



[2024] JMSC Civ. 23

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2017HCV01886**

<b>BETWEEN</b>	<b>MAXINE WILLIAMS</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE NATIONAL COMMERCIAL BANK LIMITED</b>	<b>FIRST DEFENDANT</b>
<b>AND</b>	<b>PORTMORE SHOPPING CENTRE LIMITED t/a THE PORTMORE MALL</b>	<b>SECOND DEFENDANT</b>
	<b>AND</b>	
<b>BETWEEN</b>	<b>PORTMORE SHOPPING CENTER LIMITED T/A THE PORTMORE MALL</b>	<b>ANCILLARY CLAIMANT</b>
<b>AND</b>	<b>THE NATIONAL COMMERCIAL BANK LIMITED</b>	<b>ANCILLARY CLAIMANT</b>

**IN OPEN COURT**

Mr. Travis Ebanks instructed by Kinghorn & Kinghorn for the Claimant

Ms. Faith Gordon instructed by Samuda & Johnson for the First Defendant/Ancillary Defendant

Mr. Monroe Wisdom instructed by Nunes, DeLeon & Co. for the Second Defendant/Ancillary Claimant

**Negligence – Occupiers’ Liability – Ancillary Claim – Indemnity – Failure to establish negligence or breach under Occupiers’ Liability Act**

Heard: July 3, September 22, 2023 and February 23, 2024.

## **PETTIGREW-COLLINS, J**

### **BACKGROUND**

- [1] The claimant filed a claim on June 13, 2017, seeking damages for negligence and/or a breach of the **Occupiers' Liability Act** against the first and second defendants. The claimant claims that on or about the 30<sup>th</sup> October 2015, while she was walking along the corridors of the common area of the second defendant's property, the Portmore Mall, she sustained injuries when a patron of the Mall who was exiting the enclosure of an ATM machine owned by the first defendant, National Commercial Bank (hereinafter referred to as NCB), opened the door of the enclosure of the ATM/ABM (also referred to as the vestibule of the ABM), into the common area and caused the door to violently collide with her.
- [2] The claimant avers that her collision with the door of the enclosure of the ATM was as a result of the negligence of the defendants and the defendants' breach of the **Occupiers' Liability Act**.
- [3] Issues arose on the morning of the commencement of trial regarding the admissibility of documents on which the claimant intended to rely. On the application of the claimant's attorney at law, the court ruled that the question of liability only would be determined in these proceedings. Therefore, this trial is concerned with the question of liability only.

### **PARTICULARS OF NEGLIGENCE ALLEGED AGAINST THE FIRST DEFENDANT**

- [4] The claimant particularized the negligence of the first defendant as follows:
- a. *Constructing and maintaining an enclosure to its ATM which was dangerous and unsafe;*

- b. Constructing the door of the enclosure in such a way that the door opened into the common area of the Portmore Mall;*
- c. Causing the door of the enclosure to collide with the Claimant as she traversed;*
- d. Causing the said door of the enclosure to open into the common area of the Portmore Mall when it was reasonably foreseeable that the door of the enclosure would obstruct and collide with pedestrians of the common area;*
- e. Failing to cordon off that area of the common area that that door would open into once the ATM was being used by a patron;*
- f. Failing to provide a safe place of business;*
- g. Failing to provide the requisite warnings, notices and/or special instruction to the Claimant and other pedestrians of the common area in the execution of its operations so as to prevent the Claimant being injured;*
- h. Failing to keep or maintain the said enclosure in a safe condition;*
- i. Providing an enclosure of its ATM Machine which was dangerous and unsafe;*
- j. Causing the Claimant to be hit by the door of the said enclosure and suffer a fall and injury;*
- k. Failing to take reasonable care in all the circumstances to carry out its operation in such a manner so as not to expose the Claimant to reasonably foreseeable risks.*

**PARTICULARS OF NEGLIGENCE ALLEGED AGAINST THE SECOND DEFENDANT**

**[5]** The claimant particularised the negligence of the second defendant. The first item of the particulars referred to the applicable aspects of the negligence as particularised against the first defendant. The other particulars are as follows:

- a. *Allowing the 1st Defendant to construct and maintain an enclosure to its ATM which was dangerous and unsafe.*
- b. *Allowing the 1st Defendant to construct the door of the enclosure in such a way that the door opened into the common area of the Portmore Mall;*
- c. *Causing the door of the enclosure to collide with the Claimant as she traversed the common area of the Portmore Mall.*
- d. *Causing the said door of the enclosure to open into the common area of the Portmore Mall when it was reasonably foreseeable that the door of the enclosure would obstruct and collide with pedestrians of the common area.*
- e. *Failing to cordon off that area of the common area that the door would open into once the ATM was being used by a Patron.*
- f. *Failing to provide a safe place of business.*
- g. *Failing to provide the requisite warnings, notices and/ or special instructions to the Claimant and other pedestrians of the common area in the execution of its operations so as to prevent the Claimant being injured.*
- i. *Failing to keep or maintain the said enclosure in a safe condition.*
- j. *Providing an enclosure of its ATM Machine which was dangerous and unsafe.*
- k. *Causing the Claimant to be hit by the door of the said enclosure and suffer a fall and injury.*

- I. *Failing to take reasonable care in all the circumstances to carry out its operation in such a manner so as not to expose the Claimant to reasonably foreseeable risks.*

## **DEFENCE OF FIRST DEFENDANT**

- [6] In the defence filed on the 21<sup>st</sup> day of September 2017, the first defendant denied that it was negligent in the construction and maintenance of the door to the ATM. The first defendant averred that the door opened outwards and to the right in the direction of the perimeter wall of a unit/shop located in the Portmore Mall and away from the common area corridor, further that the door posed no danger to invitees to the Portmore Mall who were exercising reasonable care in negotiating those premises. The first defendant also stated that the alleged incident was never reported to them and that they first became aware of the claimant's allegations when it was served with the claim form and particulars of claim filed in these proceedings almost two (2) years after the date of the alleged incident. It also insisted that the alleged incident could not have occurred as reported by the claimant.
- [7] It was further alleged by the first defendant that if the claimant was injured by the door to the ATM as she alleged, the incident was caused and/or contributed to by the claimant's own negligence.
- [8] The particulars of the negligence of the claimant were stated to be as follows:
- (1) *Failed to keep any or any proper lookout while walking into the path of the door to the ABM which was being opened at the material time.*
  - (2) *Failed to see the door of the ABM being opened in sufficient time or at all when it was clear and obvious to persons in the vicinity that a customer was emerging from the cubicle in which the ABM is situated.*

*(3) Failed to stop and/or wait for the door to the ABM to be safely opened before attempting to walk in the vicinity of the door and/or enter the ABM.*

*(4) Walked/stepped into the path of the door of the ABM while the same was being opened and collided with the door as a consequence.*

*(5) Failed to take any or any proper steps to avoid colliding with the door of the ABM so as to avoid being injured by the same.*

## **DEFENCE OF SECOND DEFENDANT**

**[9]** The Portmore Shopping Centre Limited, in its defence filed on the 31<sup>st</sup> of July 2017, stated that no report was ever made to it of any incident involving injury to any person by the opening of an ATM door on the 30<sup>th</sup> of October 2015, or at all. The defendant also denied the allegations of negligence or any breach of the **Occupiers' Liability Act** and averred that the door to the ATM is not dangerous and unsafe and that if the claimant was injured as alleged (which is not admitted), her injuries were caused or contributed to by her own negligence.

## **ANCILLARY CLAIM**

**[10]** The second defendant caused an ancillary claim to be filed on the 31<sup>st</sup> July 2017, in which it claimed against the first defendant a declaration that the ancillary claimant/second defendant is entitled to be indemnified by the ancillary defendant/first defendant or to a contribution against any successful judgment obtained by the claimant against the ancillary claimant/second defendant, judgment for the amount of any costs that the ancillary claimant/second defendant may be adjudged to pay to the claimant and for the amount of costs that the ancillary claimant/second defendant incurs in defending the proceedings and the costs in these proceedings.

[11] This indemnity arises in the ABM Licence Agreement dated the 19<sup>th</sup> July 2013 (hereinafter referred to as “the Agreement”), a copy of which was exhibited in the ancillary particulars of claim.

## **ANCILLARY DEFENCE AND COUNTERCLAIM**

[12] In its ancillary defence and counterclaim filed the 17<sup>th</sup> October 2017, the ancillary defendant/first defendant said that by the terms of Clause 19 of the Agreement entered into between the parties, both the ancillary claimant/second defendant and the ancillary defendant/first defendant agreed to indemnify the other “from and against any and all loss, damage or liability (whether criminal or civil) suffered (along with legal fees and costs incurred) by the indemnifying party resulting from any wilful default or negligence of the indemnifying party, its employees or agents”.

[13] The ancillary defendant counterclaimed for the following:

- (a) An indemnity and/or contribution from the Ancillary Claimant against any successful judgment obtained by the Claimant against the Ancillary Defendant in the main proceedings;*
- (b) Judgment for any sum that may be found due from the Ancillary Defendant to Claimant in the main proceedings;*
- (c) Judgment for the amount of any costs that the Ancillary Defendant may be adjudged to pay to the Claimant and for the amount of costs of defending the proceedings and the costs of these proceedings;*
- (d) Interest thereon for such rate and for such period as this Honourable court deems just pursuant to the Law Reform (Miscellaneous Provisions) Act;*
- (e) Such further and/or other relief as this Honourable Court deems fit.*

## **THE CLAIMANT'S EVIDENCE IN CHIEF**

- [14] The claimant's evidence in chief is contained in her witness statement filed on the 16<sup>th</sup> September 2022. Her evidence is that on the 30<sup>th</sup> of October 2015 about 3:00 in the afternoon, she was involved in an incident which took place in the common area of the Portmore Mall, which she said is the result of a patron of the second defendant exiting the enclosure of an ATM where NCB offers its banking services.
- [15] The claimant said that she was at the Portmore Mall with her family to purchase food and that she had just left the car park and was heading to the food court. She said that there are different blocks in the mall, and she remembered using the entrance where the Shopper's Fair Supermarket is located and also a NCB automated teller machine (ATM).
- [16] She said that she noticed a crowd to the entrance where the ATM is located, that there were persons blocking the common area and that in order for her to get to where she was going, she had to walk through the crowd and as soon as she was closer to the ATM, she suddenly felt an impact to her head that resulted in her falling to the ground. She said that she landed on her back and she heard a loud explosion when she fell to the ground.
- [17] It was the claimant's evidence that she sustained injuries to her right leg resulting in her being treated at the Spanish Town hospital. She stated that her leg was placed in a cast and she was for some time either confined mostly to her bed or was only able to move about with the use of a crutch. She also detailed that she made several visits to the orthopaedic clinic for treatment and that the cast was removed from her leg in April 2016.
- [18] I shall treat with evidence elicited in cross-examination when analysing the evidence.

## **FIRST DEFENDANT'S EVIDENCE IN CHIEF**



- [19]** Mr. Maurice Bent, manager of Technical Services and Construction at the National Commercial Bank, gave a statement on behalf of the first defendant. This statement was filed on November 24, 2022. He was also cross examined. It is Mr. Bent's evidence that by an ABM Licence Agreement dated July 19, 2013, NCB and Portmore Mall agreed that Portmore Mall would lease to NCB, property (the ABM area) situate at the Portmore Mall, that the said ABM area would be 58 ½ sq. ft and would be reserved for the installation and operation of NCB's automated banking machines (ABMs). Further, NCB would install two ABMs in the ABM area and NCB would be responsible for the cleaning and maintenance of the ABM enclosures as well as the equipment located therein.
- [20]** Mr. Bent also said that the Bank received no report of any personal injury, that the automatic door closer was defective, that the vestibule doors fell off the hinges or was in any way defective or that the glass in the door was damaged in any way.
- [21]** He stated that the Bank is confident that the vestibules were constructed and maintained in a manner which was reasonably safe for use by visitors traversing the Portmore Mall and using the ABMs.
- [22]** It is also Mr Bent's evidence that NCB has a safe system implemented for the use of its ABM area, ABMs and ABM vestibules and this system covers the layout of the ABM area, the construction of the vestibules, the security of the network and ABMs and the day to day maintenance of the ABM and the ABM area.
- [23]** Mr. Bent in giving evidence, stated that the vestibules were installed in an "L" shape, which is an enhanced safety precaution and that with this design, the doors of the vestibules open within the 48 ½ sq. ft allotted to NCB by the Portmore Mall. He further stated that when the doors of the vestibules open, they do not impede the walkway of pedestrians.
- [24]** He said that the doors of both vestibules 1 and 2 are equipped with an automatic door closure and that this device not only ensures that the doors close automatically after opening, but the automatic door closure also controls the speed

at which the vestibule doors open and close, thus preventing damage to pedestrians and the assets themselves.

**[25]** He also said that another safety measure is that the vestibules are constructed using regular glass which is transparent, allowing persons that are coming out of the space to see outside and pedestrians passing by to see when persons are exiting the vestibules.

**[26]** Mr. Bent further said that the doors of the vestibules do not open into the common area of the Portmore Mall and they do not impede the walkway of pedestrians as the claimant claims.

## **SECOND DEFENDANT'S EVIDENCE IN CHIEF**

**[27]** Mr. Courtney Henry, Property Manager for the Portmore Shopping Centre, gave a witness statement on behalf of the second defendant. This statement was filed on December 14, 2022. Mr. Henry is responsible for supervising and overseeing the premises of the shopping centre.

**[28]** Mr. Henry said that the Agreement between the Portmore Shopping Centre and NCB governs the operation of the ABMs at the mall by the Bank, including during the period covering October 30, 2015.

**[29]** Mr. Henry also said that NCB agreed to indemnify the Mall from and against all damage that resulted from the deliberate or negligent actions of NCB's agents which would include the parties who designed and constructed the ABMs in the ABM area.

**[30]** He further said that the Mall is not responsible for the construction, maintenance or operation of the ABMs in the Mall and the ABM was not being used by an agent of the Mall at the material time.

- [31] Mr. Henry stated that the Mall has discharged all its duties to any and all visitors who used the common area of the Mall by providing a safe place and did not expose the claimant to any foreseeable risk of harm.
- [32] Mr. Henry also stated that he is quite familiar with the layout of the area where the claimant alleges that the incident occurred and that there have been no significant changes made to the layout since October 2015.
- [33] Further, he confirmed the undisputed evidence that there are two (2) ABMs in the area where the accident allegedly occurred and that the vestibules are constructed perpendicular or 'L' shaped with respect to each other.
- [34] He said that the first ABM opens from left to right when facing the vestibule from the outside and when the door is opened, the opening of the door directly faces a concrete column which is about 2 feet wide and 2 feet 6 inches long and the walkway faces the ABM which extends for several meters behind the column.
- [35] Mr. Henry also said that the door to the second ABM opens to the left when facing the vestibule from the outside with the door being opened towards the wall of the ABM vestibule on which the door is hinged.
- [36] He said further, that there are 79 inches (6 feet and 7 inches) between the closed door of the first ABM vestibule and the concrete column facing it. Also, that the width of the door to the first ABM is 32 inches (2 feet 8 inches). Therefore, when opened fully, there would be 47 inches (3 feet and 11 inches) between the edge of the fully opened door and the concrete column facing the opening of the vestibule.
- [37] He said that a person who is entering the Mall can either walk in the open space separating the ABM vestibule and the concrete column or behind the concrete column and that to enter the Mall through the entrance near the ABM area, the first ABM vestibule would be to the left of a person who is walking towards the entrance. When opening the door to the first ABM vestibule, the door would be moving in the same direction as a person walking towards the entrance of the Mall. There are

two doorways through which pedestrians can enter the Mall in this area, with each doorway being approximately 64 inches (5 feet and 4 inches) wide.

[38] He also stated that when fully opened, the doors to the ABM vestibule do not in any way obstruct or impede the doorway to the mall entrance.

## CLAIMANT'S SUBMISSIONS

[39] The claimant's written submissions were filed on November 10, 2023. Mr Ebanks submitted that it is established law that four conditions must be met in order to prove negligence: a duty of care must exist, the duty must be broken, there must be a direct link between the breach and the damage, and the specific sort of damage must have been predictable.

[40] Mr. Ebanks referred to the dictum of Morrison JA. (as he then was) in the Court of Appeal decision of **Adele Shtern v Villa Mora Cottages Ltd. and Monica Cummings** [2012] JMCA Civ. 20, where commencing at paragraph 49, the learned judge analysed the requirements for proof of Negligence as follows:

*"The test of whether a duty of care exists in a particular case is, as it is formulated by Lord Bridge of Harwich, after a full review of the authorities, in the leading modern case of Caparo Industries plc v Dickman (1990) 1 All ER 568,573-574: "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other." As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof, on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case (see Clerk & Lindsell, op. cit., para. 8-149);*

[41] Counsel observed that section 3 of the **Occupiers' Liability Act** governs occupier liability; that it lays out the parameters of an occupier's customary obligation and stipulates the following:

“(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 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; and

(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 the circumstances it was enough to enable the visitor to be reasonably safe.”

[42] He also submitted that at common law, the occupier of premises owes a duty to exercise reasonable care to prevent damage from an unusual danger, that is, "one

which is not usually found in carrying out the task or fulfilling the function which the invitee has at hand" (**London Graving Dock v Horton** [1951] AC 737, 745).

[43] Mr. Ebanks addressed the question of 'who is an occupier?' by referring to section 2(2) of the **Occupiers' Liability Act** and also to a definition given by the editors of **Clerk & Lindsell** (16th ed, para. 13-06), where an 'occupier' of premises is defined as someone "who has a sufficient degree of control over premises to put him under a duty of care towards those who come lawfully onto the premises".

[44] Mr. Ebanks also referred to the case of **Fisher v C.H.T. Ltd and others** [1966] 1 All ER 88. In that case, the plaintiff came into contact with a live wire and received a shock which caused him to fall and injure himself, while he was working at the first defendants' club which was managed and run under a licence by the second defendants. It was held that in that case, both the first and second defendants were occupiers under the UK Occupiers' Liability Act 1957 because although the second defendants had the use of the restaurant, the first defendants still had the right to go through it and controlled the door to the whole premises and therefore were under the common duty of care to all the visitors coming onto the premises, including the plaintiff. In light of this, Mr. Ebanks submitted that both named defendants, in the case at hand, are lawful occupiers.

[45] In addressing the issue of whether the defendants could have foreseen that their facility could have caused injury to an invitee, Mr. Ebanks submitted that given the design and implementation of the first defendant's ABM vestibule, it was foreseeable that the original orientation of the entrance to the mall was compromised as a result of the presence of the first defendant's ABM vestibule and therefore would have posed a danger to unsuspecting visitors, especially those who might be visiting the Mall for the first time who would be unaware of the juxtaposition of the ATM vestibule at the entrance to the Mall.

[46] Mr. Ebanks referred to the case of **Indermaur v Dames** [1861-73] All ER Rep 15. In that case, the plaintiff, who was a lawful visitor on the defendant's premises, fell through an open and unfenced hole on the premises and injured himself. Willes J,

who delivered the judgment of the court, stated at page 21 that “*with respect to such a visitor, at least we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know, and this where there, is evidence of neglect.*” Based on this excerpt, Mr. Ebanks submitted that the occupiers did not use reasonable care to prevent damage from unusual danger which they ought to have known of, thereby rendering the said occupiers careless and negligent in their overall approach.

- [47]** He also submitted that the claimant was not aware of any unusual risk and had no reason to and further that based on the claimant’s evidence, it was her first time to the property and for those reasons, the defendants must accept the claimant as they find her.
- [48]** Counsel submitted that the defendants were occupiers of the premises and since the claimant was an invitee to the premises, a duty of care was owed to her and for that duty being breached by the defendants, the claimant has suffered damages and injuries.
- [49]** Counsel for the claimant also submitted that it should have been foreseen by the defendants that based on the initial design and orientation of the location where the vestibule was constructed, this would have significantly disrupted and changed the original design of the entrance that leads into the mall.
- [50]** Mr. Ebanks submitted that during cross-examination, the second defendant’s witness said that there were warning signs at the Portmore Mall to warn visitors from colliding into the first defendant’s ATM vestibule. He, however, submitted that on the court’s visit to the locus in quo, no warning signs were seen nearby or observed at all.

## **ANALYSIS OF THE EVIDENCE**

**[51]** The significant aspects of the claimant's evidence which emerged in cross-examination include the following:

- (1) She agreed that the ABM area is different from the common area of the foyer.
- (2) She did not make a report of the incident to the Portmore mall.
- (3) She did not report the incident to NCB.
- (4) She has osteoporosis.
- (5) The claimant was entering the mall when the incident occurred.
- (6) The claimant said that she was hit by the vestibule door to her forehead and not to the back of her head.
- (7) The claimant accepted that there are two different ABM enclosures.
- (8) She agreed that she had been to the mall recently and that the layout of the ABMs (the vestibules) have not changed between the date of the incident and the date of the trial.
- (9) It was the door of the first vestibule as one enters the mall, that hit her.
- (10) The claimant identified various photographs entered into evidence as exhibits 1(a) to 1(g) and accepted that those photographs accurately represent the layout of the mall as it existed on the day of the incident.
- (11) She identified various locations on exhibits 1(a), (b), and (e) when cross-examined, such as where she was when she was hit by the door, where the door is hinged, where she said the crowd was located and the approximate point at which she entered the mall.
- (12) The claimant stated that she walked into the ABM door while it was opened, although she repeatedly stated that the door hit her suddenly.



- [52]** This court accepts Mr. Henry's evidence as to the layout of the entrance to the mall, except with respect to one inaccuracy relating to measurement. In his witness statement, he said that when the door in question is opened, there is a space of 47 inches left as a walkway on one side of the column closer the ABM vestibule. In response to the court, he said the space was about 3 feet. The actual measurement is 4 feet 2 inches. This was ascertained upon a visit to the locus on September 22, 2023.
- [53]** The photographs admitted in evidence by the first defendant also clearly depict the layout of the area where the claimant claims that the incident occurred. The ABM vestibules are situated to the left side of the entrance that the claimant stated that she used to enter the mall. The evidence reveals that the door that the claimant agreed to be the one that hit her opens outward, some distance in front of the second ABM enclosure. There would be no need for the claimant to be walking where she claimed that she was when she was hit unless she was moving towards that second ABM enclosure. Indeed, the claimant agreed that she had ample space to walk into the mall with the ABM door opened.
- [54]** It is significant that the claimant eventually agreed that she walked into the door while it was opened although she initially disagreed that for the ABM door to have hit her in the forehead, the door would have had to be open. The door is framed and its height from floor extends above the height of the claimant. The claimant claims that the area was crowded by persons and thus she was unable to see where she was going. Although there is no evidence from either of the defendants' witness as to the number of persons in the area at the time the incident is said to have taken place, this court accepts the evidence of Mr. Henry that there is usually a line of persons waiting to use the ABMs and that the line does not usually block the entrance to the mall. He further explained that there is a column behind which the person who is next in line to use the ABM usually stands and that there is a space between the enclosure and the column which allows for the passage of persons. Mr Henry disagreed that the presence of persons standing in line to use

the ABM would force patrons using the mall to walk closer to the door of the vestibule.

**[55]** The observation made on the occasion of the visit to the locus which was subsequent to Mr Henry giving evidence, was that there was a line of persons waiting to use the ABMs and that the line did not block the entrance to the mall. As Mr Henry had testified, the line was formed beyond the column. I cannot help but say that without exception, that was the observation made by me on numerous prior and subsequent visits to the location, an area with which I am very familiar.

**[56]** It is true, however, that because of the line of persons waiting to use the ABMs, patrons would ordinarily be more inclined, as distinct from being forced, to walk closer to the ABM enclosures. The wider clearance would be on the side of the column closer to the enclosures. The other option would be to walk between persons standing in the line waiting to use the ABMs.

**[57]** If the claimant was in fact hit by the door of the enclosure as she alleged, then that would have been as a result of complete inattention on her part, which is a factor that cannot properly be ascribed to the layout of the entrance to the mall. Mr. Ebanks questioned Mr. Henry as to whether he agreed that the construction of the vestibule and installation of the ABMs distorted the entrance to the mall. It is evident that the placement of the vestibules altered the entry way to the mall and minimized the access area. That is not to say, however, that such placement rendered the entryway inherently dangerous or in any way unsafe to patrons of the mall. This is not a case where the claimant is saying that she was familiar with the mall being in a particular state and that for example at some point or on the occasion in question, the layout had changed. Her evidence is that she had never been to the mall before.

**[58]** Although it is not entirely inaccurate that the vestibule door in question opens towards the common area, given its proximity and position relative to the second ABM enclosure, which from appearance merges into the structure of the building as if it formed a part of the original building, the claimant would be expected to be

walking in the location where she said she was when she was hit by the door only if she was heading to the second enclosure. The door which is said to have hit the claimant does not really impede the walkway to the mall. The walkway, it is accepted, is narrower when the door is opened. It would be more probable that the claimant could have been hit by the door if she was headed toward the second enclosure and even so, any such occurrence would have to be the result of inattention. It is not her evidence that she was headed towards that second enclosure. Even if I am wrong in saying that she had no reason to walk where she did unless she was headed to the second enclosure, it does not take away from my view that there must have been complete inattention on the part of the claimant in order for the door to have hit her.

**[59]** According to the claimant, the entrance area was crowded. Even if this court accepted that the area was crowded, what is evident is that it was not so crowded as to prevent the door of the vestibule from opening. As Mr. Henry pointed out in his witness statement, the vestibule door which the claimant said hit her, is to the left of any person entering the mall and when that door is opened, it would be moving in the same direction as a person entering the mall. Based on how the door is hinged onto the rest of the enclosure, the door cannot remain opened and must therefore have been opened immediately prior to the claimant walking into same, reinforcing the view that there must have been space for her to see what was ahead of her. If indeed there was an incident involving the claimant colliding with the door of the ATM vestibule, this court finds it difficult to accept that the incident could have occurred in the manner explained by the claimant.

**[60]** Further, the claimant has not established that there was anything in relation to the construction or maintenance of the vestibule or the door that was unsafe. Neither has she established that there was any unusual risk to which patrons to the should have been alerted.

**[61]** In addition to the matters explained above, whilst the court accepts on a balance of probabilities that the claimant's leg was injured, this court entertains doubts as

to whether there was an incident at the mall as she alleged. The claimant does not dispute that no report was made to either defendant about the occurrence of the incident until some two years later. She claims that a report was made at the Waterford police station regarding the incident. No proof has been produced as to the making of that report. The court is cognizant of the claimant's explanation which is that it was only after she had spoken to her friend and based on what her friend said to her, she decided to pursue a claim. I understood her to be inferring that she did not see the need to report the matter to the defendants until it occurred to her, or she became aware, that she could bring a civil claim against the defendants. Notwithstanding that, it was open to her to seek to establish that she had indeed made a report to the police. This could quite easily have been established by the production of the receipt which is issued by the police upon the making of a report.

- [62] The claimant has not established to the required standard any of the allegations of negligence or breach of the **Occupiers' Liability Act**, as pleaded.
- [63] This trial proceeded as a hearing on the question of liability only because of late objections taken in relation to the claimant's medical reports. Having regard to my findings, however, the question of the quantum of damages will not arise.
- [64] In the result, this court gives judgment in favour of the first and second defendants on the claim and there is no need to consider the first defendant's counterclaim. The defendants are awarded costs against the claimant. Such costs are to be taxed if not sooner agreed.

.....  
**A. Pettigrew-Collins**  
**Puisne Judge**