THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2008-03280

Between

MARSHA MARIA THOMAS

Claimant

And

FIRST CITIZENS BANK LIMITED

Defendant

Before the Honourable Madame Justice Rajnauth-Lee

Appearances:

Mrs. Christlyn Moore-George instructed by Miss Sasha Franklin for the Claimant.
Mr. Neal Bisnath instructed by Mrs. Lydia Mendonca for the Defendant.

Dated the 4th May, 2011.

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JUDGMENT

INTRODUCTION

The Claimant's claim

1. By her Claim filed on the 26th August, 2008 the Claimant claimed against the Defendant

   a) Damages for negligence as a result of an accident that occurred on 9th November, 2004 at the Defendant's Retail Banking Unit situate at Corner Chacon Street and Independence Square, Port of Spain;

   b) Damages for negligence as a result of the failure and/or omission of the Defendant to provide the Claimant, when she returned to work on the 11th September 2006, with an ergonomic chair with an arm rest in compliance with the express recommendation of the Claimant's neurologist, Dr. Bedaysie.

   c) Interest;

   d) Costs; and

   e) Such further and/or other relief as the court may deem fit.

The Statement of Case

2. By her Statement of Case filed on the said 26th August, 2008, the Claimant alleged that on the 9th November, 2004, she was assigned to the Defendant's Retail Banking Unit located at First Floor, Independence Square, Port of Spain ("the Defendant's premises").

The Claimant was at that time the Administrative Assistant to Mr. Mario Young, Corporate Manager, Retail Banking ("Mr. Young") [paragraph 3].

3. At paragraphs 4 - 5 of the Statement of Case, the Claimant alleged that on the 9th November, 2004, she was instructed by Mr. Young, in his capacity as servant and/or agent of the Defendant, to order and collect food for a meeting of six (6) managers being held in his office at around 11.00 a.m. on that day. The Claimant alleged that in compliance with the said instructions she ordered food for the meeting from a nearby food outlet and collected same personally.

4. At paragraph 6 of the Statement of Case, the Claimant alleged that whilst returning to Mr. Young's office, through the Chacon Street entrance to the Defendant's premises, she was carrying two (2) large bags of food, one in each hand, and each bag contained four (4) containers of food, and, on ascending the staircase from the ground floor to the first floor, her left foot became caught under the improperly protruding lip of one of the steps of the staircase causing her to fall forward and hit her head forcibly on the wall of the landing at the top of the first flight of stairs.

5. The Claimant has alleged that she has suffered severe personal injuries as a consequence of the fall. Attorneys for the parties have agreed that the Court will determine the issue of liability only at the trial.

6. The Claimant alleged at paragraph 9 of the Statement of Case that the fall and the injuries she sustained as a consequence thereof were caused by the negligence of the Defendant, its servants and/or agents. The particulars of negligence alleged by the Claimant are set out in full hereunder.

PARTICULARS OF NEGLIGENCE

a) *failing to provide a safe place of work by the provision of a safe means of access, such as an elevator or an escalator, to gain access from the Ground Floor of the Bank to the First Floor thereof*

b) *failing to provide a safe system of work by failing to assign an adequate number of persons to collect and deliver the food to the Managers' meeting;*

c) *failing to provide adequate supervision and/or guidance in order to protect the Claimant from the dangers associated with ascending the staircase while carrying the said parcels of food;*

d) *failing to make proper arrangements for the delivery of the food for the Managers' meeting directly to the Bank's premises instead of utilizing the Claimant to collect and deliver the parcels of food;*

e) *having a defective step on the staircase with an improperly protruding lip;*

f) *failing to warn or alert persons using the staircase about the inherent defect and/or danger of the defective step;*

g) *failing to take any or any reasonable care to ensure that the Claimant would be reasonably safe in using the staircase;*

h) *failing to take any or any reasonable care to prevent injury or damage to the Claimant from unusual dangers on the said premises of which they knew or ought to have known;*

i) *failing to repair the step on the staircase or to take any or any reasonable measures to render the steps safe to use when they knew or ought to have known that the same was defective and liable to cause injury;*

j) *failing to take any or any adequate measures whether by way of periodic or other examination, inspection, test, maintenance or otherwise to ensure that the staircase was in reasonably safe condition and that it did not have a defective step with a protruding lip which was dangerous and in a condition to cause injury to someone such as the Claimant using the staircase.*

7. Thereafter, the Claimant alleged that she was unable to return to work and remained on approved sick leave while continuing to receive medical treatment. According to paragraph 11 of the Statement of Case, by August 2005, her condition had deteriorated and on the recommendation of Dr. Bedaysie she underwent micro-foraminotomy surgery on the 15th September, 2005 in New York. The Claimant alleged that she returned to Trinidad in September 2005, but continued to experience severe pains in her neck and shoulders with pains radiating down her arms/hands and was still unfit to return to work. She was assessed by Dr. Bedaysie as 50% permanently partially disabled. Thereafter, the Claimant remained on approved sick leave while continuing to receive medical treatment and physical therapy [paragraph 12].

8. The Claimant further alleged at paragraphs 13 and 14 of the Statement of Case that by letter dated the 23rd August, 2006, Dr. Bedaysie recommended inter alia that she return to work on a phased basis and that she be provided with an ergonomic chair with arm rest. The Claimant alleged that she reported to work at the Systems and Procedures Unit of the Defendant located in San Juan on the 11th September, 2006, but contrary to the express recommendations of Dr. Bedaysie, the Defendant negligently failed and/or omitted to provide her with an ergonomic chair with an arm rest and provided her instead with a straight low-back chair with arm rests. The Claimant alleges that by reason of the Defendant's negligence, she suffered deterioration in her condition, to wit, neck pains radiating to the right and left upper extremities consistent with cervical disc prolapsed and exacerbation of her original condition requiring cervical traction therapy and PCA [paragraph 15].

The Amended Defence

9. The Defendant filed an Amended Defence on the 21st January, 2009.

10. By its Amended Defence, the Defendant denied that the Claimant's left foot became caught under the improperly protruding lip of one of the steps on the staircase as alleged by the Claimant. The Defendant also stated that there was no protruding or improperly protruding lip to any of the steps/treaders on the staircase [paragraph 3].

11. At paragraphs 4 and 5 of the Amended Defence, the Defendant alleged as follows:

> 4. *The Defendant further states that the said staircase which goes from the ground floor to the first floor at the material building has seven (7) inch risers and each stair treader measures 11½ inch in depth by 3 feet 6 inches in length. The treaders are finished evenly with 12" by 12" non-skid ceramic tiles which are purpose manufactured for use in stairways and the said tiles fitted at the edge of each treader are grooved to prevent skidding. Further, the entire stairway is lined with handrails on both sides and well lit. There is also a prominently displayed sign posted in the stairway which reads "Please use handrail". The steps of the said staircase had no protruding lips.*
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> *5. The Defendant further states that the claimant was at all material times very familiar with the said staircase including the notification to use the said handrails.*

12. The Defendant also contended that the alleged fall and/or any consequential loss or damage was caused or contributed to by the negligence of the Claimant. The particulars of negligence alleged by the Defendant are set out in full.

PARTICULARS OF NEGLIGENCE

a) failing to take care in ascending the said stairs

b) failing to use the handrail in ascending the said stairs

c) attempting to ascend the said stairs while holding bags in each of her hands thereby making it unsafe for her to ascend the said stairs

d) failing to ascend the stairs in a manner which was safe, namely, with at least one hand free to hold on to the rails as she ascended the stairs

e) failing to heed the signage to use the handrails despite her familiarity with the said stairs and signage

f) failing to take care for her own safety in ascending the said stairs

g) failing to ensure that she was in a position to ascend the stairs safely at all material time prior to attempting to ascend the stairs

h) ascending the stairs when she knew or ought to know it was unsafe to do so and/or ascending the stairway an unsafe manner.

13. As to the Claimant's allegations contained in paragraph 14 and 15 of the Statement of Case, the Defendant alleged that the Claimant reported for work on or around 8.00 a.m. on the 11th September, 2006 and left the work place at around mid-morning and never returned. The Defendant also alleged that all chairs in the department where the Claimant reported for duty were ergonomic chairs.

THE ISSUES

14. It is not in dispute that on the 9th November, 2004 the Claimant fell whilst ascending the staircase at the Defendant's premises after having collected food for a meeting being held by her supervisor, Mr. Young.

15. The main issues for determination are as follows:

(A) Whether the fall and any consequential injuries were caused by the Defendant's negligence in either (a) having a defective step on the staircase with an improperly protruding lip or (b) failing to provide a safe system of work for the collection of food for the meeting of the 9th November, 2004, at the Defendant's premises.

(B) Whether the fall and any consequential injuries were caused or contributed to by the negligence of the Claimant in either (a) failing to use the handrails while ascending the staircase or (b) attempting to ascend the staircase while holding bags in each of her hands thereby making it unsafe for her to ascend the staircase or (c) failing to take care for her own safety in ascending the staircase.

UNDISPUTED FACTS

16. There are several undisputed facts in this matter. It is not disputed that the Claimant was employed by the Defendant in the year 1995 and that at the date of the incident she was assigned as Administrative Assistant to Mr. Young who was Corporate Manager of the Defendant's Retail Banking Unit. That unit was at that time located at the first floor of the Defendant's premises at the corner of Independence Square and Chacon Street.

17. It is also not in dispute that the only means of access to and egress from the first floor was a staircase which ascended half way up to a landing. There were then more stairs which led to the first floor. There was no elevator or escalator access to the first floor.

18. It is also not disputed that that first floor in addition to housing the Retail Banking Unit housed other units/departments of the Defendant and that managers and support staff numbered approximately sixty (60) employees who used the staircase for access to and egress from the first floor to the ground floor. It is further undisputed that there was a security post that was manned at all times by a security guard who sat at a table on the ground floor level at the entrance to Chacon Street.

19. It is further not disputed that on the 30th April, 2007, the Defendant terminated the Claimant's services on medical grounds.

20. It is also not in dispute the staircase was adequately lighted. In fact, in cross-examination as to the adequacy of the lighting of the staircase, the Claimant responded that you could see where you were going. The Court further notes that there is no allegation in the Statement of Case that the lighting of the staircase was inadequate and/or contributed to the Claimant's fall.

21. Whilst there is a dispute whether there were handrails on both sides of the staircase, there is no dispute that there was the provision of a handrail on the staircase and that there was a sign "**Please use handrail**" prominently posted on the staircase. The Claimant has admitted that on the day of the accident, she was wearing flat naturalized rubber sole shoes, and that her trousers were ankle length which was the standard length for the Defendant' employees. The Claimant also agreed in cross-examination that there was a band or line of grooves running straight across each tile just where one stepped up; that there was no concrete on the steps and that all the steps were thoroughly tiled.

ISSUE A(a) - Negiligence and a Defective Step

Whether the Defendant was negligent in having a defective step on the staircase.

22. The Court has perused the written submissions of the Claimant filed on the 8th September, 2010. As part of the narrative, at paragraph 5 of the written submissions, the statement is made that in climbing the stairs of the Defendant's building to return to her floor, the Claimant's foot got caught on the lip of a step and she fell over banging her head against the nearby wall and sustaining serious personal injuries. The Court has noted that the Claimant's written submissions are otherwise silent as to whether the Defendant was negligent in having a defective step on the staircase. There are no arguments or contentions advanced by the Claimant that the Defendant was so negligent. It would appear to the Court that the Claimant has abandoned this issue and is not pursuing her claim that there was a protruding lip on the last step which caused her to fall. Nevertheless, the Court will examine the evidence advanced on this issue and will make a determination thereon.

23. In the Claimant's witness statement, she stated that her left foot became caught under a protruding lip of the last step of the first flight of stairs, just before the first landing. According to the Claimant's witness statement, the edge of the step was smooth, except for an imperfection in the surface of the edge of that last stair in which there was a bulge which appeared to be as a result of too much concrete having been pasted and not smoothed out [paragraph 8].

24. Mr. Leslie Soverall ("Mr. Soverall"), the Group Facilities Manager of the Defendant, gave evidence on behalf of the Defendant. In his witness statement Mr. Soverall stated that as Group Facilities Manager of the Defendant, he was responsible for the maintenance of all facilities owned and/or leased by the Defendant. According to him, immediately after the accident, he was called to inspect the staircase where the Claimant had fallen as he happened to be in a meeting with Mr. Young in Mr. Young's office at the time. Mr. Soverall said that the staircase was properly lit and there were handrails on both sides of the staircase. On the 9th November, 2004, there was a sign "Please use handrail" prominently posted on the staircase. The staircase was completely tiled with non-skid tiles and there were bands of grooves (toe grips) on the edge of each step. He further stated that he inspected the staircase a few days after the incident and found no defects which he reported. Further, Mr. Soverall stated that there have been no renovations or changes to the staircase since the incident. At paragraph 8 of his witness statement, Mr. Soverall said that he recently visited the Independence Square Branch of the Defendant and the staircase was in the exact state as it was as on the 9th November, 2004.

25. In the cross-examination of Mr. Soverall, the following matters were highlighted:

(a) He did not know exactly where on the staircase that the Claimant had fallen.

(b) Although he said at paragraph 4 of his witness statement that he was called to inspect the staircase that was not correct. In fact, he stated that he had

made an executive decision to inspect the steps. There was no request made to him.

(c) His inspection of the steps was conducted in a somewhat summary and cursory mode.

(d) That inspection took approximately half an hour.

(e) He inspected the whole staircase: the lighting, the signage, the handrails, the risers and treaders. He conducted the inspection on the day of the incident or the day after.

(f) He made three (3) oral reports, one to the Legal Department, one to the Human Resources Department and one to Mr. Young, but he did not recall making a written report, although reports of this type of incident are usually presented in writing.

26. Ms. Marcia Joefield, Collections Officer employed with the Defendant, gave evidence on behalf of the Defendant. According to her witness statement, at the time of the accident, she held the position of collections officer in the Credit Card Collections Department, now the Electronic Banking Department of the Defendant, located on the first floor of the Defendant's premises. According to her witness statement, she was on her way to get her lunch, when she witnessed the accident. Her evidence was that the stair well was well lit and there was a sign "Please use handrail" visibly posted along the way. The stairs were tiled and there were hand rails on both sides. At paragraph 7 of Ms. Joefield's witness statement, she said that she used this staircase from the date of the accident to the date of her witness statement and no changes have been made to it. It remained in the same condition that it was on the 9th November, 2004.

27. Mr. Theophilus Francis, Claims Adjuster and Investigator, and Mr. Peter Baksh, Investigator, gave evidence on behalf of the Defendant. Mr. Francis is the managing director of Pioneer Claims Services Co. Limited and Mr. Baksh is an investigator with the company. The company was retained by Guardian General Insurance Limited to carry out an investigation into the Claimant's accident. According to Mr. Baksh, Mr. Francis' report was an accurate representation of his findings. He said that he served as the fact finder on the basis of which Mr. Francis made the report. In cross-examination, Mr. Baksh admitted that he was unaware that the Claimant had claimed to have tripped

on a protruding lip on one of the steps but he said that he had examined the steps closely and when he did, he was armed with what the Claimant had said in her notice of claim. According to him, the notice of claim contained certain details of the accident, including where, when and how the Claimant said it had happened.

28. In answer to questions from the Court, Mr. Baksh said that in all likelihood Mr. Francis would have received instructions to investigate the accident in the year 2005, because the report was coded 2005. He referred to the reference number on the report bearing the year "05". According to his evidence, the report was dated the 7th August, 2008 because the investigation dragged on during the years 2005, 2006 and 2007. According to Mr. Baksh, the union became involved and the case was not straight-forward. Mr. Baksh's evidence was that he visited the Defendant's premises in the first half of 2005 and took notes and photographs. According to the report [page 4], the staircase was well lit and no defects were recognised.

29. At page 4 of the report, it was also stated that the Claimant insisted that no discussions were to be held with her without the involvement of her union representative. According to the report, arrangements were made for a meeting at the union headquarters and the representative questioned them but was not prepared for them to take a statement from the Claimant or even to elicit the details of the incident. The meeting was therefore aborted. They were also not able to interview any of the other employees who were said to have witnessed the accident, as they all claimed to be under the directions of their union.

30. Mr. Young also testified on behalf of the Defendant. According to his witness statement, there were handrails on both sides of the staircase. A sign "Please use handrail" is and was prominently posted on the staircase. The staircase was completely tiled with non-skid tiles and there were bands of grooves on the edge of each step. The risers and treaders were tiled [paragraphs 7]. At paragraphs 8 and 9 of his witness statement, Mr. Young said that the staircase that he had described was the same staircase on which the Claimant fell on the 9th November, 2004. There have been no renovations, changes or alterations to the staircase after or since the incident of the 9th November, 2004. The staircase was in the exact state as it was at the time of the incident on the 9th November, 2004, he said.

31. Having considered all the evidence on this issue, the Court prefers the evidence of the Defendant on a balance of probabilities. The Court is not convinced by the Claimant's evidence that her foot became caught under a protruding lip. According to her, the edge of the step was smooth, except for an imperfection in the surface of the edge of that last

stair in which there was a bulge which appeared to be as a result of too much concrete having been pasted and not smoothed out. In all the circumstances, the Court finds it difficult to understand and accept how the accident happened in the way alleged by the Claimant especially as she was ascending the staircase and was wearing flat shoes.

32. Further, the Court accepts the evidence given by the Defendant's witnesses. Despite the matters highlighted in the cross-examination of Mr. Soverall, the Court accepts his evidence that he inspected the staircase soon after the accident and found no defects. The Court also accepts his evidence and that of Ms. Joefield and Mr. Young that there have been no renovations, changes or alterations to the staircase since the date of the accident. Indeed, Mr. Soverall's evidence was convincing since he was responsible for maintenance, repairs and renovations of all the buildings occupied by the Defendant. In addition, the Court accepts the evidence of Ms. Joefield and Mr. Young given that they have continued to use that staircase since the accident on the 9th November, 2004 to the date they gave evidence before the Court. The Court notes that even though Mr. Soverall did not submit a written report, a full written report was prepared on behalf of the Defendant's insurers and tendered into evidence before the Court. Indeed, the Court accepts the evidence of Mr. Francis and Mr. Baksh.

33. In addition, the Court agrees with the Defendant's written submissions filed on the 19th July, 2010 [paragraphs 14 and 15] that the Claimant was the only person to give evidence on her behalf and offered no other evidence as to the material condition of the stair. She did not submit any photographs of the stair nor did she have anyone else, whether an employee of the Defendant or any independent person who may have examined or used the stair, give evidence of its condition. The Court notes that that is so even though Leiselle Morton Phillip of the Defendant's Commercial Lending Unit witnessed the accident, and the Claimant also had the support of her union representative.

34. In all the circumstances of this case and on a balance of probabilities, the Court does not accept the Claimant's case on this issue. The Claimant therefore fails on this issue.

ISSUE A(b) – Negligence and a Safe System of Work

Whether the Defendant was negligent in failing to provide a safe system of work for the collection of meals for the meeting of the 9th November, 2004, at the Defendant's premises.

35. The Claimant's written submissions were for the most part centred on whether the Defendant failed in its duty to the Claimant to provide a safe system of work for the collection of food on the 9th November, 2004.

36. In the Claimant's written submissions, it was contended that on the 9th November, 2004, she was walking with a cane lent to her by Mr. Young. In fact, Mr. Young conceded in cross-examination that the Claimant was suffering from pains in her knee and as a caring boss he lent her a cane. She had been using that cane for some days prior to the accident, he said. The Court notes with concern that a matter of this importance was not included in the Claimant's Statement of Case. The Defendant has correctly submitted that there was no allegation in the Statement of Case that the assistance of the cane in any way contributed to her fall. The **Civil Proceedings Rules, 1998,** as amended, provides at Part 8.6(1) that the claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies. In my view, it would be unjust, unfair and contrary to the Rules for the Court to allow the Claimant to rely on the use of the case or on any allegation that she was in some way disabled at the time of the accident. Further, it is undisputed that the Claimant did not use the cane when she went to collect the food. Accordingly, the Court does not accept that because the Claimant was experiencing pains in her knee and was walking with a cane were matters which the Defendant's servant and/or agent Mr. Young should have taken into consideration when issuing instructions for the Claimant to procure the food.

37. The Claimant has submitted that an employer is under a non delegable duty to ensure that a safe system of work and adequate supervision are provided. A system of work is a term usually applied to work of a regular and more or less uniform kind. In this connection, it means the organisation of the work, the procedure to be followed in carrying it out, the sequence of the work, the taking of safety precautions and the stage at which they are to be taken, the number of men to be employed and the parts to be taken by them, and the provision of any necessary supervision. **It can, however, be applied to a single operation**. Where the mode of operation is complicated or highly dangerous or

prolonged or involves a number of men performing different functions, or where it is of a complicated or unusual character, a system should be prescribed...... When there is an obligation to prescribe a system, the obligation is to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation.[1]

38. It is a question of fact whether a system should be prescribed. In deciding this question regard must be had to the nature of the operation, whether it is one which requires proper organisation and supervision in the interests of safety of all persons carrying it out, or *whether it is one which a reasonably prudent employer would properly think could safely be left to the man on the spot*.[2] There was no failure to provide a safe system of work where an employee was faced with a "one-off" task requiring the exercise of common sense and where it was difficult to see what relevant instruction could have been given to him.[3] **An employer, however, is under a duty to prescribe a system of work, even where the operation is a single one, if it is necessary in the interests of safety**.[4]

39. It was argued on behalf of the Claimant that although the operation may be broadly called ferrying packages up the Defendant's staircase, and while it appears to be a simple exercise that may not require supervision [or for that matter, the prescribing of a system], *the following layers of this matrix warranted consideration* [see paragraph 11 of the Claimant's written submissions]. The Court will examine these arguments in detail.

(a) That the task assigned to the Claimant was not a normal or regular one. Indeed, it was argued, that the Claimant was never asked to perform such a task in all the years of her employment with the Defendant.

40. The Court has examined the evidence given on this issue. The Claimant's evidence was that she was not normally asked to go to get food as the food was normally delivered. According to Mr. Young, the meeting of the 9th November, 2004, was an unscheduled meeting. Although in cross-examination, he did not agree that the Claimant had never prior to that date been asked to procure food immediately before a meeting, he did agree that normally the Claimant would have had one (1) day's notice to order the food. According to Mr. Young, the Claimant would place the order in advance and either the food would be delivered or arrangements would be made for the collection of the

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[1] **Clerk & Lindsell on Torts** 18th edition para. 7-223.

[2] Ibid at para. 7-223; **Jenner v Allen West & Co. Ltd**. [1959] 1 W.L.R.554.

[3] **Philip Michael Chalk v Devizes Reclamation Co. Ltd.,** The Times, April 2, 1999, where a lump of lead had fallen from a lorry and the claimant attempted to move it by slewing it around.

[4] **Vernon v British Transport Commission** [1963] 1 Lloyd's L.R. 55.

food. On the day in question, however, at around 10:45 a.m. he asked the Claimant to secure meals for a meeting which was to commence at 11:00 a.m. Having examined the evidence, I accept the Claimant's evidence that she was not normally asked to collect food for such a meeting, but that she had to do so on that day.

(b) That the Claimant was assigned no assistance to perform the task but was given an urgent and irrefutable directive to obtain meals.

41. In cross-examination, in answer to the question whether the Claimant could have refused to get the meals, Mr. Young said that that would not have been in the character of the person and that would not have been the practice in the institution. According to Mr. Young from his experience as a banker, such a refusal would possibly have been met with some kind of disciplinary action. The Claimant's evidence was that she was getting the food from Excellent City, a fast food outlet, and they did not deliver. Although the Claimant conceded that there were messengers and other persons whom she could have called upon to assist her in the collection, the Court accepts her evidence that she asked the messengers to help her, but they were not in office. The Court accepts the Claimant's evidence that she had no choice but to go to get the food herself.

(c) That reasonable consideration of the request would have revealed that what the Claimant was being asked to procure and carry would be several containers of considerable weight.

42. It is not in dispute that having ordered the food from the fast food outlet and having collected the food, the Claimant obtained the assistance of Ms. Morton Phillip who had ordered food for herself. The Claimant held two (2) bags, one (1) in each hand, and Ms. Morton Phillip also held two (2) bags, one (1) in each hand. The Court notes that this exercise involved leaving the Defendant's premises and the collection of bags of food. It then involved returning to the Defendant's premises and ascending the staircase, it being agreed that there was no elevator or escalator access to the building.

43. Having regard to the arguments above stated, it has been contended on behalf of the Claimant that *these layers take the task out of the routine and elevate it to a process for which some level of structure, organization and supervision was required.* Accordingly, it was argued that *a reasonably prudent employer having the aforesaid information ought to have anticipated that the Claimant would have attempted to mount the stairs without the assistance of the rails simply because of what she was being asked to do and because there was some urgency associated with the request which came from her supervisor* [para. 12 of the Claimant's written submissions].

44. In the case of **Philip Michael Chalk v Devizes Reclamation Company Limited** The Times, April 2, 1999, the Court of Appeal (Civil Division) [England] considered the appeal from the judgment of Mr. Recorder Howells when on the issue of liability he ordered that there be judgment for the plaintiff for damages to be assessed with a deduction of 40 per cent in respect of the plaintiff's contributory negligence. The plaintiff cross appealed in relation to the finding of contributory negligence. The action arose out of an accident which occurred in the course of the plaintiff's employment. The defendants owned a scrap metal yard and the plaintiff was employed there as a labourer. On the day of the accident there was a delivery of a number of large lumps of lead to the scrap yard. They arrived by lorry and were stacked on wooden pallets. Whilst the pallets were being moved from the back of the lorry by the forklift truck, one of them broke and a lump of lead fell on to the ground. It was necessary to move the piece of lead so that it could be lifted again by the arms of the forklift truck. The plaintiff therefore fell down, took hold of one of the steel bolts on the lump of lead, slewed the metal around and felt a sudden pain in his back. In his particulars of claim the plaintiff alleged inter alia that the defendant failed properly or at all to train him how to move or lift a heavy object.

45. Lord Justice Swinton Thomas who delivered the judgment of the Court of Appeal examined the evidence before the recorder in great detail. He concluded thus:

> *The recorder's finding was that the defendants were in breach of their duty of care to the plaintiff in failing to give him adequate instruction and training. In my view, on the facts of this case, it is quite impossible to make a finding that a system of work was unsafe in relation to training or instruction without evidence and a finding as to what the instruction and training should be. If one then goes on the pose the question in the context of this accident, "What training and instruction should have been given?, it is in my view equally impossible to answer that question. The plaintiff could not have been instructed as to how to carry out this particular operation and there is no reason why he should have been instructed not to do it. If one endeavours to envisage general instructions in relation to either the lifting or the moving of heavy objects, then such instructions would not in my view have had any effect at all on what the plaintiff actually did on this occasion, because the plaintiff, as he said himself, exercised his own common sense and judgment and it is easier for him to rotate or slew the piece of metal in the way in which he did and it was his misfortune that in doing so he sustained his injury to his back. No instruction would have prevented this particular accident from occurring.*

Inevitably I have sympathy with the plaintiff and no doubt the recorder did as well. However, in my judgment, on the evidence which the recorder had before him it was impossible to come to the conclusion that the defendants were negligent or in breach of their duty to the plaintiff to provide a safe system of work or that any such breach caused this accident.

46. The President of the Court of Appeal, Sir Stephen Brown, concurred with the judgment of Lord Justice Thomas and added:

But as my Lord has pointed out, the learned recorder did not at any stage indicate what advice or instruction could or should have been given. This was not a case of system. This was an isolated "one-off", as it has been termed, incident with this piece of metal. The learned recorder in my judgment was misled into considering the application of "safe system" to the facts of this case.

Unfortunately this was an accident and a true accident. The learned recorder said at one point in his judgment that the employers were not, at this stage at any rate, insurers. In my judgment there was no evidence of a failure to take proper care for the safety and welfare of this plaintiff. The learned recorder was in error in finding that there was actionable fault on the part of the defendants in this case.

47. The Claimant also placed reliance on the case of **Vernon v British Transport Commission** [1963] 1 Lloyd's L.R. 55. In that case, the plaintiff's husband V, who had been employed by the defendants on a coal tipper at a dockyard, was crushed between the guard-rail and the stirrup on the coal tipper while it was operating. A claim was commenced by the plaintiff alleging that the defendants were negligent in that they left unguarded a gap of 2 feet which was reduced to 2 inches when the coal tipper was in operation. The defendants denied liability and contended that V failed to keep a good look-out. The evidence disclosed that V stumbled into the gap when the coal tipper was operating and he was trapped.

48. The Court of Appeal held that on the evidence V did not voluntarily place himself in the gap, but he stumbled into it; that it was to be anticipated that a man might stumble; that the danger from the gap was foreseeable; that the plaintiff had proved a breach of the common law duty by the defendants to guard against unnecessary risk; and that the breach caused V's death. The court also held that V was not contributorily negligent.

49. In the Defendant's written submissions in reply filed on the 27th October, 2011, the Defendant accepted without reservation that an employer had an obligation to provide a safe system of work. It was argued on behalf of the Defendant that the question which

arose on the facts of this case was whether the Defendant was in breach of that obligation. It was further argued that the cases cited by the Claimant had to be looked at in the context of her having to ascend a staircase and that the Defendant had done everything possible to ensure the safety of all persons using the stairs.

50. As to the case of **Vernon v British Transport Commission,** the Defendant argued that the case turned on the Court taking into account the very dangerous nature of the work being performed by the workman and the fact that since the gap was foreseeable the employer had to guard against unnecessary risks. It was therefore submitted that the **Vernon** case turned on its own facts and that no parallels could be drawn to that case.

51. The Defendant in its written submissions in reply also referred to the case of **Ammah v Kuehne & Nagal Logistics Ltd.** [2009] EWCA Civ 11 which had been cited by the Claimant. In that case, the Court of Appeal (Civil Division) [England] were satisfied that that the risk associated with standing on boxes to access upper shelves had been adequately guarded against by the instruction given by the employer. The employer had complied with its duty of care to ensure a safe system of work in relation to access to the upper shelves. Accordingly, the court held that in standing on the box, the employee had taken a risk for which only he, and not his employer, was to blame and that there was no basis upon which the employer would be held liable for the injury the employee had sustained.

52. It was submitted on behalf of the Defendant that the **Ammah** case was relevant to the matter at hand. The Court understands the Defendant to be contending that in the instant case the Claimant had basically to ascend a staircase and adequate instructions and warnings had been given by the employer for that task. It was further submitted that the employer had a safe system for the employees to get from the ground floor to the first floor. If the employee chose to take a risk the employer cannot be held liable for injury sustained as a result [paragraph 6 of the Defendant's written submissions in reply].

53. It was also argued on behalf of the Defendant that the fact that the employer requested the Claimant to do a particular task did not mean that she should disregard the signage and requirement to ascend the stairs safely. Further, it was submitted that the Claimant could have ascended the stairs safely as she had admitted in cross-examination but she chose to take the risk which resulted in her injury. The Defendant contended that the task which the Claimant was required to do gave her various options to have it done but ultimately it was a simple task; that there was nothing inherently dangerous in doing the task if the Claimant chose to do it herself; that the Claimant had the assistance of another employee and had the option of ascending the stairs in a safe manner; and that

she herself recognized and admitted in evidence that had she used the handrail she would not have fallen [paragraph 7 of the written submissions in reply].

54. The Claimant also placed reliance on the case of **Jenner v Allen West & Co.** [1959] 1 W.L.R. 554. In that case, the deceased, who was employed by the defendants as the leading plumber in their maintenance department, while engaged in repairing the gutter of the roof of a factory building, fell through the ceiling and was fatally injured. Although he had warned his assistants to keep their weight off the exposed asbestos ceiling he himself did not use any boards. The Court of Appeal held inter alia that the defendants were liable for negligence as on the facts the defendants had relied entirely on the deceased in a job that was not shown to be within his experience and competence, so that part of the fault was theirs. At pages 561-562, Pearce L.J. having examined the case of **General Cleaning Contractors Ltd v Christmas** [1953] A.C.180 set out the following principles:

> *The facts of it were, admittedly, different from those in the present case. In that case the servant was engaged in work involving great and constant peril. That case was decided on its own facts, but it shows clearly that, in cases where perils are involved which thought or planning might avoid or lessen, it may not be enough for the employer to trust that thought and planning to the skill and experience, however great, of the man who carries out the work, since there is always a duty on the employer to take all reasonable steps for the safety of his servants. The considerations involved are lucidly expressed in the often quoted passage from Lord Oaksey's opinion. But in each case it is a question of fact whether the employer failed in his duty by doing no more than trust to the skill and experience of his servant.*
>
> *In this case the task was an awkward one which involved some degree of danger. It needed careful thought, as is shown by the varying evidence on what was the appropriate method of doing it. There is no sufficient evidence that it was within the experience and competence of the deceased. They relied solely on him. He was admittedly a man of skill and experience, but he failed. That does not, in my opinion, on the facts of this case, absolve the defendants wholly from any part in that failure. In my view, the judge was right in holding that some part of the fault lay with the defendants.*

55. I have considered the evidence, the submissions and authorities cited on behalf of the parties. The Court agrees with the Claimant that the provision of a railing and signage on the staircase was not a complete system of work; that it was only part of a system but it was clearly insufficient in the circumstances. I also agree with the Claimant's submissions that the employer was required to go further in order to discharge its duty in this case. In my view, the evidence shows that the Claimant, as an administrative assistant of the Defendant, had the responsibility for making arrangements for the co-ordinating of meals for meetings held by her supervisor, Mr. Young. I accept as a fact that one day's notice was normally given by Mr. Young and that normally the meals were delivered to the Defendant's premises. The Court finds that on the 9th November, 2004, however, the Claimant was faced with an urgent request for the procurement of meals which she could not refuse, and that since she could not obtain the assistance of the messengers, in the light of the timing of the request, she had to go personally to collect the meals. It was already 10:45 a.m. and the meeting was to commence at 11 a.m.

56. The Court finds as a fact in the circumstances of this case that it was necessary for the Defendant to prescribe a system of work for the collection of the meals on that day. The Claimant as an administrative assistant was being required to procure meals without the assigned assistance of messengers or other staff. No vehicle or other assistance was assigned to her. No contract or other arrangements with food providers had been put in place to accommodate urgent requests for the delivery or collection of meals. In the Court's view, the request reasonably involved the Claimant's leaving the Defendant's premises and going into the streets and into a restaurant or food outlet in downtown Port of Spain. It also involved her collecting several packages of food, returning to her work place and ascending the stairs with them. In my view, this process involved a lot more than simply climbing steps as has been argued by the Defendant. In my judgment, the Defendant in this case was duty bound to prescribe a system of work in the interests of the safety of the Claimant even if this was a one-off task.

57. In my judgment, the Defendant as a reasonably prudent employer could not properly think that the task could safely be left to the Claimant, but that is what it did. Mr. Young's evidence was that the procurement of meals and in particular where the meals were sourced, was left completely to the Claimant once he gave the order. The arrangements for the collection of food was her call, was Mr. Young's blunt response in cross-examination.

58. In my judgment, the Defendant as employer has not complied with its duty to prescribe a safe system of work. I find that the Defendant has failed to take proper care

for the safety of the Claimant. Accordingly, the Defendant has failed to prescribe a safe system of work for the collection of meals for the meeting of the 9th November, 2004, at the Defendant's premises and is therefore liable in negligence. The Defendant relied entirely on the Claimant although she was not a messenger and on the evidence was not accustomed to collecting packages and carrying them to the Defendant's premises. They ought not to have left this to the sole discretion of the Claimant.

ISSUE B – Contributory Negligence

59. The Defendant has argued with conviction that the Claimant had no regard for her own safety, ignored the several options available to her to get the food upstairs, including leaving one bag with the security guard or Ms. Morton Phillip and taking one bag upstairs at a time, and defied the clear signage to use the handrail to her own detriment, being fully aware of the potential risk [see paragraph 17 of the Defendant's written submissions filed on the 19th July, 2010].

60. In my judgment, there is merit in the Defendant's argument. The Claimant must bear part of the responsibility for her fall. In the case of **Jenner** (supra), as to the plaintiff's claim for breach of statutory duty, the court found that the apportionment of responsibility was two-thirds on the deceased and one-third on the defendants. The court noted inter alia on this issue that the deceased was a man of long experience, naturally careful in his way, who as was proved, knew quite well that he must not in any circumstances allow his weight to go on the fragile roofs or ceilings.

61. In my view, however, the Defendant in the present case must bear the greater responsibility for the Claimant's fall since a proper and safe system had not been prescribed at all. In all the circumstances of this case, I am of the view that an apportionment of responsibility of one-third on the Claimant and two-thirds on the Defendant would be fair and reasonable.

62. As to the Claimant's allegations at paragraph 13-15 of the Statement of Case that the Defendant failed to provide her with an ergonomic chair when she reported to work at the Systems & Procedures Unit of the Defendant located in San Juan, the Court prefers the Claimant's evidence. According to Mr. Young at paragraph 18 of his witness statement, the Defendant had purchased an ergonomic chair for her as recommended and it was available for her use on her return to work; all she needed to do was to request it

that morning and it would have been put in place for her use. The Court finds this evidence very odd given that Dr. Bedaysie had made a specific recommendation. Why was the chair not in place and why did the Claimant have to request it, if the chair had been so purchased? In my view, those questions have not been answered. Accordingly, the Court will determine at the assessment of damages and on hearing the medical evidence whether the Defendant's failure to provide an ergonomic chair on the Claimant's return to work caused any deterioration in her condition as alleged at paragraph 15 of the Statement of Case.

63. The Court will also hear submissions on costs since the Claimant has failed on the first issue, has succeeded on the second, and has been found to have contributed to the accident.

ORDER

IT IS HEREBY ORDERED

1. There shall be judgment for the Claimant against the Defendant as to two-thirds of her claim with damages to be assessed and costs to be quantified.

2. The assessment of damages and the quantification of costs are adjourned to a date to be fixed by the Court.

....

MAUREEN RAJNAUTH-LEE

JUDGE