BARBADOS.

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Jurisdiction

No. 1445 of 2004

BETWEEN:

HAZELL VAUGHAN ***Plaintiff***

AND

NATIONAL SPORTS COUNCIL ***Defendant***

Before the Honourable Madam Justice Elneth O. Kentish, Judge of the High Court.

2006: June 26, 27

2007: April 24

Mr. John Forde for the Plaintiff.

Mr. Rudolph Greenidge for the Defendant.

JUDGMENT

Nature of Action

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This is an action in which Hazell Vaughan ('Ms. Vaughan') the plaintiff, is claiming damages in negligence

against the National Sports Council ('the Council') the defendant, for personal injuries sustained by her when she fell on the premises of the Council. The Council has denied any liability to Ms. Vaughan.

The Parties

[2] Ms. Vaughan was at the time of her fall employed by the Council as a clerical officer. She had been so employed since July 1999.

[3] The Council is a statutory corporation incorporated under the National Sports Council Act Cap. 48A of the Laws of Barbados. Its principal place of business is located at Blenheim, My Lord's Hill in the parish of St. Michael ("the premises").

The Issues

[4] For determination by the court are three issues:

(i) is the Council liable in negligence to Ms. Vaughan for the injuries she sustained in the fall?

(ii) if so, can the Council avoid liability by relying on the doctrine volenti non fit injuria? and

(iii) if not, what is the quantum of damages to which Ms. Vaughan is entitled as compensation for those injuries?

The Facts

[5] The facts are quite simple. On 4 October 2001, Ms. Vaughan was at work. Between 2.45 p.m. and 3.00 p.m. on that day she left her desk to get an item from her car which was parked in the car park on the Council's premises. She left the building by the main entrance and as she was descending the steps leading thereto she slipped on one of those steps falling on the step before the last on her right side on her buttocks and back.

[6] It had been raining moderately to heavily on that day. The steps were uncovered and although at the time of the incident it was not raining, the steps were still wet.

Undisputed facts

[7] In its defence the Council made no admission of any of the allegations contained in the plaintiff's statement of claim except those relating to the address of Ms. Vaughan and the location of its principal place of business, placing on Mr. Vaughan the burden to strictly prove those allegations.

[8] Nonetheless at the trial it was common ground that:

(i) rain had indeed fallen on that day;

(ii) Ms. Vaughan did fall on the steps;

(iii) the steps were wet at the time of her fall;

(iv) immediately after the fall she was lifted back into the foyer of the office by two members of the Council's ancillary staff who put her to sit in a chair from where she was taken by ambulance to FMH Emergency Medical Associates ("FMH");

(v) a staff member accompanied her in the ambulance;

(vi) Ms. Eunice Greaves, Senior Executive officer of the Council followed the ambulance in her car; and

(vii) at FMH she was treated with an injection for pain by Dr. Harold Watson, given medication and sick leave.

[9] From these undisputed facts, I am satisfied that Ms. Vaughan slipped and fell as she descended the wet steps leading to and from the Council's main entrance and suffered personal injuries as a result. The real issue therefore is the liability of the Council for those injuries. And I will now deal with that issue.

Liability in Negligence

[10] It is trite law that in order to succeed on this claim Ms. Vaughan must establish that (i) the Council owed her a duty of care; (ii) there was a breach of that duty by the Council and (iii) the personal injuries she sustained resulted from that breach. (See **Donoghue v Stevenson [1932] A.C. 562)**

The nature and scope of that duty of care is compendiously described by the learned authors of **Clerk & Lindsell On Torts (18th ed.) at para. 7-217** thus:

> "The standard of an employer's duty towards his employee is to see that reasonable care is taken; the scope of that duty extends to the provision of safe fellow-employees, safe equipment, safe place of work *and access to it*, and a safe system of work." [Emphasis added].

[11] (See also **Wilsons and Clyde Coal Co. v English [1938] A.C. 57)** Although that duty of care is expounded under four distinct heads, that exposition is a matter of mere convenience and there is but one simple duty.

[12] In this case there was no dispute as to whether the Council owed Ms. Vaughan a duty of care as Counsel for the Council, Mr. Rudolph Greenidge readily conceded that the Council owed a duty of care to both visitors and employees to ensure that its premises were reasonably safe for persons using those premises.

Was there a breach of duty of care?

[13] Mr. John Forde, Counsel for Ms. Vaughan argued that the Council breached its duty of care to Ms. Vaughan. To establish that breach, he relied on the uncontroverted evidence before the court that at the time of Ms. Vaughan's fall the steps were wet from the rain which had fallen earlier that day; that no steps had been taken by the Council to have the water removed from the steps or to place thereon adequate signs such as "Caution: wet/slippery floor" warning of the potential danger; and the absence of a hand rail in the middle of the steps to facilitate the safe descent of the steps especially in rainy conditions.

[14] Counsel further relied on the admissions of Ms. Greaves in cross-examination that:

(a) One Kathy-Harper Hall an employee of the defendant had fallen on the steps. In this regard it must be noted that Ms. Greaves had earlier stated in evidence in chief that in her 19 years of employment with the Council, no one had fallen on the steps;

(b) the tiles on the steps were red clay tiles which became slippery when wet;

(c) the steps were still wet after Ms. Vaughan's fall; and

(d) the steps would not have been swept of the excess water before Ms. Vaughan's fall.

[15] Notwithstanding these admissions Ms. Greaves did not agree with Mr. Forde's suggestion that the slippery nature of the tiles when combined with the absence of a hand rail created a dangerous condition on the steps.

[16] In response, Mr. Greenidge contended that Ms. Vaughan knew that when rain falls the steps are wet and by choosing to walk down the steps, wearing a pair of slippers she virtually assumed the risk and was solely responsible for her fall.

[17] Now, it is the testimony of Ms. Vaughan that she was in the habit of wearing shoes to work and changing into the slippers to wear around the office. This testimony was not challenged and it was not suggested to Ms. Vaughan that she had been warned about wearing the slippers.

[18] In cross-examination, Ms. Vaughan described the slippers thus:

> "the slippers have a strap across the toes and you push your
> feet in. The slipper strap is as wide as an index finger that is
> about 2½".

[19] On the other hand in her evidence in chief, Ms. Greaves in relation to the

slippers stated:

> "I saw the slippers she was wearing. It was just a push-in slipper with a strap across the instep. It was not what is called a Dr. Scholls sandal".

[20] That is the only description of the slippers. It is wholly insufficient to allow for any finding to be made that the wearing of the slippers was in any way responsible for Ms. Vaughan's fall. And I do not so find.

[21] As to choosing to walk down the wet steps, Ms. Vaughan did not accept the suggestion of Mr. Greenidge that she could have used an alternative route to get to her car. In any event, the real issue is not whether Ms. Vaughan could, or ought to, have used an alternative route to the car, but whether the Council breached its duty to provide a safe access to, and exit from, the building for all persons.

[22] I would also add that the emphasis placed by Mr. Greenidge upon the fact that Ms. Vaughan was the only person using those wet steps that day to fall, is entirely misplaced. That no one else fell cannot and does not establish a culpable disregard by Ms. Vaughan for her own safety in using the steps.

[23] But it is also the contention of Mr. Greenidge that the Council is entitled by way of defence to rely on the maxim volenti non fit injuria, that is, that Ms. Vaughan with full personal knowledge of the risk of injury involved in using the steps, impliedly consented to accept any such risk. (See para. 5 of the defence filed 1 November 2004).

[24] The term 'volenti non fit injuria' is defined in the text **Clerk and Lindsell (op. cit) at para. 3-72** as:

> "a voluntary agreement by the claimant to absolve the defendant from the legal consequences of an unreasonable risk of harm created by the defendant, where the claimant has full knowledge of both the nature and extent of the risk."

[25] For the defence to succeed the Council must establish three elements:

first, an agreement by Ms. Vaughan to waive her claim against the Council;

second, that this agreement was made voluntarily without any coercion from the Council; and

third, Ms. Vaughan had full knowledge of the nature and extent of the risk.

[26] Failure by the Council to establish on a balance of probability any one of those three elements would be detrimental to the success of the defence.

[27] It is clear from the learning that it is not easy to establish the defence in the context of an employer/employee relationship. (See **Clarke and Lindsell (supra) at para 3-80).** In the case of **Bowater v Rowley Regis [1944] K.B. 476 at p 480** Goddard L.J. in the Court of Appeal observed that:

> "The maxim volenti non fit injuria is one which in the case of master and servant is to be applied with *extreme caution.* Indeed, I would say that it can hardly ever be applicable where the act to which the servant is said to be volens arises out of his ordinary duty, unless the work for which he is employed as one in which danger is necessarily involved."

Further, the learned authors of **Clerk and Lindsell (supra)** point out that

> "knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. *Nothing will suffice short of an agreement to waive any claim for negligence". (Emphasis added).*

And in **Wooldridge v Summer [1963] 2 Q.B. 43 at 69 Diplock L.J.** quoted with approval the words of Lord Macdermott in **Kelly v Farrans Ltd [1954] N.I. 41 that**

> "The consent that is relevant is not consent to risk of injury but *consent to the lack of reasonable care that may produce that risk and requires on the part of the plaintiff at the time at which he give his consent full knowledge of the nature and extent of the risk that he ran." (Emphasis added).*

[28] Thus it is equally clear that the agreement whether express or implied must precede the defendant's act of negligence. The authors of **Clerk and Lindsell** further point out that "the claimant's decision to run a known risk which has already been created by the defendant's negligence could not constitute volenti" (See para. 3-75).

[29] Counsel for the plaintiff, Mr. John Forde cited **Nettleship v Weston [1971] 2 Q.B. 691,** a case where the plea of volenti failed because the requirement of an agreement to waive a right of action was not satisfied.

[30] So the question is whether the Council has established on the state of the evidence that Ms. Vaughan either impliedly or explicitly agreed to waive her right of action in negligence against the Council prior to falling on the step.

[31] In cross-examination of the plaintiff Counsel for the Council did not seek any time to elicit from the plaintiff any agreement on her part to waive her claim in negligence against the Council.

[32] His cross-examination of Ms. Vaughan was in the main directed at establishing that Ms. Vaughan was, as he put it, "the author of her own misfortune" in that the day of the incident was not the first time she had walked down the steps after it had rained; that other workers had walked up and down the steps and all around her that same day and none of them fell; that the steps were swept and cleaned almost daily; that in coming down the stairs, she could have asked the ancillary staff who were standing against the rail at the side of the steps to move to allow her to pass using that rail or she could have used an alternative route to get to her car; that her fall resulted from a combination of her wearing slippers (and not the shoes she had worn to work) and the fact that rain had fallen; that the slippers had a strap 2½" wide across the toes in which she pushed her feet, and she put on the slippers voluntarily and walked down the steps voluntarily.

[33] In support of its case, the Council called Eunice Greaves its Senior Executive officer to give evidence on its behalf.

[34] In her evidence in chief no testimony was lead from this witness to establish an agreement between the Council and Ms. Vaughan to waive her right of action in negligence against the Council. Her testimony in chief was limited to the following matters: the role she played after receipt of the report of the fall, primarily in arranging for Ms. Vaughan to receive medical attention at FMH; a description of the steps having on both sides a built up wall of clear decorative blocks with a concrete top; the sweeping and power 'hozing' of the steps on an almost daily basis by one of the general workers; a description of the slippers worn by Ms. Vaughan; her (Ms. Greaves)

use of the steps when it rains heavily when she would try to hold on to the wall at the side of the steps and step cautiously; and the fact that since the date of the accident there is now a hand rail installed in the centre of the steps.

[35] It seems to me that the defendant fell very short in the evidence required to establish that Ms. Vaughan in fact agreed either impliedly or expressly to waive her claim in negligence against the Council. In fact this critical issue was not addressed.

[36] The approach taken by Counsel for the Council was simply that Ms. Vaughan had full knowledge of the slippery nature of the steps when wet and must be taken to have assumed the risk of injury or put another way, consented to the Council's breach of duty of care to her.

[37] In this case, there is no evidence before me on which I can find that Ms. Vaughan prior to her fall impliedly or expressly so consented.

[38] I therefore find that the Council has failed to establish the plea of volenti

non fit injuria and is liable in damages to Ms. Vaughan for the injuries

she sustained.

[39] Mr. Greenidge further submitted that the allegation in the statement of claim Ms. Vaughan fell "whilst in the course of her duties" on the Council's premises was not established and that the case ought not to have been brought in negligence but under the Occupiers Liability Act Cap. 208.

[40] The testimony of Ms. Vaughan is that she was going to get an item from her car when she fell. No evidence was e