COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2006/CLE/gen/FP/00034

BETWEEN

PHILIP HEPBURN

Plaintiff

AND

HUTCHISON LUCAYA LIMITED

Defendant

BEFORE	The Honourable Mrs Justice Estelle Gray-Evans
APPEARANCES:	Mr Jacy Whittaker and Mrs A. Kenra Parris-Whittaker for the Plaintiff Mr Dwayne Fernander for the Defendant
HEARING DATES:	2012: 25 and 26 June
SUBMISSIONS:	2012: 3, 10 and 17 August 2012

JUDGMENT

Evans, J

1. This is a claim for damages for personal injuries which the plaintiff alleges he suffered as a result of a slip and fall accident on 5 December 2003 at the defendant's property in Freeport, Grand Bahama.

2. The plaintiff commenced this action by a generally endorsed writ of summons on 6 March 2006 in which he claimed damages "caused as a result of negligence on the part of the defendant resulting in a slip and fall accident on 5 December 2003 at the Westin, Our Lucaya at Lucaya, Grand Bahama". In his statement of claim filed 4 July 2006, the plaintiff claimed that while a lawful visitor of the defendant he slipped, falling backwards onto the walkway causing him to strike his head, back, elbows and wrist. In addition to giving particulars of his injuries, the plaintiff also gave the following particulars of negligence on the part of the defendant:

(1) Failing to take any or any reasonable care to see that the plaintiff would be reasonably safe in using the premises as a lawful visitor.

(2) Failing to ensure or failing to take any steps to ensure that the said walkway was safe for pedestrian traffic or otherwise.

(3) Failing to warn the plaintiff either by itself or through its servants, agents or otherwise, that the said walkway was dangerous to walk on as it was wet and when wet could become slippery.

(4) Failing to affix a sign to the walkway that the same was slippery when wet.

(5) Failing to institute or enforce any or any adequate system for the inspection and cleaning of the walkway.

3. In his amended statement of claim filed 18 May 2011 the plaintiff amended the aforesaid particulars of negligence by deleting the references to "wet" in paragraphs (3) and (4) and by deleting paragraph (5) in its entirety, so that the particulars of negligence on which the plaintiff relied at trial were as follows:

(1) Failing to take any or any reasonable care to see that the plaintiff would be reasonably safe in using the premises as a lawful visitor.

(2) Failing to ensure or failing to take any steps to ensure that the said walkway was safe for pedestrian traffic or otherwise.

(3) Failing to warn the plaintiff either by itself or through its servants, agents or otherwise, that the said walkway was dangerous to walk on as it was slippery.

(4) Failing to affix a sign to the walkway that the same was slippery. -

4. At the commencement of this action, the plaintiff was 51 years old and employed as a Production Supervisor at Polymers.

5. The defendant, who, at the material time, traded as The Westin & Sheraton at Our Lucaya Beach & Golf Resort ("Our Lucaya Resort"), denies liability on the basis that the plaintiff failed to observe the presence of water on the walkway due to the rain and alleges that the plaintiff's fall was caused wholly or in part by his own negligence. The defendant gave the following particulars of contributory negligence on the part of the plaintiff:

(1) Failing to look where he was going;

(2) Failing to keep any or any proper look-out while walking on the walkway;

(3) Failing to observe or pay heed to presence of water on the walkway due to rain

6. The parties agreed that the trial before me would be on the issue of liability alone and if I found for the plaintiff, then the matter would be referred to the Registrar for an assessment of damages.

7. The issues for determination now are, therefore, as follows:

(1) Whether the plaintiff's fall was caused as a result of the negligence of the defendant? And if so,

(2) Whether there was contributory negligence on the part of the plaintiff?

8. The evidence on behalf of the plaintiff was provided by the plaintiff, his wife, Michelle, their daughter, Meaghan and his brother-in-law, Rocklyn Alexander Barbes (under subpoena). Henry Williams, Arabella Roker and Kimmit Williams gave evidence on behalf of the defendant. Expert evidence was given by Maxwell Henry Quant on behalf of the plaintiff and Philip T. English on behalf of the defendant.

9. All of the witnesses, except for Mr Barbes, provided witness statements and all were cross examined at the trial.

10. The evidence on behalf of the plaintiff is that at about 7:00 p.m. on the evening of 5 December 2003, the plaintiff, his wife, their daughter and two sons went to the Willy Broadleaf Restaurant at the Our Lucaya Resort for dinner. It was not raining as they made their way from the defendant's parking lot along the walkway between Manor House and Breakers Cay to the restaurant. After dinner, they left the restaurant and headed to their vehicle, using the same route as they had taken earlier to the restaurant. The plaintiff's wife was ahead of the group. The plaintiff, carrying his 3-year old toddler in his arms, was a few feet behind his wife and the couple's daughter and older son followed the plaintiff. When the plaintiff reached the area of the pro shop, between Breakers Cay and the Manor House, he slipped and fell. He was assisted up by his family and two tourists who were passing by, and who, the plaintiff says witnessed the

incident. According to the plaintiff, at least two other persons, Nadine McBride and Pauline Boodle, witnessed the incident.

11. The plaintiff says once he was assisted up, he and his family continued to their vehicle. However, because of the pain he was experiencing he decided to return to the hotel to report the incident. He was referred to Ms Arabella Roker, one of the defendant's security officers, to whom he gave the following statement which, I have recorded verbatim:

> "On Friday, 5th December 2003 my family and I was at Willy Broad Leaf for dinner. After dinner and on our way to the parking lot via the walk way between Breakers Cay and the Manor House. When we got to the underpass in the area of the pro shop it was wet because it was raining. My feet slip from under me causing me to fall backwards. I was holding my three year old son. As I fell I held him to my chest as a result of this I landed on my back hitting my elbows, I also hurt my right wrist to the ground because he hit the ground after my elbow hit. My son fell but he do not appears to be hurt at this time. Two guests that was passing came to help me up but my wife and my son help me up. Two lady that were in the front of the Manor House saw when I fell and they came over to see if me and the baby was alright. There Nadine and Pauline. At this time my wrist, my back and both elbows are hurting. This happen around 9:20 pm.
>
> The rain had started at the time of the incident."

12. In his witness statement filed 17 May 2012, the plaintiff says that when he gave the aforesaid statement to Ms Roker he advised her that the floor was slippery and she advised him that if he decided to be examined by a doctor that he should bring the bills to the security booth at the hotel and that the hotel would deal with it from there. He said his impression was that once he brought the bills to the security booth, he would be reimbursed as it appeared that that was a system "they had in place".

13. The plaintiff alleges that his accident was caused as a result of the defendant's failure to warn guests of the resort that the floor was slippery and their failure to change the flooring due to its slippery nature.

14. Under cross examination the plaintiff admitted that he had visited the Willy Broadleaf Restaurant at the Our Lucaya Resort on several occasions before the day of the accident and that he had used the walkway between Breakers Cay and Manor House on such occasions. Notwithstanding his statements to Ms Roker that the walkway was "wet because it was raining" and "the rain had started at the time of the incident", the plaintiff insisted that it was not raining at the time he slipped and fell. He said he was certain that it was not raining because both of his children are asthmatic and he would not have taken them out in the rain. The plaintiff denied

counsel's suggestion that he was walking quickly because it was raining. He also denied passing a caution sign in the walkway or that he was distracted by his son in his arms.

15. The plaintiff agreed that his recollection of the incident would have been clearer in 2003 when he made the aforesaid statement to Ms Roker, than in 2011 when he gave the witness statement filed herein. He also agreed that he was given the opportunity to read over the statement which he had given to Ms Roker and to make corrections thereto and that it was he that added the last sentence: "the rain had started at the time of the incident". The plaintiff said that when he made the statement that the walkway was wet, he thought that it was wet because it was so slippery.

16. In her witness statement filed 17 May 2012, Mrs Hepburn said that she heard a "thump" and her daughter screaming "daddy you alright"? She said she looked back and saw the plaintiff on the ground on his back with their son on top of his stomach. She said the plaintiff was eventually assisted to his feet and they walked to the car. However, he went back to the hotel to report the incident before they left. Mrs Hepburn said that when they arrived it was not raining and they made their way leisurely to the restaurant. Under cross examination she said she could not recall if it was raining when they left the restaurant. However, she recalled that it was not raining at the time of the accident.

17. In response to counsel for the defendant's question as to whether there was anything dangerous on the walkway, Mrs Hepburn said "no". On re-examination, in response to counsel for the plaintiff's question as to what she thought counsel for the defendant meant when he asked her whether there was anything dangerous on the walkway, Mrs Hepburn said she thought it meant "if there was [sic] any obstacles in the way; whether it was wet or slippery." Then, in response to another question as to whether she would consider the walkway to have been slippery, Mrs Hepburn responded: "the walkway was a tad bit slippery".

18. The plaintiff's daughter, Ms Jolly, said that she was directly behind the plaintiff when the accident occurred. She saw him fall and she, too, thought the walkway was slippery. Under cross examination, in response to counsel for the defendant's question as to whether she found any of the conditions of the walkway to be dangerous, Miss Jolly said "I mean it is slippery". She said that she did not "think" that the walkway was also wet and in response to counsel's follow-up question: "You don't think so"? Miss Jolly said: "It wasn't wet". In response to counsel for the defendant's suggestion that it was wet and it was raining, Miss Jolly said that "it may have rained afterwards". She too denied that there were caution signs. She also denied that there was water on the walkway when she and her family were returning from the restaurant to their vehicle.

19. Rocklyn Alexander Barbes is the brother-in-law of the plaintiff and a former employee of the defendant, for whom he had worked during the period 1987 to 2004. His last position was Director of Engineering Project Manager. As indicated he gave evidence as a result of having been subpoenaed by the plaintiff's counsel.

20. Mr Barbes said that at the request of counsel for the plaintiff, he visited the Our Lucaya Resort, along with several other persons, a few months prior to the trial. He said that they were looking specifically at the walkway between Manor House and the restaurant, which, to the best of his recollection, was pretty much the same as it was when he left in 2004. He said that the type of surface used on the walkway is commonly referred to as a steel finish – "kind of slick". He said that while he worked as Director of Engineering he had received reports, "nothing serious", from his staff members that they had slipped and fallen down; that such reports were never written up; that "they/we", meaning management at the hotel, had discussed "that area" several times; that he knew that the defendant had contacted one Mr. Leo LeBlanc and they had talked about etching and chipping the surface. He said that there was even a suggestion to put in a board walk because the area flooded when it rained.

21. Mr Barbes said that he knew that the surface in another area on the defendant's property, around the [uncovered] circle, had the same finish and that something was done about that but for esthetic reasons he "guessed" the defendant, did not want to do the boardwalk. He said he had brought the matter up with management, but "at the end of the day the decision was made not to do anything".

22. Under cross examination, Mr Barbes said he never saw anyone slip in the area. He agreed that there were various grades of surfaces at the resort, although, in his opinion, the surface between Breakers Cay and Manor House could be slippery "as it is similar to walking on stainless steel".

23. Ms Arabella Roker, who was at the time of the incident employed by the defendant as a security officer, confirmed having taken the aforesaid statement from the plaintiff on the night of the incident. Her evidence is that after writing the statement, she gave the plaintiff an opportunity to read the same "to ensure that it reflected what he wanted to say." She said that after he had finished reading the statement, he signed it, then added the words "The rain had started at the time of the accident". She said he initialed the additional statement and she signed below his initials.

24. According to Ms Roker, when she prepared the defendant's standard accident/incident report used by the Risk Management Department, she included in that report under "other remarks" that "the subject further stated when asked if it was raining at the time, that it was not

raining at the time of the incident". Ms Roker said she recalled that the plaintiff seemed very unsure as to whether or not it was already raining, or had just begun to rain, at the time of the incident.

25. Ms Roker said that as part of her investigation, she interviewed the doorman, Kimmit Williams as to whether or not it was raining at the time of the alleged slip and fall and he confirmed to her that it was raining and that the plaintiff had in fact asked for an umbrella so that he could get his vehicle from the parking lot at Light House Pointe. (The plaintiff denied this). Ms Roker said she also interviewed Ms. Boodle, who confirmed that she had witnessed the incident and that it had just started to rain at the time of the incident.

26. Under cross examination Ms Roker said that she did not inspect the area immediately because at the time she took the plaintiff's statement it was raining. She said that the plaintiff asked Mr Williams for an umbrella after he had given the report.

27. At the time of the incident Mr. Kimmit Williams was employed by the defendant as a Bellman and is still so employed. In his witness statement filed 16 May 2012 he stated, inter alia:

> (1) I do recall that sometime in early December 2003, an incident involving a gentleman whom I came to know as Philip Hepburn occurred on the premises of the Resort. I was on the evening shift at the Resort and stationed at the front entrance to the Manor House. I cannot recall the particular time of the alleged incident but it was in the night and sometime between 8 pm and 10:00 pm. I do recall seeing Mr. Hepburn getting up on his feet. He had a little child in his hand. I would say maybe a 2 or 3 year old.
>
> (2) After he got up, he started towards me saying words to the effect that he had just fallen down on the floor. He also went on to say that the floor was wet and that we needed to do something about this. He stated that he had his child in his hands and had to protect the child from falling. He kept on saying you all have to fix this, referring to the floor.
>
> (3) After he was finished talking about the walkway, he asked me for an umbrella because he said that he had to go and get his car from the parking lot.
>
> (4) The walkway where the incident occurred is a covered walkway. I have worked at the Manor House for many years and do not ever recall the surface of the walkway between the Manor House and Breaker's Cay being resurfaced. The only work that has been done to the area to my knowledge is the addition of a gate between the walkways, railings and routine cleaning by the maintenance workers.
>
> (5) The Resort has strict policies that we are governed by as Bellmen. This policy includes the requirement that we must put out caution signs whenever it is brought to our attention that there is water or liquid substance on the covered walkways or in the event there is rain. Once we put out the caution signs, the Maintenance Department is notified and they would clean the area up in the

case of spills. In the case of rain getting onto the covered walkways, there is nothing that Maintenance could do until after the rain has subsided.

(6) As there was rain on the particular night, caution signs would have been placed on the walkway. To the best of my knowledge the policy is always adhered to by my colleagues and me.

28. Under cross examination, and in response to counsel for the plaintiff's question whether the strict policy to put up caution signs is because the walkway is slippery or gets slipperier when wet, Mr. Williams said "*yes*". However, he said he was not aware of employees falling in the area. He said that when it rained on the night in question the caution signs "were already out" and once the signs were out, they were left out until the surface dried. Mr. Williams said that Mr. Hepburn asked him for umbrella before he gave his statement to Ms. Roker.

29. Mr. Henry Williams, Director of Risk Management at the Grand Lucayan Resort, a position he also held in 2003, and whose responsibilities include the overall responsibility for guest and staff safety and protection of company assets, in his witness statement filed 4 May 2012 stated, inter alia:

(1) As the Director of Risk Management, I would be aware of any reports of incidents on the Resort's property. In particular, it would be brought to my attention if there was a slip and fall on the premises. I am aware of the incident alleged by Mr. Philip Hepburn as the same was brought to my attention at the material time. In addition, after the alleged slip and fall, I also visited the site the following day of the accident.

(2) The walkway that Mr. Hepburn allegedly slipped on is a covered walkway. There is a roof over this walkway to avoid excess water to rest on the walkway during periods of heavy rain.

(3) In terms of the safety, the Resort's policy is to treat it no differently from an ordinary floor. Hence, measures have been put in place to caution visitors to the property to take proper care for their own safety while using the property. As a matter of policy, the Resort deploys caution signage whenever there is a spill on these walkways or after it rains. These signs would caution users of the walkways that the walkway may become slippery when wet.

(4) In addition, the Resort has a cleaning policy in that employees clean the area every day. This may well occur twice a day depending on conditions.

(5) Finally, there have been thousands of visitors who have used the same walkway that Mr. Hepburn allegedly slipped on. These visitors have used the same walkway when it was dry and during the rain and there is not a reported case of a slip and fall prior to the time of Mr. Hepburn's alleged incident to my knowledge.

30. Under cross examination Mr Williams said that he would be aware of any accidents that may have been reported, even in cases where the person making the complaint declined to give an official report. However, there were none.

31. Maxwell Henry Quant, a licensed general contractor with 45 years of construction experience in Grand Bahama, provided the following "independent opinion":

> "June 19, 2012
>
> Philip Hepburn
> Freeport, Grand Bahama
> Bahamas
>
> Dear Mr. Hepburn
>
> On your instructions, you and I visited Our Lucaya Hotel premises to give an opinion on the safety and hazard of a walkway between the Manor House and the Grand Lucayan Hotel, Freeport, Grand Bahama. It is the opinion of Noula Investments Limited that the walkway is very dangerous for pedestrians to walk on because of the type of finish that is known as a trowel or steel finish. A steel finish is the smoothest concrete floor finish which can be very slippery when dry or wet.
>
> It is always a coded practice in the construction industry that a light broom finish in high pedestrian walkway is recommended. In the United States and Europe, the practice of steel finish on bridges and high public traffic areas were discontinued because of the high risk of accidents and deaths.
>
> This area as outlined in our previous paragraph must be approach [sic] with extreme caution and care.
>
> If you require additional information, please do not hesitate to contact the undersigned.
>
> Sincerely
> Noula Investments Ltd.
>
> Maxwell Quant
> President."

32. Under cross examination, Mr. Quant said that he had visited the locus in quo and found that the walkway in question was a steel finish that had a dye which gave it a colorful look. He noticed that there was a handicap ramp and that the smooth surface did not contain a "brooming or non-slip" finish so the surface "becomes very slippery; that it does not have to "be wet or moist sometimes where they use the type of dye." He said that he considered the surface

dangerous because it was such a smooth finish and any type of moisture would cause a tendency to slip.

33. Mr. Quant conceded that the covered walkway "may have allowed the surface to be considered a reasonable surface and slip free", although he did not think the covering had anything to do with the type of concrete that would prevent slippage. He said a "broomed" finish would prevent the walkway from being dangerous. However, in his view, the surface that the plaintiff slipped and fell on did not have brooming or adhesive. According to Mr Quant, since 2003 there have been some changes in relation to finish. He said that the 2010 amendments to the Grand Bahama Port Authority Limited's building code, "signifies and stresses" [sic] that all the walkways must be broom finish. However, Mr Quant accepted that the surface complied with the minimum requirements per the 2003 building code, although he did not think that a minimum requirement should have been used on a walkway that has as much traffic as the walkway in question.

34. Mr. Philip English, a Chartered Civil Engineer, gave evidence as the expert witness on behalf of the defendant and he provided the following report:

> Graham, Thompson & Co
>
> P. O. Box F-42451
> Freeport, Grand Bahama
>
> Attention: Dwayne E. Fernander, Esq.
>
> ***Dear Sirs***
>
> Re: Radisson Grand Lucayan Resort
>
> Inspection of the Public Footpaths at The Manor House
>
> Under instruction from yourselves, I inspected the walkways around the Manor House at the Radisson Grand Lucayan Resort; all to determine if they meet industry safety standards and for the particular reason that an Action has been commenced by a Mr. Philip Hepburn against Hutchison Lucaya Limited in relation to his alleged slip and fall on the evening of the 5th December 2003.
>
> I was invited because of my background as a structural/civil engineer with over thirty years structural design and construction experience in Freeport – see my attached curriculum vitae.
>
> While I am unable to determine the state of the surface of the walkway in 2003, I have been advised by Mr. Henry Williams, the Director of Security, that the Resort was officially opened with the existing footpaths in place sometime in the year 2000 and that they have not been resurfaced. This means that the walkway area in question would have

been in existence for three years at the time of the alleged incident of almost nine years ago. Mr. Williams informed me that thousands of guests have traversed these walkways without incident.

My visual inspection of the surface and the surroundings of the footpath show that it has an acceptable non-slip finish, that it is covered by a wooden roof with overhangs and that it is higher than the adjacent landscape. For clarity, please find attached a photograph taken by myself at the apparent location.

I am hereby able to state categorically that all of the walkways around the Manor House are built well within industry safety standards.

Yours faithfully

Philip T. English P.D, C. Eng.

35. During his viva voce testimony, Mr English said that based on what he saw when he inspected the walkway, the surface on which the plaintiff allegedly fell was a wooden float finish – a non-slip finish – and not a steel float finish as opined by Mr Quant.

36. Under cross examination, Mr English said that the wooden float finish on the defendant's premises is a smooth finish, but not like the steel trowel. According to Mr English, the walkway at the Our Lucaya Resort in 2003 would have been in compliance with the building and sanitary code then in use and which controlled the quality of the work carried out in the area covered by the code. The building code at the time was the Grand Bahama Port Authority Building and Sanitary Code.

37. In his opinion, the walkway is acceptable although he said it has been worn down because of the heavy traffic and is a "bit smoother" than it would have been in 2003.

38. It is accepted that for a claim in negligence to succeed, the plaintiff must establish that the defendant owed him a duty of care; that the defendant breached that duty; that the defendant's breach resulted in the plaintiff's injuries and/or damage and that the damage suffered by the plaintiff was reasonably foreseeable. Donoghue v Stevenson [1932] A.C. 532 and Caparo Industries Plc v Dickman [1990] 1 All ER 568.

39. Alderson, B. in the case of Blyth v Birmingham Waterworks (1856)11 Exc 781, 784 defined "negligence" as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent man and reasonable man would not do."

40. In determining whether or not a duty exists, courts apply the three-fold test laid down by the House of Lords in the case of Caparo Industries plc v Dickman [1990] UKHL 2, that is: (1) the harm must be reasonably foreseeable as a result of the defendant's conduct; (2) the parties

must be in a relationship of proximity; and (3) it must be fair, just and reasonable to impose liability.

41. Gilbert Kodilinye in Commonwealth Caribbean Tort Law, 3rd edition, at page 64 states that there are a number of common situations in which it is well established that a duty of care exists. One such situation is that of the occupier of premises and invitees or lawful visitors to such premises.

42. The duty of care owed by occupiers to lawful visitors was described by Willes J in the case of Indermaur v Dames (1866) L.R. 1 C.P. 274 as the common law duty to use reasonable care to prevent damage to persons from an unusual danger of which the occupier knows or ought to know. -

43. The occupier's duty is not absolute. See Cox v Chan [1991] BHS J 110 where Sawyer, J (as she then was) said at paragraph 21:

> "...it is clear from the decided cases, including Indermaur v. Dames, that the duty of care which a person like the defendant owes to a person like the plaintiff is not an absolute duty to prevent any damage to the plaintiff but is a lesser one of using reasonable care to prevent damage to the plaintiff from an unusual danger of which the defendant knew or ought to have known and, I may add, of which the plaintiff did not know or of which he could not have been aware. If it were otherwise then the slightest alleged breach of such a duty would lead to litigation and could, perhaps, hamper the progress of quite lawful and needful businesses."

44. As to what constitutes an "unusual danger", Lord Porter in the case of London Graving Dock Co Ltd v Horton [1951] 2 All ER 1:

> "I am not conscious that it has been stated in plain terms, but it is noticeable that what is declared to be the duty is, not to prevent unusual danger, but to prevent damage from unusual danger. It is in this consideration, as I think, that notice or knowledge becomes important. Either may prevent damage, though the unusual danger admittedly exists...I think "unusual" is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises."

45. The defendant admits that the plaintiff was a lawful visitor to the defendant's premises and on the plaintiff's evidence, I find that the plaintiff was a regular invitee of the defendant, having visited the Willy Broadleaf Restaurant on several occasions prior to the date of the accident.

46. Further, I find that as an invitee to the defendant's premises, the plaintiff was owed by the defendant the common law duty to use reasonable care to prevent damage to the plaintiff from any unusual danger on the defendant's property of which the defendant knew or ought to have known. The plaintiff also had a duty to use reasonable care for his own safety.

47. The plaintiff's case as originally pleaded was that the surface of the walkway on the defendant's property between Breakers Cay and Manor House, where he slipped and fell, was "dangerous to walk on when wet", because when wet "the walkway could become slippery". However, by the date of the trial, the plaintiff had, with leave, amended his statement of claim to allege simply that the "walkway was dangerous to walk on as it was slippery".

48. The defendant denies the allegation of negligence and avers that the plaintiff's negligence was the cause of his accident in that the plaintiff failed to observe or to pay heed to the presence of rain water on the walkway. The defendant therefore contends that the plaintiff was liable for his own accident and the resulting injuries and/or damage.

49. Counsel for the defendant in his closing submissions, submitted that in determining the issue of liability this Court must determine whether the plaintiff slipped and fell on the defendant's property because the walkway had become wet by reason of rainfall as he had originally pleaded or whether the plaintiff slipped and fell because the surface of the walkway was constructed with a finish that was overly smooth, creating an unusual danger which the defendant knew about or ought to have known about and did nothing to prevent the plaintiff's accident.

50. Counsel for the plaintiff, in his submissions in reply, disagreed. Indeed, he accused counsel for the defendant of misunderstanding the plaintiff's case. According to counsel for the plaintiff, the plaintiff's case is not about whether it was raining or not. Rather counsel submits, the plaintiff's case is twofold: firstly, he slipped and fell at the defendant's premises; and secondly, he was injured as a result of the fall.

51. It is clear from the authorities that the duty of care owed by an occupier of premises is not absolute and that not every accident that happens on premises is caused by the negligence of the owner or occupier, his servants or agents. Consequently, it is not enough, in my view, for a plaintiff invitee to say to a defendant occupier: "I slipped and fell on your premises and injured myself, therefore, you are liable in negligence." The plaintiff must show that having taken all reasonable care himself to prevent the accident, he nevertheless slipped and fell as a result of the defendant's negligence.

52. In this case, the plaintiff, in his amended statement of claim, alleges that the walkway between Breakers Cay and Manor House on the defendant's property was slippery, and it was

the slipperiness of the walkway that caused him to slip and fall. Further, that the defendant was aware that the surface of the walkway was dangerous, but failed to take steps to prevent the plaintiff's accident.

53. I have found that the plaintiff was a regular visitor of the defendant – having, on his evidence, along with his family, visited the Willy Broadleaf Restaurant on several occasions previously. There is no evidence that the plaintiff or any member of his family had any problems with the walkway on any of the other occasions they visited the property.

54. On the night of the accident, the plaintiff and his family made their way to the restaurant without incident. After dinner, they all left together. This time, however, the plaintiff was carrying his toddler in his arms. The toddler weighed about 35 pounds. There was no evidence that the plaintiff had carried his son into the restaurant nor is there any indication why he was carrying him in his arms when they left. Neither the plaintiff's wife nor any of the other two children slipped and fell, but the plaintiff did.

55. I do not doubt that he fell. The fact of his fall was confirmed by his wife and daughter and is not disputed by the defendant. According to the plaintiff, the accident was also witnessed by several other persons, including one Ms Pauline Boodle, who was interviewed by Ms Roker on the night of the accident. However, except for the plaintiff's wife and daughter, none of the other persons was called by the plaintiff to give evidence.

56. According to Ms Roker, Ms Boodle confirmed to her that she had witnessed the incident and that it had just started to rain at the time of the incident. Added to that bit of evidence is the plaintiff's account of the incident given to Ms Roker shortly thereafter. It is the most contemporaneous record of the accident.

57. In that account, the plaintiff is recorded as having said while recounting the events leading up the incident, that "it was wet because it was raining" and the plaintiff admits that after reading over the statement and making and initialing corrections thereto, he added, in his own handwriting: "The rain had started at the time of the accident." Although I can understand the plaintiff believing the surface was wet because it was slippery, no reasonable explanation was given why he thought it necessary to add that last statement if the rain had not in fact started. Perhaps the plaintiff wanted to ensure that Ms Roker and/or the defendant appreciated that the area on which he had slipped and fell was actually wet. Further, according to Mr Kimmit Williams, the plaintiff also told him that the floor was wet and that they had to "do something about this" and "to fix this", referring to the floor.

58. Under cross examination the plaintiff said that notwithstanding the statements he made to Ms Roker in 2003 that the walkway was wet and that it had started raining at the time of the

incident; and notwithstanding his apparent instructions to his attorneys in 2006 when this action commenced that the walkway was wet, he somehow realized in 2011 when preparing his witness statement for this trial that the walkway was, in fact, not wet but that it was so slippery that he thought it was wet. It is unclear how or when the plaintiff was able to ascertain that the walkway was merely slippery – not wet. There is no evidence that after reporting the incident to Ms Roker the plaintiff went back and inspected the area and discovered that it was not wet, merely slippery. Indeed, Ms Roker's evidence is that she did not go to the area immediately after taking the plaintiff's statement because it was raining.

59. Further, although no mention was made by Mrs Hepburn or Ms Jolly in their respective witness statements as to the condition of the walkway, during re-examination Mrs Hepburn said that the walkway was a "tad bit slippery" while Ms Jolly, under cross examination, said that the walkway was slippery. Mr Kimmit Williams, also said that the walkway was slippery while Mr Barbes' evidence was that the surface on the walkway was "commonly referred to as a steel finish, kind of slick"; that the surface "can be slippery" as "it is similar to walking on stainless steel". I note here, however, that when looking at one of the recent photographs of the area in question, taken shortly before the trial, Mr Barbes commented: "according to this photograph, it doesn't appear to be" steel finish.

60. The experts also weighed in. They disagreed on the type of flooring on the walkway. Mr Quant for the plaintiff said it was a steel finish while Mr English for the defendant was of the view that it was a "wooden float finish". Mr Quant was of the opinion that the walkway is "very, very dangerous", while Mr English's view was that it was an "acceptable non-slip finish". Admitting that he was unable to determine the state of the surface in 2003, Mr English opined that, because of the wear and tear over the years, the walkway was probably safer in 2003 than in April 2012 when he inspected it.

61. Although none of the experts was present at the time of the accident and, therefore, able to say what the actual state of the walkway was in 2003, the objective evidence on which they agreed is that the walkway was constructed within the then existing building code and complied with industry standards.

62. So assuming that the walkway was not wet, but yet slippery, the question then is whether the walkway was an unusual danger of which the defendant knew or ought to have known and, therefore, ought to have taken reasonable steps to prevent the plaintiff from slipping and falling.

63. As I said the plaintiff and his family were regular visitors to the defendant's premises. None of them had slipped and fallen on those occasions. Further, they used the same walkway

earlier in the evening without incident and, except for the plaintiff, none of them had any problems when they left.

64. Moreover, the evidence is that prior to the plaintiff's accident, the only "reports" of slips and fall which were alleged to have been made were supposedly made by fellow employees to Mr Barbes, the plaintiff's brother-in-law, while he was employed by the defendant. But even Mr Barbes says that those alleged reports were "nothing serious" and were never "written up" and he admitted that he had never seen anyone slip and fall in the area.

65. On the other hand, Mr Henry Williams, the defendant's Director of Risk Management, a position he held in 2003 and at the date of trial, and whose responsibilities included responsibility for guest and staff safety, says that had any reports of slips and fall incidents on the defendant's property been made, he would have been aware of them. His evidence is that thousands of visitors have used that same walkway when it was dry as well as during the rain and, to his knowledge, there were no reported cases of a slip and fall prior to the time of Mr. Hepburn's incident. Additionally, although Mr Kimmit Williams was also of the view that the walkway was slippery, he too admitted that he had never seen anyone slip and fall thereon.

66. In the circumstances, I am unable to find that the walkway between Breakers Cay and Manor House where the plaintiff fell was, per se, an unusual danger.

67. Although, the plaintiff says the walkway was not wet, because of the evidence I went on to consider whether if the walkway was wet, an unusual danger existed at the time and if so whether the plaintiff used reasonable care to prevent the plaintiff's accident.

68. Rainfall is not an uncommon occurrence in The Bahamas. Indeed, the evidence is that it did rain in the area of the Our Lucaya Resort on the evening of 5 December 2003. The disagreement appears to be over the time that it rained.

69. So, assuming that it rained while the plaintiff and his family were having dinner or the rain had started at the time of the incident and that as a result the walkway was wet and assuming further, although not deciding that the walkway was wet and was an unusual danger, the question then is whether or not the defendant used reasonable care to ensure that its premises were reasonably safe for the purpose for which it was to be used. In this case, guests moving between Breakers Cay and Manor House.

70. It is common ground that the walkway is covered. Although Mr Quant expressed the view that "any type of moisture [on the walkway] would cause a tendency to slip", under cross examination, he agreed that the covered walkway "may" have allowed the surface to be considered a reasonable surface and slip free.

71. Moreover, the defendant's evidence, which I accept, is its policy is to put out caution signs whenever it becomes aware that there is water or liquid substance on the covered walkways or in the event there is rain and to have the area cleaned as soon as possible thereafter. Mr Kimmit Williams' evidence is that to the best of his knowledge the defendant's policy in that regard is always adhered to by him and his colleagues. Mr Williams' evidence is that on the day of the accident, the signs were already out when he arrived at work at three o'clock that afternoon, although he could not recall when the rain had started. The plaintiff's witness, Mr Barbes, also confirmed that the defendant did indeed have a policy of putting out caution signs in the event of liquids on the walkway.

72. The plaintiff and his daughter denied seeing the caution signs.

73. However, in my view, even if the defendant had not put out the caution signs, I agree with counsel for the defendant that water on the walkway by reason of rain would have been open and obvious to the plaintiff who, as I have found, was a regular invitee to the defendant's premises, and who had a duty to use reasonable care for his own safety. In that regard, I note here that the plaintiff was carrying his 3-year old toddler in his arms. So, if as the plaintiff reported to Ms Roker, the rain had started at the time of the accident, and bearing in mind the plaintiff's evidence that his children are asthmatic, it is probable, as suggested by counsel for the defendant, that the plaintiff may have been moving quickly to get out of, or to avoid, the rain, and in doing so he did not use reasonable care for his own safety, resulting in him slipping and falling.

74. In any event, I am not satisfied that the plaintiff has, on a balance of probabilities, proven that there was negligence or breach of duty on the part of the defendants.

75. So, having regard to the evidence as a whole, I find that the plaintiff has failed to prove that his slip and fall accident and resulting injuries were caused by the negligence of the defendant and I dismiss the plaintiff's claim with costs to the defendant, to be taxed if not agreed.

Delivered this 7th.day of December A.D. 2012

Estelle G. Gray Evans

Justice