REPUBLIC OF TRINIDAD AND TOBAGO

In the High Court of Justice

CV 2014-04027

Between

ERICA HENRY

Claimant

And

MASSY STORES (TRINIDAD)

(A DIVISION OF MASSY INTEGRATED RETAIL LIMITED)

Defendant

Before Hon. Madam Justice E. Donaldson-Honeywell

Appearances:

Mr. Ronald Singh, Attorney-at-Law for the Claimant.

Mr. Keston McQuilkin and Mr. Ramnarine Mungroo Attorneys-at-Law for the Defendant.

Date delivered: March 2nd, 2016

JUDGMENT

Factual Background and Decision

1. Counsel for Defendant herein brought the proceedings at trial to an abrupt end after cross-examination of the Claimant, who was the sole witness, by submitting that there was no case to answer. Thereafter, both parties were permitted to file written submissions based on which a determination would be made whether to dismiss the

claim. The Defendant's submission is in essence that there was no evidence to support the Claimant's claim. The Claimant in response relies on the doctrine of *Res Ipsa Loquitur*.

2. The Claimant, Erica Henry, alleges that she sustained injuries to her back when she fell down the stairs at her workplace on November 1, 2010. She was employed at the Mid Centre Shopping Plaza, Chaguanas Branch of Massy Stores which was then known as Hi-Lo food Stores. The Claimant proceeded on sick/injury leave for two years and eventually on July 14th, 2014 a letter seeking relief was sent to the Defendant based on the instructions to her Attorney-at-Law that the cause of her fall was *"the slippery condition of the stairs at the material time."*

3. The Defendant did not grant the relief sought so the instant Claim was filed in Court on October 14, 2014. The Claimant alleged therein that she had *"slipped on the smooth and/or worn treadings*[1] *on the stairway causing her to fall down the stairs."* She reiterated that *"the cause of the fall was due to the slippery condition of the treadings on the stairway at the material time."* In her statement of case, particulars of the Defendant's negligence included allegations that the Defendant:

- Failed to maintain the treadings on the staircase;
- Failed by means of signs, notices, barriers or otherwise to warn the Claimant of the presence and/or position of a slipping and/or trip hazard;
- Exposed the Claimant to a slipping or trip hazard;
- Failed to provide any or an adequate handrail on the said stairway or other indication of their existence at or/in the vicinity of the treadings;
- Permitted the Claimant to walk on the treadings of the stairway when it was unsafe in all the circumstances to so do;
- Caused, permitted or suffered the treadings on the stairway to become worn or to remain slippery and dangerous; and

[1] The word "treading" has been inserted as it is the correct word for part of the stairway being described. It is used in this Judgment instead of "Threader" as used by the Claimant or "Treader" by the Defendant

- Exposed the Claimant to a danger or trap or a foreseeable risk of injury and/or a slipping hazard.

4. A Defence was filed on January 30, 2015 in which the Defendant:

- Denies that the treadings on the stairway were smooth or warn and caused the Claimant's fall due to slippery conditions of the treadings.
- Avers that iron handrails are mounted on the staircase and there is a sign above the entrance of the staircase with the words *"please use handrails"*.
- States that the staircase is enclosed and sheltered from the elements.
- Avers that the Claimant was wearing inappropriate footwear, namely slippers at the material time when she fell; and
- Contends she was hurrying down the staircase to reach her child's day-care centre in time to avoid payment of late fees.

5. The Claimant made clear from her Statement of Case that she intended to rely on a submission of *Res Ipsa Loquitur* since she said she would *"rely on the happening of the accident itself as evidence of negligence on the part of the Defendant."* In fulfilment of this intention there was in fact no admissible evidence presented by the Claimant to support her claim that the accident was caused by the Defendant's negligence.

6. An attempt was made to introduce as evidence the fact that more than two months after the fall, the Claimant made a report to the Occupational Safety and Health ["OSH"] Agency which produced a Non-Critical Accident Report around March/April 2011. That evidence was, however, struck out based inter *alia* on the Defendant's objection that it would be hearsay evidence and there was insufficient indication that the maker of the Report could not be located to be called as a witness.

7. The said evidence was also irrelevant because the inspection took place several months after the fall and did not provide information on the condition of the stairs at that time. Furthermore, prior to the Claimant's visit to the OSH office there had been no contemporaneous complaint to her employer, the Defendant that her fall was caused by a worn or slippery state of the treadings on the stairway. Accordingly, there was no relevant probative value and only the potential for prejudicial effect, in the evidence of the OSH Report. It was not admitted into evidence and the Claimant's reference thereto in her witness statement was struck out.

8. In all the circumstances the Defendant's submission that there was no case to answer was well founded. My determination is that the Claim must be dismissed for reasons more fully explained herein.

The Evidence:

9. The Claimant, in the evidence-in chief set out in her witness statement, said that at the material time of the fall when she was *"descending the stairs, the treadings were worn."* Additionally, she says she can remember that *"there was not any non-slip tape and/or a rubber and/or non-slip mat on the surface of the treadings of the said stairway."* She said she was neither descending the stairway at a fast rate nor hustling as alleged by the Defendant. She did not deny that she had slippers on at the time but said she would often change her footwear before leaving work.

10. Under cross-examination further evidence was led from the Claimant that she had been employed at the same location for six to seven years and was required to walk up and down the same stairway around five times a day. This was so because it led not only to the changing room but also to the lunch room and the wash room. On the day of her fall she had used the staircase to go to the changing room intending to finish work, thereafter, by signing the register downstairs.

11. She admitted that she changed out of her uniform and changed her footwear as well, putting on a pair of soft plastic slippers. She also admitted that she intended to pick up her child at the nearby day-care centre and that she was required to be there by 5.30 p.m. to avoid paying late fees. She said her fall while descending the stairs took place at around 5.05 p.m. and she had not yet signed out as having finished work. She

denied however, that she had to try to get to the front desk inside the store to sign out as quickly as possible.

12. She said she was walking slowly and also maintained that she was looking down at the treadings as she descended the stairs. She admitted that there was a railing as well as a sign warning that it should be used and said she was holding the railing when she fell. She acknowledged that these admissions had not been included in her witness statement but said she forgot to put that in. It was also admitted by the Claimant that the staircase was located in the building and not exposed to the rain or the elements. She could not give any evidence of a slippery substance on the stairs and admitted that she gave varying accounts, unsupported by expert or other evidence as to the condition of the stairs that she said led to her fall.

13. The Claimant also admitted, when asked by Counsel for the Defendant, that immediately after the fall she gave a written statement on the accident to her employer. The said statement headed *"Notice of Incident"* and dated the day after the fall on November 2, 2010 was shown to the Claimant. She confirmed, as suggested by Counsel for the Defendant that she did not, in this contemporaneous statement, allege that the stairway treadings were worn or the stairs were slippery causing her to fall.

14. Further, the Claimant admitted under cross-examination that she had not at any time prior to the fall complained to her employer that the staircase was worn or slippery and that the Notice of Incident did not include any information about a complaint regarding the staircase or any such observation by those that first came to assist her when she fell. The Claimant candidly confirmed that she had neither witnesses nor contemporaneous photographs to prove that the staircase was slippery or worn when she fell. Furthermore, the first time she raised the issue of the stairs being smooth and sometimes slippery was when she went to the OSH Offices two months after the fall. She admits that this was after her employer, the Defendant herein had told her about the slippers she was wearing and said that she was to blame for the accident.

<u>The Submissions:</u>

15. Counsel for the Defendant, in closing submissions, firstly explained that the decision taken by the Defendant to elect not to call evidence was based on the Claimant's failure to effectively put forward evidence in support of her case. In particular the Defendant underscored that the Claimant's evidence failed to demonstrate that her fall was due solely to unsafe conditions of the stairs or that the alleged unsafe condition of the stairs was caused by the negligence of the Defendant. Further the Defendant submitted that the Claimant's evidence was so discredited in cross-examination that it would be unsafe for the Court to conclude that she had proven her case. Accordingly, there was no case for the Defendant to answer.

16. In support of the contention that there was no case to answer the Defendant cited a number of authorities. The first case cited was a decision of their Lordships in the Court of Appeal, **Kirpalani's Limited v Hoyte Civ App No 77 of 1971**. In that case the Plaintiff slipped and fell whilst shopping at the Defendant's supermarket. She alleged that the reason for her fall was the presence of a product referred to as *"Clean Sweep"* on the floor. At first instance the trial judge held that the Defendant was culpable. On appeal to the Court of Appeal in a unanimous decision, the Court of Appeal overturned the trial judge's decision.

17. The Lord Chief Justice Sir Isaac Hyatali and Mr. Justice of Appeal Corbin with whom Mr. Justice of Appeal Rees disagreed held that the Plaintiff was required to prove that the "*Clean Sweep"* was slippery and that it caused her to fall. They concluded that the Plaintiff failed to prove that the *"Clean Sweep"* was slippery and that was the cause of her fall.

18. The Defendant submitted that in applying their Lordship's judgment in **Kirpalani v Hoyte** to the instant case, the basic principle or requirement for the Claimant to succeed is to prove, by her evidence, that the reason for her fall was the unsafe staircase and that the staircase was worn or slippery. The Defendant contended she has failed to do that.

19. Furthermore, the Defendant pointed out that not even the dissenting judgement in the **Kirpalani v Hoyte** case assists the Claimant in the instant matter. Mr. Justice of Appeal Rees in his dissenting judgment said that the Plaintiff was not required to

prove that the Clean Sweep was slippery only that the Defendant put it on the floor and knew persons would walk upon it. Once the Defendant placed the substance on the floor then they failed to take reasonable care to ensure that person were safe upon entering their premises since they ought reasonably to know that persons could fall when they step on the Clean Sweep.

20. The Defendant underscored that in the instant case, the Claimant has lead no evidence that the Defendant placed any slippery substance upon the staircase or that the Defendant through some act or omission caused the staircase to become worn and therefore they ought reasonably to have known that when the Claimant walked along the staircase she would have fallen. The Claimant's case is devoid of such evidence.

21. The decision in **Kirpalani v Hoyte** was followed in the decision of the Honourable Mr. Justice Smith (as he then was) in the case of **Jean Carr v Telecommunications Services of Trinidad and Tobago HCA No 1899 of 2000**. In that case, the Plaintiff alleged that she slipped along a wet landing on the Defendant's compound and fell down some stairs. Mr. Justice Smith (as he then was) citied the **Kirpalani case** and the established principle stated by the Hon. Jamadar J (as he then was) in **Diana Witherspoon v The Airport's Authority of Trinidad and Tobago (H.C. 2533/1995)** that:

> "*A slip is quite a common incident of life and usually no harm is done so it is incumbent on the Plaintiff to show:*
>
> *(1) That the substance on the floor caused her to slip;*
>
> *(2) That the substance on the floor constituted an unusual danger;*
>
> (3) *That the Defendants knew it to be dangerous*".

22. According to the Defendant herein, applying this established principle to the facts of this case, it is incumbent upon the Claimant to show that the slippery or worn staircase was the reason for her fall. Implicit in that requirement is that the Claimant must also show that the staircase was slippery or worn. Again the Defendant argued she has failed to so do.
23. In the case of **Darryl Damian Abraham v The Attorney General of Trinidad and Tobago CV 2011-03101**, the Honourable Mr. Justice Rahim explained the Claimant's burden of proof as follows:

"*In order to recover damages for negligence, a Claimant must prove that but for the Defendant's wrongful conduct he would not have sustained the harm or loss in question. He must establish a degree of causal connection between his damage and the Defendant's conduct before the Defendant is held responsible for the damage: Munkman: Employer's Liability at Common Law, Chapter 3 para 3.12*"

24. The Defendant recommended to the Court that in applying the aforementioned principle to the instant case the Claimant was required in her evidence to prove that the Defendant's wrongful conduct or negligence was the cause of the fall. The Defendant pointed out that the Claimant's evidence does not however suggest that the Defendant's wrongful conduct or negligence was the cause of her fall.

25. Accordingly, based on the authorities cited and the analysis thereof the Defendant asked the Court to conclude that the Claim should be dismissed because the Claimant has failed to discharge her burden of proving that the staircase was unsafe/slippery/worn, that the unsafe/slippery/worn staircase was the cause of her fall and that her fall was caused by the Defendant's wrongful conduct or negligence.

26. Counsel for the Claimant summarised her case as being *"essentially that due to the negligence of the Defendant she was injured, whilst as a visitor to the premises owned and/or controlled by the Defendant and/or in the course of her employment, which resulted in her suffering foreseeable personal injury loss and damages which are not remote."* He submitted further that *"from the evidence emanating at trial, she is unable to precisely and definitely explain the cause of the accident and, as such, will rely on the maxim of res ipsa loquitur*."

27. The Claimant cited a number of authorities in explaining the reliance on *res ipsa loquitur* the most recent of which was his reference to the decision in **Annie Kellman v Dr. Robert Downes and North Central Regional Health Authority (CV2007-01036)** where at pages 7-9 the Hon. Des Vignes J explained:

"Res ipsa Loquitur:

17. It is clear from the authorities that the burden of proving negligence lay at all times upon the Claimant. In certain circumstances, a Claimant who has

sustained injuries in circumstances where such injuries would not have happened if the Defendant had taken due care, the Claimant may discharge that burden by inviting the court to draw the inference that on a balance of probabilities the Defendant must have failed to exercise due care. ***Ng Chun Pui v. Lee Chuen Tat [1988] RTR 298 (P.C.)*** *However,* ***the Claimant must adduce evidence to establish a prima facie case and then, if the Defendant does not adduce any evidence, there will not be any evidence to rebut the inference of negligence and the court will be entitled to conclude that the Claimant has proved his/her case.*** *Where, however, a Defendant adduces evidence, the court must then assess that evidence to determine whether it is still reasonable to draw the inference of negligence.*

18. In ***Ng Chun Pui v. Lee Chuen Tat (ibid)****, the Privy Council adopted two passages from the decided cases as a clear exposition of the true meaning and effect of the so-called doctrine of res ipsa loquitur.*

19. In ***Henderson v. Henry E. Jenkins & Sons [1970] RTR 70****, Lord Pearson said at pp. 81I-82A: "In an action for negligence the Plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the Defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial* ***the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the Defendants, and if he is not so satisfied the Plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the Defendants, the issue will be decided in the Plaintiff's favour unless the Defendants by their evidence provide some answer which is adequate to displace the prima facie inference.*** *In this situation there is said to be an evidential burden of proof resting on the Defendants. I have some doubts whether it is strictly correct to use the expression 'burden of proof' with this meaning, as there is a risk of it being confused with the formal burden of proof, but it is a familiar and convenient usage."*

20. In ***Lloyde v. West Midlands Gas Board [1971] 1 WLR 749****, 755* Megaw LJ said*: "I doubt whether it is right to describe res ipsa loquitur as a "doctrine". I think it is no more than an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances,* ***It means that a Plaintiff prima facie establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the Defendant or of someone for whom the Defendant is responsible, which act or omission constitutes a failure to take proper care for the Plaintiff's safety. I have used the words "evidence as it stands at the relevant time." I think that this can most conveniently be taken as being at the close of the Plaintiff's case. On the assumption that a submission of no case is then made, would the evidence, as it then stands, enable the Plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inference on balance of probability is that that cause, whatever it may have been, involved a failure by the Defendant to take due care for the Plaintiff's safety? If so, res ipsa loquitur. If not, the Plaintiff fails.*** *Of course, if the Defendant does not make a submission of no case, the question still falls to be tested by the same criterion, but evidence for the Defendant, given thereafter, may rebut the inference. The res, which previously spoke for itself, may be silenced, or its voice may, on the whole of the evidence, become too weak or muted."* [Emphasis Added]

28. In addition to relying on *res ipsa loquitur*, the Claimant contended in closing that the failure of the Defendant to call any witnesses was an occasion for the Court to draw adverse inferences against the Defendant. Counsel for the Claimant, citing **Phipson on Evidence, 16th Edn. (2005)** at para 11-15 pointed out that:

    "(W)here a party declines to call a witness in respect of whom he has served a witness statement, the court cannot compel the party to call him as a witness, but the court may draw an adverse inference against a party who fails to call a witness to deal with certain evidence."

29. The principles applicable as to when such adverse inferences can be drawn were also set out by the Claimant citing Brooks L.J. in **Wisnieski v Central Manchester Health Authority[1998] PIQR 324** as follows:

> *"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
>
> *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
>
> *(3)* ***There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.***
>
> *(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."* [Emphasis added]

30. The principle was effectively summarised by the Hon. Rahim J in **Michael Coban (A minor by his mother and next friend Carol Noel) and Carol Noel v the AG (CV 2010-03064)** at paragraph 33 as follows:

> "*It is well established that where a party does not call a witness who has given a witness statement touching on a relevant matter who is not known to be unavailable and/or who has no good reason for not attending, and the other side has adduced relevant evidence, the trial judge is entitled to draw an inference adverse to that party and to find that matter proved. See Wisniewski v Central Manchester Health Authority [1998] P.I.Q.R. p 324; Ramroop v Ganeias and others CV 2006-00075.* ***The party seeking to rely on such an inference must establish a prima facie case on the matter in question***." [Emphasis added.]

31. In applying these authorities on *res ipsa loquitur* and the drawing of adverse inferences from the fact that witnesses were not called, Counsel for the Claimant argued that the evidence the Claimant gave supported her pleading that her fall was due to the slippery condition of the smooth and/or worn treadings on the stairway. Counsel argued that *"little affirmative evidence"* was required from the Claimant to establish a prima facie case and shift the burden of proof to the Defendant based on the *res ipsa loquitur* maxim. This was so he said because the stairway was in the control of the Defendant.

32. Counsel for the Claimant argued that as a result of the Defendant's decision not to call evidence they had not discharged the burden of proof which had shifted. Accordingly he asked that the Court draw an adverse inference against the Defendant.

33. The Claimant sought to distinguish cases relied on by the Defendant but placed reliance on the same principles cited by the Defendant on the issue of a slip and fall. The principles were stated by Jamadar J. in the **Diana Witherspoon** case. Based on that case the submission of counsel for the Claimant was that:

> "*In the instant case at bar, it is firstly for the Court to determine whether or not the smooth and/or worn treadings on the stairway caused the Claimant to slip and fall. Secondly, the Court must determine whether or not a smooth and/or worn treading on a stairway is an unusual danger? It is submitted that it is. Thirdly, the Court must determine whether the Defendant knew or reasonably ought to have known that a smooth and/or worn treading on a stairway was a danger? Yes, the Defendant ought to have known of the status of the treadings because other workers fell as well on the said stairway.*
>
> *The Court must also ask itself this very pertinent question: But for the treadings on the stairway being smooth and/or worn, would the Claimant have slipped and fallen? The Claimant submits that had it not been for the smooth and/or worn treadings on the stairway, she would not have fallen."*

34. In concluding his submissions Counsel for the Claimant urged that the Court should find that the Claimant had made out a prima facie case of the Defendant's breach of

its duties of care owed to her both as a visitor and as an employee which resulted in personal injuries which were foreseeable and not remote.

35. The Defendant filed submissions in Reply pointing out firstly that the maxim of *res ipsa loquitur* is not applicable to assist the Claimant on the facts of this case. Counsel for the Defendant explained that this is so because this is neither a case of an occurrence that could not happen without the Defendant's negligence nor a case where the Claimant does not know the reason for the occurrence of the alleged accident.

36. On this point **Clerk and Lindsell on Torts 20th edition** at paragraph 8-172 to 175 was cited as follows:

> *"Res ipsa locquitur which stems from the judgment of Erle CJ in Scott v London and St Katherine Docks, applies where (1**) the occurrence is such that it would not have happened without negligence** and (2) the thing that inflicted the damage was under the sole management and control of the Defendant…there is however, a further negative condition: (3)* ***there must be no evidence as to why or how the occurrence took place****. If there is, then appeal to res ipsa locquitur is inappropriate for the question of the Defendant's negligence must be determined on that evidence. ....**Res Ipsa Locquitur has no application when the cause of the occurrence is known**. **This is because there is then no need to do more than to decide whether on these facts negligence on the part of the Defendant has been proved or not**"*
> [emphasis added]

37. Counsel for the Defendant opined that the occurrence of a slip is a natural part of everyday life which is not always caused by the negligence of a person other than the person falling. Accordingly, simply because the Claimant slipped on the staircase cannot automatically lead to the conclusion that the Defendant was negligent. Counsel underscored that in the instant case the Claimant has not tried to say the occurrence was such that it could not happen without the Defendant's negligence but she does not know the cause. She has clearly stated that the accident was because of worn treadings and she particularised specific acts of negligence by the Defendant in allegedly neither maintaining the stairs in a safe condition nor protecting her from

falling on the smooth treadings. Accordingly, counsel argued, the doctrine of *res ipsa loquitur* is inapplicable and the Claimant must prove her case.

38. Furthermore the Defendant contended that although the Claimant particularised the allegations against the Defendant in her Statement of Case she had failed to establish by evidence a prima facie case of the Defendant's negligence. Accordingly, the burden of proof had not shifted for the Defendant to prove anything and there was no basis for the Court to draw an inference that the Defendant's negligence caused the accident.

39. Finally, in response to the Claimant's submissions on the application of the principles on proving negligence in slip and fall cases set out by Jamadar J in the **Diana Witherspoon** case**,** counsel for the Defendant asked that the Court note that the first question to be determined should be whether the treadings were smooth and/or worn. To resolve that question the Court has to determine whether there was sufficient evidence that the treadings were in that condition. Counsel for the Defendant reiterated that the Claimant had failed to establish this by evidence.

Issues and Analysis:

40. In determining this matter the first issue that was considered was whether there was sound basis for the application of the maxim *res ipsa loquitur* in the circumstances of this case. My finding was that it was not applicable for a number of reasons. Firstly, although the stairway was under the management and control of the Defendant the accident that took place, namely a slip and fall, was not one that in the ordinary course of things does not happen. The occurrence of a slip and fall is something that happens to everyone from time to time. This has been recognised by the Court as a factor to be taken into consideration in cases where negligence of another is alleged to have caused the fall since "*a slip is quite a common incident of life.*[2]" It is therefore necessary for a Claimant making such an allegation to prove it since the fact of a fall per se does not raise an inference that another person caused it.

[2] Jamadar J in **Witherspoon**

41. The UK decision of **Crafter v The Metropolitan Railway Company (1866) L.R. 1 C.P. 300** provides assistance here as the circumstances of that case were quite similar to the present one. The case involved a fall on a railway staircase that was about six feet wide with each step having upon it a strip of brass which originally had been roughened, but which had from constant use become worn and slippery. Some witnesses gave evidence that the use of lead would have been less slippery than the brass. However, the court, on appeal, held that there was no evidence to go to the jury of any actionable negligence on the part of the defendants. The Court considered that the staircase was an ordinary one with nothing particularly dangerous in it as in other cases. It noted that even the absence of a hand-rail did not make it more dangerous, only less convenient. The Court further observed that the staircase was in use by the Plaintiff for several months and had been used by thousands of people with no prior complaint. These factors formed the basis of their determination that the Plaintiff's case was insufficient to go to the jury. This determination can be translated to the present case in the form of a finding of no prima facie case being made out.

42. The maxim of *res ipsa loquitur* is also inapplicable because this is not a case where "*on the evidence as it stands at the relevant time*" [and here the relevant time is the close of the Claimant's case] "*it is more likely than not that the effective cause of the accident was some act or omission of the Defendant …….which act or omission constitutes a failure to take proper care for the Plaintiff's safety*.[3]"

43. At the close of the Claimant's case there was evidence from her admissions under cross examination that she was wearing inappropriate footwear and was leaving work to meet a deadline so that she may have been rushing down the stairs. The Claimant also admitted that she traversed those stairs five times a day for around seven years yet she had neither fallen before nor complained about worn treadings. Although in closing submissions Counsel for the Claimant said that other workers had fallen on the stairs before the Claimant, there was no direct evidence before the Court on that point. The Claimant's hearsay testimony on such other falls was struck out.

[3] Megaw L.J. in **Lloyd v West Midlands Gas Board[1971] 1WLR 749 at 755**

44. There was only the Claimant's testimony before the Court that the treadings on the stairs were worn. She admitted that she had no evidence of an examination by anyone of the condition of the stairs at the time of her fall and did not raise that as an issue until months after the fall. In all the circumstances, it is my finding that her allegation that worn treadings caused the fall was less likely to have been the cause than that the fall was due to her own unfortunate loss of footing on the stairs.

45. Finally, my determination that *res ipsa loquitur* is inapplicable is also based on the fact that the Claimant has not established that there is on the evidence a prima facie case of negligence where it is not possible for her to prove precisely what was the relevant act or omission which caused her fall. Instead the Claimant, has in her pleadings, set out precisely how she alleges the Defendant caused the fall. The fact that she was in her evidence at trial *"unable to precisely and definitely explain the cause of the accident"* so as to prove the case pleaded in her Claim is not an occasion for application of the maxim *res ipsa loquitur*.

46. The submission by the Claimant that adverse inferences should be drawn from the Defendant's election not to call evidence was likewise without merit. A pre-condition for such adverse inferences to be drawn would be that the Claimant had made out *a prima facie case* of the Defendant's negligence. A Prima Facie case is made out when there has been evidence in support of a party's case which is "*so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence*[4]". In my consideration of the evidence it was my determination that the Claimant had not made out a prima facie case of the Defendant's negligence at the close of her case. Accordingly, there was no need for the Defendant to call witnesses and no basis for drawing adverse inferences against the Defendant for electing not to do so, having decided to make a no-case submission.

47. The Claimant having failed to establish either that there was basis for applying the maxim *res ipsa loquitur* or the drawing of adverse inferences against the Defendant the determination of the matter turned on whether the evidence presented by the Claimant established negligence as alleged.

[4] Cross on Evidence, Sixth Edition, 1985 at pg. 61

48. The evidence was examined against the questions identified by both parties relying on the established principles on slip and fall cases from the **Diana Witherspoon** case as modified to reflect the different fact circumstances said by the Claimant to have caused her fall. Accordingly, it was my determination that the questions to be considered were as follows:

    i) Whether there was sufficient evidence that the treadings were smooth and/or worn?

    ii) If so, whether or not the smooth and/or worn treadings caused the Claimant to slip and fall?

    iii) If so whether or not the smooth and/or worn treadings on the stairway were an unusual danger that the Defendant ought reasonably to have known about and therefore taken necessary steps to protect the Claimant from the danger?

    iv) If so whether the Defendant failed to provide a safe place of work by inter alia not installing railings, signs warning of the alleged danger or non-slip tape on the stairs and as such breached a duty of care to the Claimant resulting in her injuries?

49. On the evidence it was my finding that there was no case made out by the Claimant in relation to any of the questions outlined above. Firstly, there was no evidence that the treadings were worn, smooth or slippery other than the Claimant having said so months after the fall. On that basis alone the Claimant's case is not made out.

50. However, in answer to the second question there was no unequivocal evidence from the Claimant as to the reason for her fall since under cross-examination she admitted to wearing slippers. She confirmed that her employer had said this was inappropriate footwear that could have caused the fall. As it relates to the third question again since there was no evidence that the treadings were worn or smooth it is also my finding that there could be no basis for a finding that the Defendant knew of such a condition.

51. Accordingly, in answer to the fourth question there was no evidence of a breach of duty of care to the Claimant that caused her to slip and fall resulting in her injuries. On the contrary, there is evidence that the Defendant placed a railing and a sign that the railing should be used on the stairway. So even if the treadings were worn there is

no evidence that implementing these protective measures were not sufficient to discharge the Defendant's duty of care in relation to the Claimant.

Conclusion and Order:

52. Having considered the evidence presented by the Claimant and the submissions herein it is my determination that no prima facie case has been made out of negligence on the part of the Defendant having caused her fall. Accordingly, the Order of the Court is as follows:

    i) The Claim is dismissed;

    ii) The Claimant shall pay the prescribed costs of the Defendant in the sum of Seventeen Thousand, Two Hundred and Ninety Dollars and Eighty-Nine Cents ($17,290.89).

……..

Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely

Judicial Research Counsel I