TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA: No.416/2000

BETWEEN

DANIELLE SOO YEE

Plaintiff

AND

JOHNNY SOONG
(Trading as CLUB COCONUTS)

AND

CASCADIA HOTEL LTD

Defendants

BEFORE THE HONOURABLE MR. JUSTICE PETER RAJKUMAR

APPEARANCES:

Mr. Derek. Ali for the plaintiff
Mr. Taylor Morris for the 1st defendant
Ms. Denise Gouveia for the 2nd defendant

JUDGMENT

The First Defendant operated a night club on the premises of the Second Defendant, Cascadia Hotel Limited.

The Plaintiff's claim against the Defendants is for damages for personal injury allegedly sustained on 11th December 1999.
The Plaintiff suffered chemical burns which resulted in some level of disfigurement in the area of her back. There can be little doubt that those injuries were traumatic and painful, and that the treatment thereof resulted in loss and expense. The issue is whether the Defendants or either of them should be held liable for that unfortunate injury and its resulting loss and expense.

The Evidence

The Plaintiff was a visitor to the night club. She alleges in her witness statement that upon exiting the night club at about 1:30 AM, she sustained injury in the following way:

> *"At about 1:30 AM I left the club's inner premises and proceeded to the car park which is located on the said compound, there to await my father who was returning to take me home. While waiting, I sat on a landing which formed part of the said car park. The said car park was used by patrons of the said club and it appeared to me that it was also used by patrons of the Hotel. The said club is on the premises of the Hotel or the Hotel is on the premises of the club. I was tired and decided to lay* [sic] *on my back to rest for a while. No sooner I had done that* [sic]*, I felt a burning sensation on my back from my neck down and on the right side of my head. This caused me to react by spinning up from the ground on which I lay. Upon examination I discovered that my jersey was saturated with a liquid and that that liquid was causing the burning. Upon further examination I discovered that the said liquid was all over the ground where I had just laid.* [sic] *I was assisted by my friends and was taken to the Eric Williams Medical Complex by my father who came approximately half an hour later."*

This is the extent of the Plaintiff's evidence as to how she sustained the injury.

Disposition

For the reasons set out hereafter I dismiss the plaintiff's claim and order that the Plaintiff is to pay the costs of the first named and the second named Defendants.

The Pleading

At paragraph 3 in the Statement of Claim, it is pleaded that on the said date (11th December 1999) while the Plaintiff was in the car park in the said premises, she leaned on a wall therein on which there was a noxious substance, in consequence whereof the Plaintiff suffered severe injuries and has suffered loss and damage.

She alleged in the Particulars of Negligence in the Statement of Claim filed on 18th February 2000 that the Defendants were negligent in:

> *"(c) causing or permitting the said car park and wall to be or to become or to remain a danger to persons in particular the Plaintiff lawfully using same;*
>
> *(d) causing or permitting the said car park and wall contaminated [sic] with a noxious substance and to be unguarded or unprotected.*
>
> *(e) permitting the Plaintiff to lean on the said wall when they knew or ought to have known that it was unsafe and dangerous for her to do so."*

I therefore note a discrepancy between the pleaded case and the evidence. In the pleaded case, the Plaintiff claims that she leaned on a wall while, in her evidence, she explained that she sat on a landing which formed a part of the car park and then decided to lay [sic] on her back to rest for a while.

Other Matters

(i) There is no evidence as to what the noxious substance or liquid was and no attempt appears to have been made to retain any portion of the affected clothing for analysis. It would have been useful to ascertain what type of product allegedly caused the Plaintiff's injuries since this would have been indicative of whether or not the Defendants or either of them could have been responsible for such liquid being where it was.

(ii) Assuming that in fact there is no real difference between the Plaintiff leaning on a wall and her lying on her back on a landing, I note also that there is no evidence as to whether the Plaintiff's injuries were aggravated by any failure to take appropriate or necessary steps after encountering the liquid, for example, removal of the affected clothing or washing the liquid off.

(iii) The Plaintiff claims that she was assisted by her friends. No friends came to testify as to how this incident allegedly took place.

(iv) She also indicated that her father came approximately half an hour later. In the interim, there is no indication as to what was done by the Plaintiff.

The burden of proof is upon a Plaintiff who alleges that an incident has occurred to establish on a balance of probabilities that that incident has occurred and to establish that that incident occurred in a manner which renders the Defendants liable. In order for a court to find that there has been a breach of duty by either the First Defendant or the Second Defendant, it must first be convinced that an incident had in fact occurred on the premises of either the First Defendant or the Second Defendant.

In this regard, I consider the following:

(1) The departure of the Plaintiff in her evidence from her pleaded case;

(2) The absence of any corroboration;

(3) The significant and noticeable lack of detail in the witness statement as to what precisely was done, if anything, apart from the Plaintiff being assisted by her friends, and what was done between the time she

encountered this alleged noxious substance and the arrival of her father half an hour later.

Evidence of the Plaintiff

In answer to the Court, she mentioned that the jersey had been cut away at Eric Williams Medical Sciences Complex. That would have been, by her own testimony, more than half an hour later given that her father who took her to the Eric Williams Medical Sciences Complex, arrived half an hour later and that the journey to that hospital could have taken no less than 15 minutes at absolute minimum. If the Plaintiff was still wearing that jersey 45 minutes later, it casts considerable doubt in this Court's view upon her claim that the jersey was saturated with a liquid and that that liquid was causing the burning. One would have thought that the logical, sensible thing to do would have been either on her own (a) to remove the jersey and soak it with as much water as possible; and/or (b) to find a source of water and wash the affected area; (c) to complain immediately to the numerous staff on the compound.

I take account of the fact that this compound contained a Hotel and that the possibility existed that the Plaintiff could have been provided with an area with a water supply where she could have washed as much of the substance off her as possible while awaiting the arrival of her father. There was absolutely no evidence of any attempt to do any of these things. I find it remarkable that a party in this situation would keep on a jersey that was saturated with a noxious burning substance until it was removed at the Hospital more than half an hour later. If it were not possible to have it removed before then, I consider this also would have been a material fact to have been included in her evidence.

Evidence of the Second Defendant

I take into account the evidence of the Deputy Maintenance Manager of the Hotel who testified that no chemicals were used by the Cascadia Hotel in maintaining the car park and that the car park was only washed with water using a power washer. Although he testified that he is not aware of what Housekeeping used to clean toilets, he did testify that Housekeeping used mostly soaps. He denied that bleach was used or that muriatic acid was used or that any chemical was used for the removal of moss.

Even though he testified that at 1:30 AM he would not have been on the premises, his hours of work being from 8:00 AM to 4:00 PM and on 24-hour call, I am satisfied that

as Deputy Maintenance Manager, he would know what substances were used for maintenance of the car park. I accept his evidence.

Evidence of The First Defendant

I accept the First Defendant's evidence that he was not in possession or control of the car park although he did share in the maintenance of the parking lot. I accept his evidence that this incident was not reported to him as would normally be the case with respect to all serious incidents that occurred at the club. I also accept his evidence that he first learned of the incident when he met with the Plaintiff's father in the wee hours of the morning after the incident had supposedly happened. Accordingly, this would have been before 8:00 AM when the washing down of the car park would have begun by the staff of the Cascadia Hotel. Therefore, any noxious substance more likely than not would still have been on the compound but no such noxious substance was detected.

I accept the evidence of the First Defendant that the responsibility of the First Defendant was to remove matter such as cups and food boxes. I find that there is no evidence whatsoever that the First Defendant or his staff would have been engaged in the application of a noxious substance in the car park. I accept that their responsibilities were effectively confined to removal of litter.

Both Defendants' witnesses described the method of cleanup of the car park. Neither Defendant's witness was shaken in cross-examination with respect to the key issue of whether either of them would have used any noxious substance in the cleaning up of the car park. I accept their evidence.

Law

I find that the Plaintiff was not a trespasser. She was an invitee of the First Defendant and by implication of the Second Defendant who clearly contemplated that the First Defendant's customers would have been on their premises. The lease agreement is in evidence and I find there is nothing in there to displace this finding. In fact, the lease agreement supports it.

I find that the presence of a noxious substance in the car park, on the landing, on the wall or in fact anywhere on the premises of the Second Defendant would have been an unusual danger.

I find that the Defendants were not negligent in relation to the existence of the alleged noxious substance

(a) because its existence on the Defendants' premises was not proved and

(b) (b) because neither was it proved that, if it existed, that existence was with the knowledge of the First Defendant or the Second Defendant.

Duty of care

If it had been established that the First Defendant or the Second Defendant either placed the noxious substance or allowed the noxious substance to remain in the car park or in its vicinity or on the wall or on the landing, I would then have considered whether or not there was a breach of the duty of care owed by either or both of them to this Plaintiff

The duty to an invitee was described by Willers J. in ***Indermaur v Dames (1866) LR 1 CP 274***

> *"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 that, where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise and whether there was contributory negligence in the sufferer, must be determined by the jury as a matter of fact."*

Also:

> *"And 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 …"*

Burden of proof

See ***Kirpalani's Limited v Wilma Hoyte, Civil Appeal No. 77 of 1977***, Corbin J.A. at page 4:

> *"The onus of proof is on the plaintiff to prove her case and to determine what duty is owed to her by the defendant."*

Also per Corbin J.A.:

> *"A slip is quite a common incident of life and usually no harm is done. So 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."*

In the instant case, although I recognise that a slip is not in issue here, I find it incumbent upon the Plaintiff to show that the substance on the floor, (the alleged source of damage like in the Kirpalani case), caused her burns, that that substance

constituted an unusual danger, and that the Defendants knew it to be dangerous or that the Defendants knew or ought reasonably to have known of its existence.

While I find that if the alleged substance had been proved to exist it would have constituted an unusual danger, I do not find that the existence of such a substance was proven. Nor do I find that the Defendants knew that it existed or were responsible for its being placed there. I find that in this case the Plaintiff has not proven injury resulting from conduct caused by the Defendants' breach of duty. Even if, however, such had been established, (and I expressly find it has not been), and the onus of proof had shifted to the Defendants to show that they had taken all reasonable precautions to avoid the existence of any noxious substance, I find that

(1) their evidence, which I accept, is clear that neither the First Defendant nor the Second Defendant would have applied such a noxious substance nor had any cause to do so and

(2) that there were present security and personnel on the premises and in the car park.

I find that the Plaintiff has not proven the necessary ingredients to succeed in her claim.

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Was the Plaintiff contributorily negligent

I found suspicious that the Plaintiff would not have looked at the area where she proposed to lie on her back to see whether it was free not only of noxious substances, but of debris or dirt, litter of any description. In an aside, in answer to a question by Counsel, the Deputy maintenance manager of the hotel mentioned that the landing, which he described as a walkway, was an area where they sometimes had to wash vomit from. One would have thought that the Plaintiff would have therefore scrupulously examined the ground where she proposed to lie on her back.

I find that even if the noxious substance had been present as contended and I were to accept her evidence (which I do not), that in fact her own actions in lying down in the noxious substance without proper care or regard for her own safety amounted to 100% contributory negligence on her part.

I also express my reservations and concern as to whether or not her actions or her failure to act also contributed to her **damage**, that is, in not immediately removing the clothing which was soaked with the substance and in contact with her skin and in immediately washing the area, as was in fact subsequently done when she received medical attention.

Conclusions

I find that there is no evidence whatsoever that the First Defendant or the Second Defendant applied any noxious substance. Further, I find that there is no evidence as to what such a noxious substance could be. I find that the Plaintiff has failed to discharge the burden of proof upon her that there was in fact a noxious substance on the premises of the Defendants.

I find the Plaintiff's case significantly lacking in any attempt to supply essential supporting evidence and that her own evidence deviates from her pleaded case and gives rise to suspicion.

I also find suspicious the following:

(i) Failure to explain what steps she took when *"upon examination she discovered that her jersey was saturated with a liquid and that that liquid was causing the burning"*.

(ii) Failure to attempt to preserve any evidence of the noxious substance;

In those circumstances I am not persuaded to accept her evidence alone without any corroboration as to the existence of a noxious substance on the premises of the Defendants. There is none.

I therefore dismiss it on the basis that the Plaintiff failed on a balance of probabilities to establish the existence of any noxious substance on the Defendants' compound which caused her damage and on the basis that no negligence was established on the part of either the First Defendant or the Second Defendant in relation to any alleged noxious substance or at all.

I would also have dismissed the Plaintiff's claim on the basis that, if there were in fact a noxious substance on the ground, she failed to take any reasonable steps for her own safety by examining that ground before lying on it. I would find that the Plaintiff contributed 100% to her own injury and disallow her claim on this basis also.

Dated the 6th of June 2008.

Peter A. Rajkumar
Judge