c)).

[22] The defendant's next witness was Orville McCalla. He was the security supervisor at the defendant's hotel. His witness statement dated 8th July 2011 stood as his evidence-in-chief. He said that on the 21st March 2006 while on the 7:00 a.m. to 3:00 p.m. shift he received a call as a result of which he proceeded to the lobby area of the hotel. On arrival he saw a lady sitting on the steps of the hotel. She had a small hand towel with blood from her nose. She had bruises on her left knee and right elbow. He spoke to her. The nurse arrived and she was taken to the nurses' station. He was shown the area where she fell by the Atlas Security Supervisor. The area shown to him was at the front of the hotel in the driveway. Upon examining it "closely" he did not see

anything that could cause her to fall. The area he said was looking 'perfect'. Mr. McCalla also stated that he went to the nurses' station where he interviewed the lady who gave her name as Joy Hew. He took a written statement from her and also asked her to write her own statement and she did so. Mr. McCalla stated that there was no pavement with an edge in the area Mrs Hew fell.

[23] He was asked some questions in amplification. He identified Exhibit 34 as the written statement Mrs. Hew gave to him. The word "Orville" in the statement was written by him but the other handwriting is Mrs Hews'. The witness was also shown Exhibit 49 (c) and identified it as the report he submitted and is the written statement he took from her.

[24] When cross examined Mr. McCalla admitted he did not see Mrs. Hew fall. He was shown the photographs (Exhibits 31 (a), (b) and (c) and identified the area depicted as in front of the lobby area. The area he said remains the same. He continued to maintain that the area was 'perfect", and denied the surface was uneven or had gaps.

[25] There was no re-examination and that was the defendant's case.

[26] Each counsel made oral submissions. Defence counsel suggested that Mrs. Hews' evidence was to be closely scrutinized as her reluctance to admit signing one of the statements shed doubt on her credibility. Furthermore, the account of having "twisted" her ankle is seen in paragraphs 34 and 35 of pleadings but not in her statements. Bumping or hitching of shoe is what is otherwise reflected. When giving evidence orally she preferred to say it "bucked" rather than "hitched". Counsel suggested that three (3) versions were to be found emanating from the claimant, (1) hitch or lodge (2) buck and (3) twist. He charged that the court must determine as a matter of fact whether there were gaps or an edge in the tiles and if so whether either or both constituted a dangerous state of affairs which triggered the common duty of care. He submitted that the area in question is constantly traversed and that this is evident from the video (Exhibit 3(b)). He submitted that as a matter of law the duty is one of reasonable care. The occupier is to guard against special risks. In order to ground

liability, claimant would need to prove that the premises were dangerous and that occupier should have known of it or corrected or warned of it. He cited a number of authorities most of which were reviewed and applied by Reckord J in **Anatra v Ciboney Hotel Ltd CL A – 196/1997** unreported judgment dated 31st January 2001.

[27] On the question of damages the defendant's counsel submitted that the injury warranted an amount for pain, suffering and loss of amenities of no more than $500,000.00 and relied on **Finn v Nagimesi (Khan 4d) p. 66 and Gentles v Artwell (Khan 5d) p. 60,** he suggested that the claim for transportation should not exceed three (3) months.

[28] The claimant's counsel in her submissions referred to and relies on written submissions dated the 10th January 2013 and which were nicely bound along with copies of the authorities. She stated the factual issue to be whether the surface was uneven and whether it caused the fall. She described a "preponderance" of evidence which established this not least of which were the photographs (Exhibits 32 (a) (b) and (c)). She denied any real discrepancy in the claimant's account as whether it was a "twist" of foot or lodge or buck the effect was the same. Any difference is to be attributed to her condition when giving the statement as she was 'very dazed and weak," as per the report of Kay-Ann Williams (Exhibit 33).

[29] Reliance is also placed on Kay-Ann Williams' report to support the allegation of an uneven surface. This says the claimant created a dangerous situation of which the claimant was unaware.

[30] The claimant's attorney relied on three authorities to support her claim that an uneven surface gives rise to liability. These were, **Commissioner for Railways v Patricia McDermott** [1966] 3 WLR 267; **Marron (Magella) as parent and next friend of Paul Shaun Marron v. McKiverigan** [2010] NIQ3 1; and **McCue v North Lancashire Council** [2006] LT 693. The test, submitted counsel, was whether the occupier took "reasonable care."

[31] As regards damages counsel urged that $1,000,000.00 for pain and suffering and loss of amenities and relied on **Golding v Miller HCV 00478/2005 Khan Vol. 6 at pasge 62 and McLean v Locerno Ltd** HCV 01013/2005 unreported judgment 8th July 2008.She urged me not to rely on **Finn** as it was of some vintage and the Jamaica Court of Appeal had cautioned against reliance on older cases when assessing damages.

[32] I have considered carefully the submissions of counsel and the evidence in the case. I accept that the claimant is a witness of truth. Any divergence in description of the incident may be due to a number of factors not least of which is the passage of time. Whether it is she butted her toe or twisted her foot is a detail which does not significantly change my view of her evidence and the evidence generally. The photographs speak volumes to the condition of the premises and even the video is of assistance.

[33] In this regard therefore, I make the following findings of fact:

a. The claimant was a rather buxom lady at the time of her fall. This is apparent from the video of the incident. She could still be so described while giving evidence before me.
b. The claimant fell as she was walking towards the hotel lobby and across the driveway of the hotel
c. the area in which she fell had two (2) different types of tiles which met.
d. The tiles were level but interlocked and therefore had grooves.
e. The point at which the driveway tiles met the hotel lobby tiles had a slight slope and at points a very small edge. The two (2) types of tiles were differently coloured and were different in size and shape.
f. The condition of the titles as described at (d) and (e) was not dangerous nor was it hidden.

[34] This court is therefore of the view, and I so decide, that the defendant is not in breach of any duty either at Common Law or under the Occupiers Liability Act. The defendant has a duty to take reasonable care. That duty will have been discharged by

the creation of a reasonably safe driveway and lobby area. The tiles shown in the photographs and the area of joinder are and appear to be normal everyday scenes. There is no duty to have a perfect driveway and although I reject the evidence of the defendant's witness that the driveway was perfect it is not such as to constitute a dangerous situation. In this regard I rely on **Bell v Travco Hotels Ltd** [1953] 1QB 437. In that case, the claimant slipped and fell because some stones on the walkway had worn and became slippery. The court decided in favour of the owner of the hotel whose duty was to take reasonable care to see the driveway was reasonably safe for foot passengers to walk on. There was no unusual danger. Per Goddard J, at p. 479:

> *"For myself, I cannot say that because it might be possible to find that one part of a drive, a quarter of a mile long, was slippery – and I am prepared to accept that it was slippery - one ought to hold that this drive was dangerous, or that in itself was any evidence that the premises were not reasonably safe for the use of the guests at the hotel. I think that this is just one of those cases where a person on an evening walk meets with a misfortune."*

[35] See also the judgment of Reckord J, in **Marie Anatra V. Ciboney Hotel Ltd. et al** (above) in which a guest slipped and fell while using a staircase. The learned trial judge having reviewed the authorities and the evidence concluded thus:

> *"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 (10) 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."*

[36] Contrast if you will, the cases relied upon by the claimant. The Irish case of **Marron (Magella)** (above) involved injury to an eight-year-old claimant who had been playing in the backyard of premises. He tripped as he proceeded across paving stones after it had begun to rain. An engineer gave evidence for the claimant to the effect that

if the tripping point was of the order of ½" to 1" protrusion it would be a toe catching tripping point and was in a dangerous position. At the time of the engineers' examination of the premises, the defendant had significantly altered the area.

[37] The trial judge found as a fact that there was a ½" to 1" protrusion of the slab and that it caused the plaintiff to fall and was a danger to a child:

> *"In circumstances where the 1st named defendant should have been prepared for children to be less careful than adults."*

[38] In the **McCue** case (above) on which the claimant also relied, the claim was against a local authority for uneven paving stones on a path. In that case there had been prior complaints made to the defendant about the condition of the path and the court found, (at p. 4):

> *"The path was in a seriously deteriorated state and there were many gaps and irregularities in the surface on which the pursuer could have fallen even though he was paying attention."*

[39] In the instant matter, the court has been afforded no expert evidence or opinion as to the adequacy for the purpose of, what visually appears to be ordinary and normal driveway tiles which at some point meet ordinary and normal lobby tiles. The difference in the level or the "edge" is almost imperceptible. The claimant's fall whether due to a "buck", a "hitch", or a "twist" as she walked across it, was an accident. It is not due to a failure to take care or to guard against or warn of dangers by the defendant. Indeed it may be that she fell because when walking she did not lift her feet in the normal way but walked with more of a shuffle, due to her physique. This however is speculative and I make no such findings save to say tha the fall could have had other causative factors.

[40] I find as a matter of law that the defendant breached no duty to the claimant and at all material times; the premises were reasonably safe for the purpose for which the claimant was invited. This finding is supported by the unchallenged evidence of Clive Miller that there had not before or since been such a fall and that:

> *"The driveway at the front of the hotel was enhanced using interlocking bricks while the section under the Port Cochere was tiled. The work was supervised by Sandal's Project Department headed by Mr. Patrick Carrington who was the project manager and who is no longer employed to the Sandals Group. He was a Construction Engineer."*

[41] Even if I am wrong on this and the slight edge at the point of joinder of the two (2) sets of tiles does pose a danger, it is not one of which the defendant could or ought to have been reasonably aware. The edge is so small as to be almost imperceptible and therefore, would not reasonably be regarded as dangerous by the occupier

[42] Notwithstanding my decision on liability, I will proceed to assess damages so as to avoid a retrial in the event an appeal on liability is successful. In this regard the evidence as to injuries is to be found in the medical reports of Dr. Phillip Waite dated 8th July 2006 and Dr. Christopher Rose dated 14th January 2010.

[43] Dr. Waite first saw the claimant on the 24 April 2006. She reported to him that she slipped and fell hitting her face into a wall. On examination he found the dorsum of the right foot swollen with tendon of 4th metatarsal and base of 5th metatarsal. There was a comminuted undisplaced intra-auricular fracture to the base of the right 5th metatarsal revealed by radiograph. The doctor applied a cast boot. The cast was removed on the 13th April, 2006 she was assessed as clinically healed. On 26th May 2006 all pain had ceased and the fracture was assessed as being healed with fibrous union. She was referred to physiotherapy department for muscle strengthening and range of motion exercises. On the 7th July 2006 the client reported mild pains after excessive activity. The doctor described it upon examination as very mild tenderness to the fracture site and moderate pain with resisted eversion. He stated there was no disability consequent on the injury but there may be occasional pain and discomfort.

[44] Dr. Rose first saw the claimant on the 24th September 2009. He had been made privy to previous medical reports including that of Dr. Phillip Waite. His examination revealed a middle aged female in no obvious painful distress. There was mild

tenderness on palpation of the base of fifth metatarsal and mild pains on inversion of the foot. The left foot had mild tenderness at the point of insertion of the planter facia to the heel. He opined that the discomfort experienced is due to tendonitis and not the result of the bony injury. The tendonitis can be easily treated with a short course of physical therapy or an injection of corticosteroid. He assessed the disability as 1% of the whole person.

[45] I accept that the claimant continues to have discomfort and mild pain occasionally. After considering the authorities on damages cited and the injuries described I would have awarded damages as follows:

Pain Suffering and Loss of Amenities	$650,000
Nursing Care	$192,600
Cost of Transportation	$260,000

[46] In the result however there is judgment for the Defendant against the Claimant as the claim is dismissed. Costs are awarded to the Defendant to be taxed if not agreed.

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David Batts QC
Puisne Judge