THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Port of Spain

Claim No. CV 02329-2016

BETWEEN

Taxyna Dunbar

Claimant

AND

Dr Joao Havelange Centre of Excellence

Defendant

Before The Honourable Madam Justice Eleanor Donaldson-Honeywell

Date of delivery: November 16, 2018

Appearances

Mr. Phillip Wilson, Ms. Keneisha Browne and Mr. Cordell Salandy for the Claimant

Mr. Narendra Latchman for the Defendant

Judgement

A. Introduction

1. The Claimant slipped and fell down two concrete steps to the driveway at the end of a path leading to the front carpark of the Defendant's Centre of Excellence address. This happened at around 6 pm while she was leaving a Children's Show she attended with her daughter and a neighbour on September 24th, 2015. The Claimant's contention is that the steps were poorly constructed such that they posed an unusual danger which caused her fall. Her ankle was fractured and as a

result she filed this Claim seeking compensation in damages for the injury sustained.

2. The specific nature of the structural defect in the two steps was not particularised in the Claimant's pleadings. Under Particulars of Negligence in her Statement of Case there is a bare assertion that what is referred to as "the staircase" was poorly constructed

3. However, the Claimant later added information providing details in her supporting Witness Statements as to what aspect of the construction of the steps was found to be poorly done. She alleged:

   > "*As I stepped onto the first step, I slipped and twisted my left foot. I could hear a cracking sound as I twisted my foot. I immediately experienced excruciating pain to the left foot and screamed in pain I tried to look for something to hold on to but there was nothing there. I put down my right foot to balance my fall, however* ***the step was too small*** *and I twisted my right foot also and I fell to the ground…….****the steps seemed to be painted with oil paint and had a very smooth surface***". [Emphasis Added]

4. Her neighbour who was there with her, said in her Witness Statement that she observed that the steps were "*small concrete steps. They were short in width and length.*" She also said there were no railings or warning signs nearby and the steps were smooth.

5. The Defendant contends that the Claimant's use of the path she chose to leave the premises took her away from the area where the event took place. The event was hosted by another organisation that had leased the Sept Blatter Hall inside the main building on the premises. There were other routes out of the venue that led more directly to the Carpark, including though the front entrance. As such the Defendant contends it would have had little or no duty of care to protect the

Claimant from the alleged unusual danger of the two steps at the end of the path she chose.

6. Further, the Defendant's case is that in any event the Claimant has not presented any evidence to prove on a balance of probabilities that the two steps posed any unusual danger. Instead, the Defendant contends that any adult could be fairly credited with the ability to traverse the two steps and it was the Claimant's negligence or lack of care that led to her alleged injury.

B. Common Law considerations and Issues determined

7. The issues to be determined in a case such as this, where Occupier's Liability is alleged in relation to a slip and fall, are well settled. The relevant legal principles were explained by Jamadar J, as he then was in **H.C.A. No. Cv2533 of 1995 Diana Wotherspoon v The Airports Authority of Trinidad and Tobago** where he cited cases dating back to **Indermaur v Dames (1866) LR 1 C.P. 274.**

8. In **Indermaur** Willes, J defined the Occupier's duty to an invitee to premises as to "use reasonable care to prevent damage from unusual danger, which he knows or ought to know." The alleged unusual danger should, in most instances, also be something that the invitee did not know of or of which they could not be aware [**Cox v Chan, (1991) Supreme Court, The Bahamas, No 755 of 1988 (unreported)**].

9. To be considered an invitee entitled to be treated with in this way a person must, as explained in **Indermaur**, have entered upon the premises "upon business which concerns the occupier, and upon his invitation, express or implied." On the other hand, if the Claimant fails to establish that she is an invitee a lesser duty of care would be owed to her by the Defendant. That lesser duty is defined as one of common humanity or to act in accordance with civilised behaviour. The Defendant would then have a duty to take reasonable care to keep trespassers off the unauthorised area by use of fencing or other means **[British Railways Board v Herrington [1972] 1 All E.R. 749].**

10. Guidance on what type of circumstances can be considered "unusual dangers" in slip and fall cases generally is provided on the facts of **Diana Wotherspoon** and in **Kirpalani's Ltd v Wilma Hoyte Civ App 77 of 1977**. These cases addressed allegations as to the condition of the floor of the premises on which the invitee was walking. In the former case a construction issue, namely an uneven bump, was alleged and in the latter the alleged danger was the slipperiness of the floor due to a cleaning substance. Corbin J.A. in **Kirpalani's** while observing that "*A slip is quite a common incident of life and usually no harm is done*" explained that in a case where occupier's liability is alleged "*it was 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; and (3) that the defendants knew it to be dangerous.*"

11. In **Wotherspoon** Jamadar J applied this approach to a case where a construction defect was alleged to have caused the fall. He said it was incumbent on the Plaintiff to prove *"(1) that the bump caused her to slip/stumble (trip); (2) that the bump constituted and unusual danger; and (3) that the Defendant knew or ought to have known that it was dangerous."*

12. More specifically of relevance to the allegations in this case there have been cases where the condition of steps has been considered. These include **CV 2016-00612 Rhonda De Leon v Port Authority of Trinidad and Tobago** and **CV2010-05009 Betty v The Attorney General of Trinidad and Tobago** cited by the Claimant in closing submissions.

13. In **Rhonda De Leon** a visitor to a business place that was leasing space within the Defendant's Port Authority building was found to have been an invitee. Expert evidence, presented to establish that the stairs she fell on were poorly constructed and failed to meet specified standards, was persuasive. Judgment was awarded in favour of the Claimant.

14. In **Betty** the Claimant's case established that there was negligence in the Defendant not having a handrail on a flight of stairs descended by the Claimant. The Court ruled in favour of the Claimant citing **Jaguar Cars Ltd v Coates [2002] EWCA Civ 337** where the Court in making a decision relied on evidence of an expert regarding the difference in height of one step in the staircase and "assessed the condition of the staircase in detail in determining whether the absence of a handrail equated to negligence on the part of the Defendant".

15. Expert evidence and/or detailed measurements and other specific observations by lay witnesses were significant features in other relevant cases on alleged defects in stairs causing falls such as **Drysdale v Hedges [2012] All E.R. (D) 345; Keane v Wallcave Ltd [1983] Lexis Citation 497 and Newman v Whitbread Plc [2001] EWCA Civ 326 .**

16. Applying the guiding principles to the allegations herein concerning alleged poorly constructed steps causing the Claimant's fall and taking into account the Defences raised, the issues to be determined are:

    i) Whether the Claimant was an invitee or a trespasser to the premises
    ii) Whether the Claimant has proven the following factors:
        a) The two steps were small and painted with oil paint
        b) The alleged small size of the steps and/or its smoothness due to oil paint and/or the absence of railings or signs caused the Claimant to slip and fall
        c) The alleged small size and oil painting of the steps constituted an unusual danger; and
        d) The Defendant knew or ought to have known that the two steps were dangerous

17. In this case the pleadings and evidence presented by the Claimant were lacking as to establishment of most of these issues. The circumstances mirror those in **Wotherspoon** where it was observed that the Claimant had only been able to lead evidence as to one of the required factors to be proven, namely that the construction issue, the bump on the floor, caused her to slip.

18. In this case some evidence of the status of the Claimant as an invitee and as to the small size and smoothness of the steps was led. However, the evidence as to the construction issues was unsupported by expert evidence or lay measurements. Although expert evidence is not a requirement, there was no evidence to establish any of the other issues highlighted above.

19. In particular, as to the alleged "unusual danger" posed by the two steps, it can be said in this case as it was in **Wotherspoon** that "there is absolutely no evidence, that objectively" this smallness and/or smoothness of the steps would or could constitute an unusual danger. Additionally, there was no evidence that the Defendant knew or ought to have known that the two steps were dangerous or even that steps constructed in that way are not usually found at the end of outdoor pathways.

20. My conclusion, having considered the pleadings and the evidence presented, was that the Claimant had not proven on a balance of probabilities that the Defendant was liable to compensate her for injuries she sustained when she fell. The pleadings and evidence considered as well as my findings are more fully set out hereafter in this Judgement.

C. Pleadings, Evidence and Site Visit

The Claimant's Case

21. The Claimant's pleaded case is that on or about 24th September, 2015 she and neighbour Sharon Dos Santos attended a children's show with their children/grandchildren. It was hosted at the Defendant's address, the Centre of Excellence on Macoya Road in Tunapuna. At around 6:15pm that evening she

proceeded to leave the venue via a concrete walkway located on the southern side of the compound.

22. At the end of the walkway, there was a short staircase comprising of two (2) steps ["the two steps"]. She attempted to descend the two steps but slipped and fell to the ground. She pleaded further that the two steps had no railings and there were no signs indicating that caution should be taken when descending. There were no lights on the compound or the area at that time. The two steps were relatively short in both length and width.

23. The Claimant pleads that she was in immense pain after the fall, couldn't stand and was taken to the Eric Williams Medical Sciences Complex by Ambulance. She was diagnosed as having sustained a left trimalleolar ankle fracture and had to undergo surgery twice. Firstly, an open reduction and internal fixation and then on the 25th February, 2016 the removal of a screw from her left ankle.

24. As a result of the fall, the Claimant claims to have lost mobility and been unable to return to work as a Geriatric Nursing Assistant. She says she continually experiences extreme discomfort, and has been assessed as having a permanent partial disability of 30%, among other things.

25. The Particulars of Negligence the Claimant alleges on the part of the Defendant are as follows:

    a. Failing to take any adequate precautions for the safety of the Claimant while she was visiting the premises;
    b. Failing to provide a safe environment at the facility;
    c. Failing to ensure that the staircase was properly constructed;
    d. Exposing the Claimant to the risk of damage or injury which was or ought to have been known to them;
    e. Exposing the Claimant to the foreseeable risk of injury;
    f. Failing to provide adequate warning signs as to the danger associated with

the use of the stairs which were poorly constructed;

g. Failing to cordon off or otherwise hinder access to the staircase.

26. The evidence in support of the Claimant's case as set out in the witness statements of herself and her neighbour was consistent with her pleadings. A picture of the two steps was attached to the Claimant's witness statement. However, there were neither measurements of the steps in any of her evidence nor any forensic basis presented as to her belief that the steps were painted with oil paint which was smooth enough to present an unusual danger.

27. She stuck to her version of events leading to the fall under-cross examination and was not discredited. She had not seen any flyer or invitation indicating that her presence for the Children's show was to be limited to any defined area. Her neighbour had received tickets for the show and she too could not recall that there was any notation on the tickets that entry was only to a defined area.

28. When challenged as to why she passed along the path by the pool when leaving the Claimant explained that she exited from the back side of the Hall. On exiting with the children a car approached and they stepped up onto the other side of the paved driveway area. There was a pathway there which went alongside the pool and she and the children and her neighbour walked on it towards the carpark. The children stopped for a few seconds to look at the pool but she hurried them along as she expected a driver to come for her. The Claimant said she did not, at the time of leaving the show, notice the closer walkway leading along the side of the building from the side exit.

29. Her version of events as to how she entered and exited the premises on the day of the Children's Show was supported by observations made on the occasion of a Court site visit to the Defendant's address. There was nothing unreasonable about the route that she took as the two possible pathways from the side exit were parallel to each other. The path by the pool was not in a remote area such that the claimant could be treated as a trespasser.

30. On reaching the end of the path the children stepped down the two steps. The claimant however fell when she stepped down.

31. Under cross-examination the Claimant was extremely co-operative. She freely admitted to certain factors that tended to support the Defendant's contention that the two steps posed no unusual danger. Some of these points, highlighted in paragraphs 21 to 24 of the Defendant's submissions, are as follows:

    "*She stated that she noticed the steps before she attempted to descend. She noticed that there were no railings. That she was not walking fast. That she slowed down before descending. That the steps were clearly visible to her.*

    She stated that she noticed that the step had paint on it but only after she fell she noticed it was oil paint. She stated that she was in excruciating pain but that is when she noticed it was oil paint. She did not touch the alleged paint; there was no residue on her slipper.

    She was asked if she knows oil paint to be slippery, she said she doesn't know.

    She was asked if she noticed the steps were relatively short in width and length before she descended she said no, she stated that the steps seemed fine. In her Statement of Case she stated that the steps were relatively small but she did not say in relation to what did the steps seems short in width and length. In her Witness Statement she did not elaborate on the size of the steps except to say that the step was too small. During cross-examination she stated that she accepted the risk of walking down the stairs having observed it prior."

32. The Claimant's witness Sharon Dos Santos could provide no real assistance as to an objective basis for saying that structurally the two steps posed an unusual danger. As set out in the Defendant's submission "*She stated that she did not notice any substance on the step. She stated that she did not touch the step. When*

asked about how she knew it was smooth she stated that she doesn't know and that she didn't touch it or walk on it. "

33. It had been anticipated by the Court that on the Site visit perhaps a view of the steps could have assisted. This would be so if on looking at the steps the Court could in some way have been convinced that there was an unusual danger. However, the steps had been removed prior to the Site visit after sustaining damage from a maxi-taxi. In any event the steps were in place long enough after the Claimant's fall for pictures of it to be taken. It would have been useful for measurements and paint samples to have also been taken by the Claimant or her representatives so as to present some objective basis for findings as to unusual danger.

34. In the face of this lack of evidence it was the submission of Counsel for the Defendant that "*The problem with the allegation that oil paint is slippery is that paints are generally oil or water based and that paint is not generally in nature slippery once dried, this being common knowledge. The Claimant by her evidence implied that there was a slippery substance on the steps that caused her to slip off and that that substance was oil paint.*" There was no evidence of that. It was not clear how just by looking at the two steps the Claimant could identify that it was decorated with oil-paint and that the surface would have been slippery because oil paint was used or that oil paint ought not to be used for outdoor steps.

The Defendant's Case

35. The Defendant's pleaded case firstly raises as a Defence that the Claimant was neither an expressed nor an implied invitee at the Defendant's address.

36. Secondly, the Defendant pleads that it was not the occupier of the premises at the relevant time for purposes of liability. Instead, the Defendant contends that the Claimant was the invitee of its tenant, the organisation that was hosting the

Children's show. As such, the Defendant pleads that the Claimant was invited by that tenant and not by the Defendant itself to enter the premises.

37. Thirdly, the Defendant says the Claimant was only invited by the tenant to enter a defined space on the compound where the event was held and to use the "normal and usual access" to the entrances, exits and carparks which were all part of the lease agreement. The Defendant pleads that the pathway taken by the Claimant that led to the two steps where she fell was on a part of the compound near the swimming pool and it was closed that day. There was neither a need nor permission for the Claimant to "wander across to the swimming pool area" where, according to the Defendant, she claimed she fell.

38. Finally, the Defendant pleads that the alleged danger referred to by the Claimant, as it relates to the two steps, is not an unusual danger. It is one that can be expected and no special skill or experience was required to traverse the two steps. Accordingly, the Defendant pleads that the Claimant's own negligence led to her injury.

39. The Defendant's sole witness was its Corporate Secretary, Mr. Tristan Bonterre. He sought to support the Defendant's case as to the path by the pool being off the normal route to be taken by the Claimant by pointing out that there is a clear road access for persons leaving the Auditorium where the Children's show was held. All other parts of the Compound were closed that day.

40. He said that the path taken by the Claimant led to the two steps used by infants as an access point from the maxi taxi area where they were dropped off to use the pool. He admitted under cross-examination that no signs designated the pathway and the two steps as admissible to children only. Furthermore, he admitted that he himself had used the two steps as on occasions he breaks the rules.

41. Under cross-examination Mr. Bonterre gave the closest thing to actual evidence of a measurement of the dimensions of the two steps. It was the only evidence of

such a measurement before the Court. The cross examination on the point was as follows:

> *"Q: Mr. Bonterre you are familiar with the stairs that is in issue in this matter?*
>
> *A: Yes.*
>
> *Q: And you would have used those stairs before?*
>
> *A: Personally myself yes.*
>
> *Q: And in your witness statement didn't you indicate that the stairs were placed there to be used by infants?*
>
> *A: Correct yes.*
>
> *Q: I take it because it was placed there to be used by infants that it might be small; could you describe?*
>
> *A: It is in line with that area; there is where the large maxi taxi back in; it would be in line with the maxi taxi so I would say 10 inches from front to back and 15 inches left to right."*

42. There was no evidence from the Claimant to either contradict this measurement or suggest that it proved the steps were small enough to present an unusual danger.

43. The un-contradicted evidence of Mr. Bonterre, was that to date no one save and except the Claimant had reported an accident owing to walking on the two steps either before or after the alleged incident. The Defendant held a conference during the pre-trial stages of the matter to reach an early resolution with the claimant. However, parties did not come to an amicable settlement.

D. Findings

Whether the Defendant was the occupier of the premises at the relevant time for purposes of liability

44. The Defendant has pleaded in its Defence that it was not the occupier of the premises at the time of the incident due to the fact that the venue was rented by the holders of the event the Claimant attended. This, firstly, appears to contradict the Claimant's own suggestion that the tenant had no license to occupy the area in which the incident took place.

45. Further, the test to determine whether someone is an occupier is whether that person has some degree of control associated with and arising from his presence in and use of or activity in the premises - **Halsbury's Laws of England 2018 on Negligence (Vol. 78) [30]**. Exclusive occupation is not required (**Greene v Chelsea Borough Council [1954] 2 QB 127**) and two or more persons may be occupiers of the same land, each under a duty to use such care as is reasonable in relation to his degree of control - **Fisher v CHT Ltd (No 2) [1966] 2 QB 475, [1966] 1 All ER 88, CA**.

46. The Defendant clearly has some degree of control over the entire premises and appears to assert that the tenant had no control over the part of the premises in which the incident took place. In particular the Defendant pleads in its Defence:

    "4. c. If the Claimant was an invitee of a tenant of the Centre of Excellence, the Claimant would have been invited to occupy a defined space of the compound and to use the normal and usual access to entrances, exits and car parks providing the use of the car park was part of the lease agreement;

    d. The alleged site of the incident is neither the defined space where any event was held, an entrance, an exit, a route to any entrances or exits or to any car parks;"

47. It does appear, therefore, that the Defendant can be considered one of, if not the only, occupier of the Hall where the Children's event took place, such that it would have a duty of care proportional to its degree of control of the area. The Defendant, in fact, suggests that the tenant did not have control over the poolside pathway area where the incident took place and proffers no other occupier of that

part. The Defendant would therefore be attributed full liability for any damage sustained by an invitee through negligence in that area.

Whether the Claimant was an invitee or a trespasser to the premises

48. The Defendant argues in submissions that the Claimant entered parts of the compound that she had no permission to occupy. The Defendant's defence under this head is therefore that the Claimant was a trespasser as the invitation to the event which the Claimant was attending does not give any right or permission to explore the entire compound.

49. It is clear, however, that an open pathway or a knowledge that a track is and has long been constantly used, together with a failure to take any steps to indicate that ingress is not permitted, may amount to a tacit licence – **Halsbury's Laws of England 2018 on Negligence (Vol. 78) [31]; Lowery (Pauper) v Walker [1911] A.C. 10**. In the present instance, it was admitted by the Defendant's witness under cross-examination that millions of persons have traversed the area in question, that the side doors leading to the pathway to the two steps were open at the time of the incident and that there were no signs indicating that the use of the area was prohibited at the time of the incident.

50. It is clear therefore that due to the knowledge of the Defendant that the area is often traversed by visitors, the Claimant, by being allowed on the premises for the purposes of the event and not being expressly prohibited from the area where the two steps were located may have been by implication permitted to use them. Thus, she would not be considered a trespasser for the purpose of limiting the scope of the Defendant's duty of care towards her.

51. *Whether the Claimant has proven the following factors:*
    a) *The two steps were small and painted with oil paint* – In stark contrast to the **Ronda DeLeon v PATT** and **Betty v AG** cases relied on by the Claimant, neither expert evidence nor detailed lay measurements and observations were

presented to prove these alleged structural characteristics of the steps. The bare assertion by the Claimant and her witness that the steps were small, smooth and appeared to be painted with oil paint is not probative as to this factor. The pictures attached to the Claimant's Witness Statement do not assist as it is not possible to gauge from the pictures the size, slant and smoothness of the steps.

b) *The alleged small size of the steps and/or its smoothness due to oil paint and/or the absence of railings or signs caused the Claimant to slip and fall* – The Claimant led no evidence other than her own bare assertion as it relates to the size and smoothness of the steps causing her to fall. It was clear even from her evidence that signage could not have assisted in this case. The Claimant observed the steps before stepping down. There was no evidence led to support that railings should be in place on a structure such as the two steps in this case. From observations at the Site Visit it is difficult to see how railings could practically be placed for a depth which in effect was no more than a curb from walkway to driveway.

c) *The alleged small size of the steps constituted an unusual danger* – There was no evidence presented to establish that objectively the two steps presented an unusual danger.

d) *The Defendant knew or ought to have known that the two steps were dangerous* – Here as in **Wotherspoon** the Defendant presented evidence that a large number of persons entered the subject premises over, in this case, a number of years. It is uncontradicted that neither before nor since this particular incident involving the Claimant has there been any report of an invitee or any person falling on the two steps and/or being injured.

No one complained about the steps to the Defendant. Furthermore, the type of structural defects alleged by the Claimant were not such that even if no-one complained the Defendant should have been aware of the need to take care

that no danger arises. In other words, this is not a case such as that in **Keane v Wallcave Ltd [1983] Lexis Citation 497** for example, where loosening rubber treading on steps was something that could be observed by a careful occupier as potentially causing persons to fall.

52. In this case although the Claimant was an Invitee to the Centre of Excellence she has not proven that the two steps posed an unusual danger that caused her to fall. Additionally, it cannot be said that the Defendant knew or ought to have known that the two steps constituted any unusual danger that would cause persons walking on them to fall.

E. Decision

53. The Claim is dismissed and the Claimant is to pay the costs of the Defendant on the prescribed basis in the amount of $14,000.00.

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely JRC I