IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

SUIT NO. CL.T-138 of 2001

BETWEEN	**CECILE THOMPSON**	**CLAIMANT**
AND	**RENMOTE MEWS LIMITED**	**DEFENDANT**

Sylvester Morris for claimant.

John Sinclair instructed by Raymond Clough of Clough, Long & Co for defendant

Heard: October 2, 3, 5 and December 15, 2006

JONES, J:

[1] Few maxims reflect the cynical aspects of life with as much resonance as Sod's law. It has existed in many forms, through generation after generation, in varied cultures, for hundreds of years. Simply put, it means "if anything can possibly go wrong, it will" to which has been added "and it will happen at the worst possible moment". Dermot Blake a director and former manager of Renmote Mews Limited may be forgiven for believing that Sod's law is at work here. No sooner had they completed the refurbishing and addition of a new wing to the Sutton Place Hotel in New Kingston, than they were met with both a complaint and claim from Cecile Thompson. Miss Thompson, a paying guest at the hotel, slipped and fell in the bathtub of one of the newly constructed rooms. She stayed at the Sutton Place Hotel many times before, usually, in the older wing without complaint or incident. The events that followed the injury to Miss Thompson led to a curious, if somewhat, undignified court battle.

[2] On November 6, 2001, Cecile Thompson filed an action against Renmote Mews Limited the owners and operators of Sutton Place Hotel claiming damages for negligence, breach of warranty and breach of statutory duty under the Occupier's Liability Act. She contends that on January 16, 1998, she was a paying guest in room 549 at the Sutton Place Hotel when she slipped and fell in the slippery bathtub while using the bathroom facilities provided for the room thereby injuring herself. She further contends that this was due to the failure on the part of the Sutton Place Hotel to take reasonable care to make sure that anyone using the premises was reasonably safe.

[3] Renmote Mews Limited denied all liability. They deny that Miss Thompson's injuries were caused by negligence, breach of statutory duty or breach of the Occupier's Liability Act. They contend that they provided the best facilities in the circumstances which would make the hotel safe and secure for its guest. They also contend that Cecile Thompson had a duty of care for her own safety while using the bathroom, which is necessarily a private and personal matter and she failed to discharge that duty. That was a bit harsh. As it was, they called no witnesses to speak on the condition of the bathroom at the time of the accident, or generally, about the refurbishing work done on the bathrooms in the new section of the hotel.

[4] It is common ground that Cecile Thompson was a paying guest at the Sutton Place Hotel on January 16, 1998, and that she slipped and fell while using the bathroom facilities in her bedroom. It is also common ground that the Sutton Place Hotel was at all material times owned by Renmote Mews Limited a limited liability company with registered offices at 11 Ruthven Road in Kingston.

[5] There are four issues in this case:

a) As occupier of the premises, did Renmote Mews Limited fail to ensure that the bathtub in the bathroom in the guest room provided to their paying, guest Cecile Thompson, was reasonably safe for the purpose?

b) Did Cecile Thompson willingly accept the risk of injury by using the bathtub knowing it was not safe to do so?

c) To what extent, if at all, did Cecile Thompson contribute to her injury and, if so, how should liability be apportioned between the parties?

d) What are the appropriate damages, if any, in the circumstances?

As to (a): As occupier of the premises, did Renmote Mews Limited fail to ensure that the bathtub in the bathroom in the guest room provided to their paying guest Cecile Thompson was reasonably safe for the purpose?

[6] The evidence in chief of Dermot Blake is taken from his witness statement. He says that he was advised by the supervisor at the Sutton Place Hotel that Cecile Thompson was taken to Medical Associates Hospital after the accident. He also says that room 549 in which Miss Thompson stayed, had been newly and completely refurbished and fitted with the latest and highest standard bath facilities inclusive of, but not limited to, abrasive and non-slip surfaces which if used normally would not have resulted in injury to anyone using the bathtub.

[7] Under cross examination he said that room 549 was part of a new wing at the hotel. He said that he was present on the premises when the incident happened. The matter was reported to him by the supervisor but he did not visit the room at the time of the accident. The suggestion was made to Dermot Blake that the bathtub did not have an abrasive or non skid surface. He agreed

that he did not see a non-skid mat or a handle in the bathtub at the time when he visited. He also agreed that there were no strips in the bathtub of the room. He said, however, that mats (it appears from instructions given) were placed in the bathtubs although he was not able to say that he saw the mats with his own eyes as he did not go into the room and examine it personally. He said that Renmote Mews Limited paid the medical bill for Cecile Thompson.

[8] The denial by Renmote Mews Limited to the claim of Cecile Thompson is alarmingly flimsy. Dermot Blake said that when he visited the room occupied by Cecile Thompson the tub did not have an abrasive or non-skid surface or a handle, nor did he see a non-skid mat. This supports the contention of Cecile Thompson that the bathtub did not have bath mats, safety strips, hand rails or a hand guard.

[9] The liability of an occupier to a visitor to his premises is now governed by Section 3 of the Occupier's Liability Act which provides as follows:

> "3...
>
> (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.
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> (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".

[10] Where a person enters premises under a contract, the common law rules which had hitherto implied warranties into the contracts, no longer applies. The liability of an occupier to a person

entering premises under a contract for valuable consideration is now governed by Section 6 of the Occupier's Liability Act. It provides that:

> "(1) Where persons enter...any premises in exercise of a right conferred by a contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care".

[11] There is no dispute that Cecile Thompson was a paying guest at the Sutton Place Hotel which is owned and operated by the Renmote Mews Limited. She went there on the invitation, express or implied, of the occupier. Accordingly, the owner and occupier, Renmote Mew Limited, owed her the highest duty to take reasonable care that the bedroom and bathtub were safe for the purposes.

[12] Dermot Blake, as the only witness for Renmote Mews Limited, was not able to factually oppose the claim of Cecile Thompson that she was given a room with a bathtub that was not a non-skid bathtub; that the bathtub had no non-skid mat, nor did it have a handrail. From these facts it is difficult to resist the conclusion that Renmote Mews Limited as owner and operator of the hotel did not take reasonable care to ensure that the bathtub in the room was reasonably safe for the purpose, and I so find.

As to (b): Did Cecile Thompson willingly accept the risk of injury by using the bathtub knowing it was not safe to do so?

[13] Having regard to my findings that Cecile Thompson was given a room without a non-skid bathtub, and no bathmat or handrail, it is necessary for me to go on to deal briefly with the defence of voluntary assumption of risk raised in the pleadings as an alternative but curiously not supported

in the evidence. Section 3 (7) of the Occupier's Liability Act provides that the occupier is not to be held liable for risk "willingly accepted as his by the visitor".

[14] Where a defendant has knowledge of the risk, this alone is insufficient to raise the defence. It must be shown that he has accepted it. As Denning LJ said in **White v Blackmore**[1]:

> "...they cannot excuse themselves from liability by invoking the doctrine of volenti non fit injuria; for the simple reason that the person injured...does not willingly accept the risks arising from their want of reasonable care":

[15] In this case, I do not accept that Cecile Thompson was aware that the bathtub was not a non-skid bathtub when she entered it. Accordingly, she did not willingly accept the risk of injury by using the bathtub without being provided with a bathmat or handle. Volenti non fit injuria does not apply.

As to (c): To what extent, if at all, did Cecile Thompson contribute to her injury and, if so, how should liability be apportioned between the parties?

[16] Section 3(3) of the Occupier's Liability Act preserves the right of the occupier to take into account the contributory negligence of the visitor by making provision that one of the circumstances to take into account in any claim is the "degree of care and of want of care" of the visitor.

[17] Section 3(1) of the Law Reform (Contributory Negligence) Act provides that:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the

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[1] [1972] 3 WLR 296 at 302

> court thinks just and equitable having regard to the claimant's share in the responsibility for the damage"

[18] In this case the defendant contends that Cecile Thompson contributed to her own injuries and if judgment is given for her it should be apportioned to reflect her own negligence in causing her own injuries. Dermot Blake puts it this way in his witness statement:

> "The claimant also had a duty to care for her own safety when using the bathroom which is necessarily both a private and personal matter and she failed to discharge that duty..."

[19] In **Jones v Livox Quarries**[2] Denning set out the requirements for a claim in contributory negligence in this way:

> "Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless".

[20] Adopting this test, the question here is whether or not Cecile Thompson entered the bathtub either fully recognizing that it was a slippery bathtub or not caring about the condition of the bathtub. There was no evidence from either witness suggesting that when Cecile Thompson used the bathtub she would have reasonably foreseen the risk of slipping but continued to use the tub under those circumstances. There is also no evidence to suggest that Cecile Thompson used the bathtub in a manner other than the way in which it ought to be used.

[21] It has not been established on the evidence that there was any contributory negligence on the part of Cecile Thompson. The defendant, having raised contributory negligence as a defence, has

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[2] [1952] 2 Q.B 608 at 615

the duty to prove it on balance. This defence fails. In my judgment, therefore, Cecile Thompson is entitled to succeed on her claim -- in full -- against Renmote Mews Limited the owner and occupiers of the Sutton Place Hotel for breach of their duty to take care under the Occupier's Liability Act. From these findings apportionment of damages cannot arise.

As to (d): What damages, if any, are appropriate in the circumstances?

[22] I will now turn to the issue of damages. From the evidence Cecile Thompson suffered a rotator cuff injury to the right arm, tear to the muscle and ligaments and early adhesive capsulitis. Mr. Morris submitted that **Charlton v Super Star Bus Company Limited**[3] provided a reasonable guide for the assessment in this case. In that case the injury suffered was head injury, whiplash injury affecting lower back muscles and spine. The general damages awarded in 1989 were $22,000.00. The injuries suffered in that case are not comparable to the injuries in this case.

[23] A more appropriate analogy is the case of **Ivan Clarke v Lionel Baylis & Another.**[4] In that case the plaintiff suffered an undisplaced fracture of the greater tuberosity of the left humerus; abrasions to the left palm, elbow and left leg and prepatellar with paresthesia of the left knee. He was treated at the hospital and sent home. There was no further treatment. General damages were assessed in May 1992 in the sum of $40,000.00. That amount when updated to today's dollar is estimated to be $250,000.00.

[24] In this case there was no fracture of any bones, just tearing to the muscle and ligaments in the claimant's right arm. I accept that the injuries in that case, although more serious, are nearer to the

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[3] Suit No. 1987/C320
[4] Suit No. 1990/C232 [Delivered May 17, 1992].

injuries in this case and the updated award for general damages of $250,000.00 to be an appropriate award in this case.

[25] On the issue of special damages, there was no evidence given -- either in the witness' statement or under cross-examination -- about the loss of income of US$6,852.00 representing four weeks salary by Cecile Thompson. She provided no pay slips or bank statements to substantiate this aspect of her claim. This must, therefore, be rejected. As far as transportation cost of US$160.00 and cost for physiotherapy of US$310.00 are concerned, these although not substantiated by receipts, appear to be reasonable in the circumstances of this case and I will exercise my discretion to accept them.

[26] In summary then, there shall be judgment for Cecile Thompson on her claim with damages assessed as follows:

a) General Damages for pain and suffering and loss of amenity in the sum of J250,000.00 with interest at the rate of 6 percent per annum from November 6, 2001 to the date of this judgment.

b) Special Damages in the sum of $31,490.00 (US$470.00 converted at US$1.00 to J$67.00) with interest at the rate of 6 percent per annum from January 16, 1998 (the date of the accident) to the date of this judgment.

c) Cost to Cecile Thompson in accordance with CPR 2002.