JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 54/2007

BEFORE: **THE HON. MR. JUSTICE SMITH, J.A.**
THE HON. MRS. JUSTICE HARRIS, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

BETWEEN:	**VICTORIA MUTUAL BUILDING SOCIETY**	**DEFENDANT/ APPELLANT**
AND	**BARBARA BERRY**	**RESPONDENT/ CLAIMANT**

Emile Leiba instructed by Myers, Fletcher and Gordon for the Appellant.

W. Clark Cousins for the Respondent.

December 3, 2007 and July 31, 2008

SMITH, J.A.

I have read in draft the judgment of Harris, J.A. I agree with her reasoning and conclusion and there is nothing further I wish to add.

HARRIS, J.A.

1. This is an appeal from a judgment of Jones J, made in favour of the respondent on May 9, 2007, on the issue of liability.

2. On July 22, 1998 the respondent, a customer of the appellant, visited its

establishment to transact business. On completion of the transaction, and while leaving the building, she slipped on a step. She fell on her knees with her feet trapped beneath her body. She was transported to the hospital where it was discovered that she had sustained a fracture of the right foot and a sprain of the left ankle.

3. At the time of the accident, she was proceeding from the customer service area of the building to the banking hall. The banking hall and the customer service areas are separate. To gain access to the banking hall the respondent had to go through a door way and descend a step which was three to four inches in height. A warning sign with the words "Please watch your step" was suspended from the roof of the building and was at a height of approximately six feet from the ground. This sign was within close proximity to the doorway through which the respondent entered. She stated that she did not see the sign.

4. On July 20, 2004, the respondent commenced an action against the appellant in negligence and/or the Occupiers Liability Act. The allegations of negligence and/or breach of statutory duty were particularized as follows:

> "(a) Placing short steps in a position which were not readily visible to customers likely to access and/or use same
>
> (b) Failing to provide any or proper warning of the presence of the said steps which were not obvious
>
> (c) Failing to provide any handrail to safely ascend or descend same

> (d) Exposing the claimant and other visitors to the risk of injury which given the circumstances the defendant knew or ought reasonably to know might occur
>
> (e) Failing to ensure that its premises were reasonably safe for persons using same for the purpose(s) for which they were invited
>
> (f) The claimant relies on the doctrine of res ipsa loquitor."

5. The appellant, in its defence, denied liability. It averred that a warning sign was in place and that it had taken all reasonable steps to ensure that all its visitors were not exposed to the risk of injury. Its further averment was that the premises were reasonably safe for all users thereof. It was also its averment that the doctrine of res ipsa loquitor was inapplicable in the circumstances of this case.

6. The learned trial judge gave judgment for the respondent with damages to be assessed, if not agreed. Costs were awarded to the respondent.

7. At common law, an occupier of premises owes a duty to take care as is reasonable in all the circumstances to ensure that visitors to his premises are reasonably safe. A common duty of care is also imposed on an occupier by statute as ensconced in the Occupier's Liability Act. Section 3 of the Act provides:

> "3. (1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.

> (2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
>
> (3) The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing-
>
> (a) an occupier must be prepared for children to be less careful than adults;
>
> (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
>
> (4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.
>
> (5) Where damage is caused to a visitor by danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe."

The statutorily regulated duty of care is essentially similar to that of the common law. However, at common law, a visitor is required to employ reasonable care for his own safety. Under the statute, the degree or want of care which would ordinarily be looked for in an invitee is only a relevant factor.

8. Where a visitor sustains damage by a danger of which he has been warned by the occupier, the warning, in itself, does not exonerate the occupier from liability unless the

circumstances are such that the warning was sufficient for the visitor to be reasonably safe. In deciding whether an occupier has discharged his common duty of care, regard must be had to all the circumstances.

9. It is a question of fact whether a defendant, as an occupier, failed to take reasonable care for the safety of his visitor, and whether the visitor was contributorily negligent. In ***Indemaur v Davies*** (1867) L.R. 2. C.P. 311 Kelly, C.B. in affirming the decision of the lower court quoted, Willes, J. who opined:

> "... with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

10. The following grounds of appeal were filed:

> "(a) The learned judge failed to appreciate that there was no evidence in this case which took it outside the general law applicable to "slip and fall" cases. (**Wheat v. Lacon** [1966] 1 All ER 582; ***Bell v Travco Hotels Ltd*** (1953) 1 All ER 638; ***Davis v DeHavilland Aircraft Co. Ltd.*** (1950) 2 All ER 583; ***Anatra v Ciboney Hotel Ltd. & Anor.*** Unreported SC C.L. A-196j 1997 decided January 31, 2001)
>
> (b) The learned judge failed to appreciate that there was no, or no sufficient, evidence of a want of care on the part of the Appellant.
>
> (c) The learned judge erred in failing to find that the Appellant had taken such care as in all the circumstances of this case was reasonable to see that

the Respondent would be reasonably safe in using the premises for the purposes for which she was permitted by the Appellant to be there.

(d) The learned judge, in determining whether the warning sign was sufficient and whether the Appellant had discharged its duty under the Occupiers Liability Act in the circumstances of the case, failed to take into consideration the fact the Respondent was aware of the step, as she had used it to step up and was in the process of stepping back down when she fell.

(e) There was insufficient evidence before the learned judge to support finding that the step was dangerous.

(f) The learned judge erred in not having any or any sufficient regard to the evidence of Mr. Winston Tucker that no accident had previously occurred on the step.

(g) The learned judge erred in failing to appreciate that the Appellant's duty of care was not enlarged by the Respondent's neglect in caring for her own safety.

(h) The learned judge failed to properly or at all address the issue of the Respondent's inconsistency in her evidence in relation to her credibility.

(i) In light of the evidence adduced, the learned judge erred in law in finding

i. In May 2007 that the remodeling of the Defendant's premises was relevant to the question of whether the step was dangerous in July 1998, with no evidence having been lead as to the time when the remodeling occurred; and

ii. That the area where the step was located was remodeled due to the fact that the step was dangerous.

(j) The learned judge failed to address the question of contributory negligence."

11. It was submitted by Mr. Leiba that the respondent merely slipped and fell and this

case was clearly within the purview of the "slip and fall" cases. He argued that there was no evidence before the court from the respondent to show how she fell. The appellant, he argued, took all reasonable care to ensure the safety of its property by prominently displaying a warning sign.

12. Mr. Cousins argued that it was for the appellant to show that it was not in breach of its duty of care to the respondent. He submitted that the critical question is whether the location of the warning sign had satisfied the duty of care imposed by the statute. It was further submitted by him that the appellant's duty of care was not conditional upon the respondent exercising reasonable care for her safety.

13. The doctrine of res ipsa loquitor was pleaded by the respondent. Its applicability to this case had been denied by the appellant. This maxim has its origin in the often cited case of ***Scott v London & St. Katherine Docks Co.*** (1865) 3 H & C 596 where Erle C.J., at page 601 said:

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

14. I am of the view that in this case the doctrine is inapplicable. The 'res' which is said to speak for itself is the short step at the doorway between the banking hall and the customer service areas. It cannot be denied that at the material time it was under

the management and control of the appellant and that the evidence discloses that the respondent fell on it and sustained injury. However, persons slip and fall on steps in the ordinary course of things. The appellant had displayed a warning sign within proximity of the area where the respondent fell. It is for the respondent, not the appellant, to show that the step was a potential danger to all persons who lawfully came on the appellant's building and that the warning sign was inadequate. The respondent must demonstrate that her slipping and falling on the step was inconsistent with the appellant exercising due diligence in providing a safe area over which all visitors could have safely traversed its building.

15. An occupier of an institution to which members of the public attend on business owes a duty of care to all visitors to his building. He is under a duty to take such care as is reasonable for the protection of the visitors from dangers which are foreseeable. It is reasonable to expect that an occupier, by way of protection, will ensure that the building is of sound construction and where necessary, to make certain that a warning sign which is clearly visible to all visitors is displayed in a prominent area.

16. There is no dispute that the appellant, as an occupier, owed a duty of care to the respondent. It must be determined, however, whether the respondent's injury emanated from a want of care on the part of the appellant for which liability ought to be ascribed to the appellant. Two crucial questions arise. The first is whether the step was a danger to all visitors who used it. The second is whether the presence of the warning sign could be said to have been sufficient to discharge the appellant from

liability. Had it taken reasonable steps to guard visitors, including the respondent, from the risk of harm or injury while on its property? Was the presence of the warning sign sufficient to absolve the appellant from liability?

17. The learned trial judge, considered the case within the framework of the Occupiers' Liability Act and in dealing with the issues had this to say:

> "8 In order to determine whether VMBS exercised the "common duty to take care" in accordance with the statutory duty to ensure that the visitor is reasonably safe for the purposes which she was on the premises a number of factors should be considered.
>
> First, was there a warning given?
>
> Court finds as a fact that there was a sign saying "please watch your step".
>
> 9 However, a warning is just one of the factors to be considered.
>
> In this case the court finds as a fact that the warning was inadequate to warn the claimant of the particular risk. (Short step) It did not go on to tell her of the particular danger.
>
> In addition, I do not accept that the sign was six feet from the floor. I accept that it was higher and as a result the claimant was unable to see it.
>
> 10 The claimant is a senior citizen and such persons would normally look down on the ground or straight ahead but not up in the air to see a sign.
>
> The bank ought to have foreseen that persons of all ages use the banking hall and that some

> persons after completing a transaction and putting away papers would not see the sign.
>
> 11 Second, what was the danger?
>
> It is not in contest that there was a short step, three to four inches at the doorway. I find that this was a dangerous short step; it was a danger to visitors if they are not aware of it.
>
> The fact that later VMBS later remodeled the short step and replaced it with a ramp with railings would suggest that there was a safer method and that they knew it."

18. The findings of the learned trial judge led to his conclusion that it was foreseeable that the appellant's breach of its duty of care would have caused injury to the respondent. This brings to the forefront the role of an appellate court in its review of a trial judge's discretion. The evidence before the trial judge was that the respondent slipped and fell on the short step and suffered injury. A warning sign was displayed close to the area where she fell. Subsequent to the respondent's fall, the appellant replaced the step with a non skid ramp. Handrails were also placed on either side of the ramp.

19. The question is whether having regard to the learned trial judge's findings of fact, he could have correctly arrived at his conclusion. The approach of an appellate court, in reviewing the decision of a trial judge on questions of fact, are well known. An appellate court may not interfere with the decision of a trial judge unless it is satisfied that the judge exercised his discretion wrongly. This court can only intervene where it is

shown that he had applied the wrong principles or misdirected himself on law and has been shown to be plainly wrong. See **Watt v Thomas** [1947] 1 All E.R. 582 23 J.L.R. 35; and **Clarke v Edwards** (1979) 12 J.L.R. 133.

20. The learned trial judge's finding that the warning sign was higher than 6 feet was erroneous. The evidence is that the sign was suspended from the roof and was approximately 6 feet from the ground. The learned trial judge's finding that it was higher than 6 feet is speculative. This notwithstanding, it is necessary to determine whether liability could be imposed on the appellant.

21. In support of his submissions Mr. Leiba cited the cases of **Wheat v E. Lacon & Co. Ltd.** [1966] 1 All E.R. 582; **Bell v Travco Hotels Ltd.** [1953] 1 All E.R. 638; **Davies v De Havilland Aircraft Co. Ltd.** (1950) 2 All E.R. 582. It is my view that all these cases are distinguishable from the case under review. The case of **Anatra v Ciboney & Anor** CL A - 196 of 1997 was also cited by him. It is an unreported case from the Supreme Court in which the defendants were held not liable to a plaintiff who fell on the step of their hotel. This is a first instance case by which this court is not bound.

22. In **Wheat v E. Lacon Co. Ltd.,** Mr. Wheat and his family were guests at the respondent's inn. Sometime after 9 p.m. on September 4, 1958, Mr. Wheat, while using an unlit backstairs, fell and died. The backstairs which had handrails, were essentially a service entrance and were not intended for daily use. Unknown to the manager, a light bulb which was at the top of the stairs had been removed by a

stranger. It was held that there was insufficient evidence to determine how the accident happened, as, there was no evidence from the administratrix of Mr. Wheaton's estate to show how he fell. It was also held that the unlit backstairs was not dangerous to someone using it with proper care and the respondent was therefore not liable to the deceased.

23. In the instant case, the step on which the respondent fell was intended to be traversed by all persons who lawfully entered and used the appellant's building. She was using it during daylight hours. In using a dark backstairs which was not intended to be used by guests, Mr. Wheat had obviously done so at his peril. He clearly took the risk, ignoring his safety. Further, there was no evidence to show how he fell.

24. In ***Bell v Travco,*** the plaintiff was a guest at the defendant's hotel. She slipped, fell and was injured on a slippery path, which was a quarter mile from the end of the hotel's driveway, near to the main road. It was held that although the hotel had a duty to its guests to take reasonable care to ensure that the driveway was reasonably safe for the purpose for which it was used, the driveway was as reasonably safe as the hotel could have made it.

25. In the case under review, the respondent was injured on a step inside the appellant's building and not in an area which is some distance from the building. The evidence discloses that the step was replaced by a ramp with handrails. It could be that the step was unsafe and that at the time the respondent fell it was incumbent on

the appellant to have taken such care as required to have made it reasonably safe for all visitors, including the respondent.

26. In **Davis v D.E. Havilland Aircraft &. Co. Ltd,** the plaintiff was one of 5000 employees of the defendant. He testified that he slipped and fell in a passage at his workplace, in a patch of oil or grease. On other evidence, it was found that he slipped in rainwater, which had collected on the floor, containing mud or oil from other employees' boots. It was held that the defendant had not failed in its duty of care to the plaintiff, as, inter alia, at the time of the accident, the plaintiff was using the passage to gain access to the canteen and not to any work area.

27. In that case Sommerville L.J. said that slipping is a common incident of life. He made his observation in the circumstances of that particular case. His observation was made within the context of the evidence before him. He specifically pointed out that if water had collected in a slight depression on the floor with the result that the floor became slippery, the evidence, the plaintiff's fall would not have resulted from a breach of the [English] Factories Act which required that all floors, steps, stairs and passages should be of sound construction and properly maintained.

28. There is a marked distinction between the foregoing case and the case under review. In the foregoing case, the defendant's building had been shown to have been of proper construction and adequately maintained. The defendant could not have said to have been negligent in properly maintaining the passage of its factory where the plaintiff fell. At the time he fell, he was not on his way to any work area in the building.

In the instant case, there is no evidence to show that the area of the appellant's building where the respondent fell was of sound construction. The step was replaced by a ramp with handrails after the respondent's accident. This clearly points to the fact that the step could have been poorly constructed and consequently, unsafe.

29. The case of **Home Office v Lowles** (2004) EWCA CiV 55 was cited by Mr. Cousins. The facts of that case are somewhat similar to the facts of the instant case. In that case, on March 13, 2000, Mrs. Lowles an officer at Armley Prison injured her foot on a threshold in that building. She normally gained entry to the building through the main gate. However, she was required to use a side entrance when prisoners are being collected or returned. At this side entrance was a covered ramp leading up to a portacabin. The entrance of the portacabin *consisted* of two doors. The outer door was kept open while the inner, which had a window in it, remained closed. A warning sign, "Please mind steps" was placed above the window. There was an unmarked two inch step-up to the level of the portacabin floor. Mrs. Lowles used the entrance twice before the date of her fall. The trial judge found that she had seen the warning sign but fell while engaged in conversation with another employee. He held that the threshold exposed her to a risk of her health and safety as the floor was unsuitable for the purpose for which it was being used and that the Home Office was liable. He also held that Mrs. Lowles was contributorily negligent. On appeal it was held as follows:

> "The judge's assessment was one open to him and which he was well placed to reach on the evidence and therefore should not be interfered with. The judge had correctly carried out the assessment of relevant factors identified in ***Palmer v. Marks and Spencer*** plc

> (2001) EWCA Civ 1528, (2001) EWCA Civ 1528. Internal risk assessments, which accepted the step as suitable and safe subject to the presence of the notice, were relevant but could not be determinative. (2) On the facts, the judge could not be criticized for proceeding straight to a conclusion that there was a relevant obstruction for the purposes of reg. 12(3), as he had considered all relevant factors relating to the nature and extent of the risk when making his assessment under reg. 12(1). (3) As regards common law negligence, the judge had been entitled to conclude that, in all the circumstances, there was foreseeability of injury and a duty of care, which was not sufficiently discharged by the notice. (4) It was open to the judge to make the finding that L would have seen the warning sign, and would have appreciated the warning it carried. However the judge noted that it was not too surprising to find people arriving for work deep in conversation with fellow employees or other visitors, and not paying full attention to the most prominent of notices. Accordingly, the court would not in this case interfere with the judge's assessment on contributory negligence."

30. In the case under review, the step constituted an obstruction. The learned trial judge was correct in finding that it posed a danger. The fact that the appellant carried out a remodeling exercise subsequent to the respondent's fall makes it obvious that it was aware that the step posed a substantial risk to all persons who lawfully traversed its building. A clear inference can be drawn that the step was dangerous. There ought to have been evidence from the appellant to establish that the surface of the step or its height was of such a nature that in the ordinary course of things, the respondent, or any other visitor, would not have slipped and fallen on it. It was for the appellant to have shown that there were no obvious or latent defects in the step. This it failed to do. The learned trial judge's findings that the short step was dangerous and the appellant's

subsequent replacement of it by a ramp with rails is not without merit. I see no reason to interfere with these findings.

31. The question whether the appellant's display of the warning sign from the roof, at a height of 6 feet from the ground, was sufficient to discharge the appellant from its duty of care remains to be determined. The respondent said that she had not seen the sign. The sign hung from the roof at a distance of 6 feet from the ground. Could it be said that it was prominently displayed so that the attention of everyone who entered the appellant's building would have been drawn to it? I think not. Although the sign was suspended 6 feet from the ground, this does not mean that it would have been observed by everyone. It can reasonably be inferred that, in order to view the sign, persons may have been required to look up and therefore, it was not obviously visible to all who entered the building. It could be accepted that the respondent had not seen it. The sign had not been adequately displayed. There is no doubt that the appellant failed to discharge its duty of care to the respondent.

32. The foregoing notwithstanding, a further question is whether in all the circumstances, it could be said that the respondent contributed to her injury. The learned judge's finding that the step was dangerous to visitors, who were not aware of it, seemed to have partly influenced his imposing full liability on the appellant. It appears to me that he included the respondent among the visitors who were unaware of the existence of the step. Although the step posed a danger to the respondent and she had not seen the sign, there were several other factors which the learned trial judge ought to have considered. The step was used by the respondent earlier that very

day of the mishap. As a consequence, she would have known of its presence. There was evidence from the appellant's witness that there had been no accident prior to the date of the unfortunate event. This, however, does not necessarily mean that there was not some degree of negligence on the part of the appellant. The fact that the respondent had travelled over the step prior to her fall was a most compelling factor. This the learned trial judge ought to have taken into account. It is an important determinative factor as to whether the respondent could be said to have been contributorily negligent.

33. A claimant who seeks to impose liability on a defendant by way of negligence is obliged to take reasonable care for his own safety by keeping a good lookout. In **Davies v Swan Motor Co. Ltd.** [1949] All E.R. 620 at page 631 Lord Denning said:

> "When a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe to a motorist who is going at an excessive speed any duty to avoid being run down. Nevertheless, if he does not keep a good lookout, he is guilty of contributory negligence. The real question is not whether the plaintiff was neglecting some legal duty, but whether he was acting as a responsible man and with responsible care: see per ATKIN, L.J., in ***Ellerman Lines v Grayson*** (3) ([1919] 2 K.B. 535), approved by the House of Lords ([1920] A.C. 475-7), and ***Caswell v Powell Duffryn Associated Collieries*** (2) ([1939] 3 All E.R. 730)."

It is my view that the respondent had not kept a good lookout. She ought to have known that she should have taken care for her safety, having passed over that step previously on that eventful day. She ought reasonably to have foreseen that if she did

not pay attention as she travelled over the step on a second occasion on the day of the accident, she might have injured herself on it. Some degree of fault must be attributed to her. In all the circumstances, the injury sustained by her was partly due to her negligence. She, being contributorily negligent, is 50% responsible for her injury.

34. I would allow the appeal in part. The matter is remitted to the Supreme Court for an assessment of damages. I would award one half of the costs of the appeal to the appellant.

DUKHARAN, J.A. (Ag.)

I agree.

SMITH, J.A.

ORDER

The appeal is allowed in part. The matter is remitted to the Supreme Court for an assessment of damages. One half of the costs of the appeal is awarded to the appellant.