COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 67 of 2021

B E T W E E N

TYSON STRACHAN

Appellant

AND

ALBANY RESORT OPERATOR LTD

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Jones, JA

APPEARANCES: **Ms. Yvette Rahming, with Ms. Gabrielle Rahming, Counsel for the Appellant**
Ms Giahna Soles-Hunt, with Mr. Glenn Curry, Counsel for the Respondent

DATES: **31 March 2022; 11 August 2022**

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Civil Appeal – Negligence – No Case to Answer – Whether the Judge Properly Upheld the No Case Submission - Res Ipsa Loquitur - The Applicable Burden of Proof

The appellant was employed as a House Keeping Supervisor with the respondent company. On 11 April 2013, he slipped and fell on a wet floor and suffered injuries while at the respondents' premises. The respondent severed the appellant's service and made the required statutory payments to him. The appellant began an action against the respondent for general damages for negligence and special damages. During the trial the respondent made submissions that the appellant did not prove his case sufficiently to have the respondent call its witnesses in rebuttal. The judge put the respondent to its election not to call its witnesses. The judge dismissed the action. The appellant now appeals against the decision on numerous grounds inter alia, that the learned judge "erred in law in not considering and/or incorrectly applying the common law standard of negligence which requires the employer to take reasonable care for the servant's safety in all circumstances and to so carry on his operations as not to subject those employed to unnecessary risk … erred in law by placing a higher burden of proof on the Plaintiff beyond the standard preponderance of the evidence, erred in fact and law in placing the sole burden and responsibility on the Plaintiff, as the employee, to check for potential hazards, lack of signage, lack of preventative measures … erred in fact and law in failing to hold the Defendant, as the employer at all responsible for checking for potential hazards, lack of signage, lack of

preventative measures … erred in law by failing to consider the concept of res ipsa loquitur. The court heard the appeal and reserved its decision.

Held: appeal dismissed; the judgment in the court below affirmed. Costs to the respondent to be taxed if not agreed.

The court amalgamated the appellant's grounds of appeal to the question "Whether the trial judge properly upheld the respondent's no case submission having regard to the appellants' burden of proving to the standard required to establish the respondent's alleged negligence?"

The test of whether a submission of no case to answer succeeds in a civil case is whether the claimant has met the burden of proof to the required standard. There was no expert evidence to support the appellant's claims of injuries, although witness statements were available.

The judge (in the court below) took the view that the appellant had failed to establish the required elements of negligence in this case. The appellant is required to prove a breach of duty and that the breach caused reasonably foreseeable injuries. The judge ruled they did not prove the essential ingredients of negligence on the evidence at the trial and the court does not see where she was plainly wrong or that her conclusions were not based on the evidence before her.

The statement of claim failed to set out the injuries, and the appellant led no evidence to prove the injury. There was no medical evidence to prove that there was an injury or that the injury was because of negligence by the respondent. Also, there was no evidence that the respondent did not have a safe system of work. Bearing in mind that it is for the appellant to prove there was a foreseeable risk and the respondent did not have the required system in place to safeguard his employees from injury.

Res ipsa loquitur describes evidence from which one can draw an inference of negligence. The appellant failed to establish the required elements of negligence needed to establish his case on a balance of probabilities. In those circumstances, there is no evidence from which the court can draw the inference of negligence. Application of res ipsa loquitur would not have made a difference and the appellant's claim would fail.

Bennett v Chemical Construction (G.B.) Ltd. [1971] 1 W.L.R. 1571
Dawndenzza Sands v Hutchison Lucaya Limited SCCivApp. No. 201 of 2016
Miller v Cawley [2002] EWCA Civ 1100
Wilsons and Clyde Coal Company Limited v English [1937] UKHL J0719-325

J U D G M E N T

Judgment delivered by The Honourable Mr. Justice Jones, JA:

I. INTRODUCTION

1. This is an appeal against the decision of Bowe-Darville J, ("the judge") in the Supreme Court where she dismissed an action for negligence by Tyson Strachan ("the plaintiff/appellant") against Albany Resort Operator Limited ("the defendant/respondent") with costs to the defendant/respondent. The dismissal arose out of a submission by the respondent that the appellant did not prove his case sufficiently to have the respondent call its witnesses in rebuttal. The judge put the respondent to its election not to call its witnesses prior to the dismissal.

II. THE STATEMENT OF CLAIM AND THE APPELLANT'S EVIDENCE

2. From the appellant's Statement of Claim, the respondent employed him on 9 September 2010, as a House Keeping Supervisor. On 11 April 2013, the appellant, while at the respondents' premises, slipped and fell on a wet floor and suffered injuries while lifting bags with towels and walking near the toddler's pool into the pool attendants' area. They took him to the hospital, and he received treatment. They placed him on extended sick leave with pay. On 2 December 2013, the respondent severed the appellant's service after making the required statutory payments to the appellant.

3. On 13 April 2015, the Appellant began an action against the Respondent for general damages for negligence and special damages in the sum of $99,196.00. The claim for negligence was that the defendant/respondent:

    a) failed to ensure that the premises were reasonably safe for its visitors, resulting in the Plaintiff sustaining injuries and damages.

    b) failed to erect adequate warning signs showing that the indoor tiled area was wet.

    c) failed to ensure that they kept the indoor tiled area adequately dried and suitable for use by its visitors.

    d) failed to within sufficient time erect or place any wet surface warning signs to avoid the Plaintiff slipping and falling.

4. The appellant claimed that because of the respondent's negligence, he sustained injuries to his neck and back and suffered loss and damage. The appellant also claimed that he received several injuries, whereas:

a) He could not move for hours because of severe pains in his back and neck because of his slip and fall;

b) They admitted him to Doctors Hospital for six (6) Days under doctor's supervision;

c) He underwent physiotherapy for three months and after all conservative treatments failed;

d) He underwent Cervical Laminectomy at C4 to C7 and Lumbar Decompression at L3-L4;

e) He requires physiotherapy for two years for his continued healing.

5. In addition to the negligence and injuries claimed, the appellant asserted that they unfairly disengaged him from his employment whilst on sick leave from his job.

6. At the trial on 7 October 2019, counsel for the appellant called the appellant and his witness, Mr. Eric Tai. The appellant in his evidence in chief said that they employed him at Albany Resort as a Housekeeping Supervisor. Sometime around 6:30 a.m. he was at Albany Resort doing his duties, which comprised lifting a stack of pool towels. These were the Albany standard of thirty (30) folded towels in a bag. This was in the Pool Attendants' and Pool Managers' area. In order to keep the glass door open, he placed a bag of towels on the ground. He placed five bags in the Pool Attendant's area. He then removed the bag used to keep the glass door open. As he walked from the outdoor pool tiled area onto the indoor tiled area, suddenly he slipped and fell on the wet tiles. He said he believed water wet the tiles. His legs went into the air and his head, neck and lower back hit the tiled floor with force. He could not see clearly after and could not move. He could recognize voices as people spoke.

7. He said that he did not see any wet floor notices or signs in that area and was unaware that the floor was wet. He said that he did not contribute to his accident, and he experienced severe pains and could not move for hours.

8. While on the floor, he said that Desmond Dorsette approached him and enquired if he was alright. He told him he had no sensation in his legs. They later transported him to Doctors Hospital for treatment. Dr. Winston Phillips treated him for six days and then discharged him. He underwent physiotherapy for three (3) months but still had limited movement in his neck and had severe pain. They gave him time off from his duties at work because of his injuries. He had an MRI scan, which established that various discs in his neck and back were protruding on his nerves. He said he consulted Dr. Magnus Ekedede, and he recommended surgery.

9. In February 2014, he recalled going to see Mrs. Donella Bodie the Human Resource Manager at Albany. During the meeting, she gave him a severance letter effective 2 December 2013. They did not give him a reason for his termination, but gave him a

severance cheque for the amount of nine thousand six hundred and seven dollars and eight cents ($9,607.08).

10. On 18 March 2014, he underwent two surgeries, one to his neck and the other to his lower back, which were performed by Dr. Magnus at Doctors Hospital. Afterward, he underwent two years of physiotherapy. Because of this slip and fall, he said he still has pain and he now uses special pillows in order to sleep.

11. The appellant denied responsibility for his slip and fall and the resulting injuries. He says he was unaware that the tiles were pressure washed. There were no notices or signs showing that the area was wet. He says in his evidence that Albany Resorts was at fault for his slip and fall, which resulted in his injuries and his wrongful termination.

12. His witness, Eric Tai, gave evidence for the appellant. They also employed him at Albany Resort as a Receiving Clerk. His evidence was that on 11 April 2013, he was near the pool bar and noticed people looking at someone on the ground. He went closer and noticed that it was the appellant Tyson Strachan, the Housekeeping Supervisor at Albany Resort, who was lying on the ground near the doorway of the pool office. He appeared to have pool towels on top of him while he was on the ground.

13. He said that the appellant did not appear to be moving and appeared to be dazed. He went to assist him and noticed that the ground appeared to be wet. However, the usual "wet floor" signs were not there. The appellant appeared to be conscious, but was not moving. An ambulance arrived and took the appellant to the hospital.

14. The appellant had two other witnesses, Ms. Kayla Stuart Pratt and his expert medical witness, Dr. Magnus Ekedede. They did not appear after being given an adjournment for that purpose. Counsel for the appellant closed the appellant's case without the evidence of the absent witnesses.

III. THE RESPONDENTS' SUBMISSION OF NO CASE

15. From the evidence before the court, counsel for the respondent at trial submitted to the judge that there was no case to answer as the appellant failed to prove negligence and any resulting injury and/or damages. On 8 October 2020, the judge dismissed the appellant's case with costs to the respondent. We set out the respondents' submissions that were before the judge in the court below.

16. Counsel for the respondent at trial placed the burden of proof on the appellant. He said that the rules of evidence and procedure limit the appellant to proving his pleaded case. He argues that the appellant's Statement of Claim places his claim in negligence, or as an employer's or occupier's liability.

17. Counsel for the respondent submitted to the judge below that the appellant must allege facts in his pleadings that, if proven, would establish liability for negligence by the Defendant, including the causal connection between that negligence and the injury suffered. The

respondent submitted to the judge that the appellant did neither. The respondent referred the judge to a passage in **Clerk & Lindsell on Torts (19th Edition, 2006, Sweet & Maxwell)** where the learned authors said in paragraph 8-04.

> **"Requirements of the tort of negligence There are four requirements, namely:**
>
> **(1) The existence in law of a duty of care situation, i.e. one in which the law attaches liability to carelessness. There has to be recognition by the law that the careless infliction of the kind of damage in question on the class of person to which the claimant belongs is actionable;**
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> **(2) Breach of the duty of care by the defendant, i.e. that he failed to measure up to the standard set by law;**
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> **(3) A causal connection between the defendant's careless conduct and the damage, and;**
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> **(4) That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote."**

18. Counsel for the respondent told the judge that they did not take issue with the existence of the duty of care, i.e. that it owed the appellant a duty of care. They conceded they had to exercise reasonable care to create and maintain a safe system of work and ensure that the premises were reasonably safe for its visitors, including employees, such as the appellant. However, they were of the view that they did not have a strict duty to ensure that its employees did not slip and fall on wet floors. Rather, the appellant's duty on the job was to exercise reasonable care to ensure that its employees did not slip and fall on wet floors.

19. The court had to consider, however, whether the respondent breached the duty owed to the appellant as an employee. Counsel for the respondent argued that the Statement of Claim simply states, in paragraph 2, that Mr. Strachan **"slip (sic) and fell on the wet tiles"** in the area in question and then states that the fall resulted from the Defendant's negligence. He submitted that the "negligence" described in the Statement of Claim is simply an assortment of claims that the respondent failed to keep the area safe, dry up the floor, post wet floor signs, etc. These points, Counsel for the respondent submitted, did not establish a breach of duty and ultimately a sustainable claim for negligence.

20. Counsel for the respondent at trial submitted that there was no allegation of how the tiles came to be wet or who should rectify it. They argue it is not enough for the Plaintiff to say that the Defendant was careless in not drying the floor or posting signage, and rely on his statement that the floor was wet and there were no wet floor signs when he fell as proof of negligence. They argued the appellant must plead and prove that the floor was wet, and a hazard to him because the Defendant was careless. Counsel for the respondent also pointed out that the appellant's duties included cleaning the Defendant's premises. This included

cleaning up spills and wet floors, and that the Plaintiff was himself part and parcel of the Defendant's system for dealing with wet floors, etc.

21. In the appellant's evidence before the judge, he said that the housekeeping staff normally dealt with erecting signs and cleaning up spills. He described a system for cleaning up wet floors as soon as they happened.

22. With respect to the evidence of Eric Tai, counsel for the respondent submitted to the judge that it added nothing to the appellant's case. He said Mr Tai was not there when the appellant fell and could not assist the Court regarding where the water came from. Counsel for the respondent submitted that the evidence of the appellant and Eric Tai was contradictory, as the appellant did not say that it rained that day. Tai testified that the entire area was wet and that it rained earlier. There was no evidence that showed that it rained that day.

23. Counsel for the respondent submitted that a necessary requirement in the claim for negligence was a causal connection between the injuries suffered by the appellant and the carelessness of the respondent. Counsel for the respondent argues that has not specified his injuries at all. Under the heading **"Particulars of Injuries",** the Statement of Claim says that the appellant could not move for hours because of severe pain, that they took him to hospital and that he was admitted for six days, then underwent physiotherapy and eventually surgery. Nowhere is it said what injuries he actually sustained. Counsel for the respondent argues that the appellant's evidence does not establish a causal connection between the claimed negligence of the respondent and his injuries. In addition, he argued that the judge could not reasonably assess whether the damage was foreseeable if the damage itself is not pleaded.

24. Finally, the appellant's decision not to call any medical evidence leaves the judge unable to determine whether the Plaintiff suffered any injuries at all, or, if he pleaded injuries, whether they proved them. Without that evidence, the judge below could not award any relief to the Plaintiff.

25. At the end of the day, counsel for the respondent submitted to the judge that the appellant failed to discharge his burden of proof regarding the elements of his claim in negligence or damages for the injuries he suffered. There is nothing for the Court to consider, as there is no case to answer.

IV. THE APPEAL

26. The appellant filed the following grounds of appeal:

> **1) The learned Judge erred in law in not considering and/or incorrectly applying the common law standard of negligence which requires the employer to take reasonable care for the servant's safety in all circumstances and to so carry on his operations as not to subject those employed to unnecessary risk.**

2) The learned Judge erred in law by placing a higher burden of proof on the Plaintiff beyond the standard preponderance of the evidence.

3) The judge erred in fact and law in placing the sole burden and responsibility on the Plaintiff, as the employee, to check for potential hazards, lack of signage, lack of preventative measures.

4) The judge erred in fact and law in failing to hold the Defendant, as the employer at all responsible for checking for potential hazards, lack of signage, lack of preventative measures.

5) The learned Judge erred in law by failing to consider the concept of res ipsa loquitur.

6) The learned Judge erred in law by failing to consider the non-delegable statutory duty an employer owes to every employee.

7) The learned Judge erred in law by failing to draw an adverse inference against the Defendant when they elected not to call on any witnesses.

8) The learned Judge erred in fact in ruling that the Defendant discredited the Plaintiff's witness and failing to consider the fact that his oral testimony was consistent with that of his Report given at the time immediately following the accident, while he was employed.

9) The learned Judge erred in law in finding that the Plaintiff's witness had to be present and see the slip and fall take place to add value to the Plaintiff's case.

10) The learned Judge erred in fact and law in making a finding of no case to answer and failing to consider both the written and oral evidence put forth by the Plaintiff.

11) The learned Judge erred in law, ruling in favour of the Defendant's no case submission and not finding that the no case submission must fail.

12) The learned Judge erred in law in failing to find that because the Defendant had elected not to bring evidence, the Defendant's evidential burden was not met.

13) The learned Judge's overall conduct of the trial and finding of no case to answer in a case such as this amounts to a serious procedural irregularity.

V. ISSUES:

a) The several grounds of appeal filed by the appellant can be summarised into a single issue. It is this. Whether the trial judge properly upheld the respondent's no case submission having regard to the appellants' burden of proving to the standard required to establish the respondent's alleged negligence?

VI. DISCUSSION

A. Whether the trial judge properly upheld the respondent's no case submission having regard to the appellants' burden of proving to the standard required to establish the respondent's alleged negligence?

27. In this case the respondent elected not to call any evidence in rebuttal of the appellant's case and rested on its submissions. The test of whether a submission of no case to answer succeeds in a civil case is whether the claimant has met the burden of proof to the required standard. The learned authors of Charlesworth & Percy on Negligence 15th Ed. para 6-01 puts it this way.

> **"As in any civil case, the burden of proof in an action for negligence falls upon the claimant to establish the elements of the tort. The standard of proof is the usual standard of the balance of probabilities. It is for the claimant to lead evidence of the facts on which the claim is based. That evidence will consist in facts either proved or admitted, together with expert evidence if appropriate and necessary. At the end of the evidence, questions will arise: (1) whether, on that evidence, negligence may be reasonably inferred; (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred; and (3) whether a causative link is established between any proven negligence and the injury, loss or damage claimed."**

28. Then later at para 6-07.

> **"...The test on a submission is whether there is a case to answer, that is, whether realistically there is no basis upon which a jury, properly directed, could find in favour of the claimant on the evidence adduced."**

29. In **Miller v Cawley** [2002] EWCA Civ 1100 the appellant appealed against the ruling of the judge on a no case to answer submission. The appellant contended that the judge was wrong to put her to election not to call evidence after the no case to answer submission at

the close of the respondent's evidence. The appellant argued the judge should have considered whether the respondent (who had the burden of proof) proved his case on the balance of probabilities and not on the basis of a reasonable prospect of success. Mance LJ (as he then was) said at paragraph 17:

> **"Where a defendant is put to his or her election and elects to call no evidence, the position is quite different. As I said in Boyce at para. 4:**
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> > **"First, where a defendant is put to his election, that is the end of the matter as regards evidence. The judge will not hear any further evidence which might give cause to reconsider findings made on the basis of the claimant's case alone. The case either fails or succeeds, even on appeal."**
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> **18. The issue after an election is, in other words, not whether there was any real or reasonable prospect that the claimant's case might be made out or any case fit to go before a jury or judge of fact. It is the straightforward issue, arising in any trial after all the evidence has been called, whether or not the claimant has established his or her case by the evidence called on the balance of probabilities. [Emphasis added]**

30. The judge made several important observations relating to the respondent's submission of no case answer. In the following paragraphs of her judgment she addressed the appellant's burden of proof and the requirement to prove the case to the civil standard of proof which is on a balance of probabilities. In paragraph 3 she said.

> **"The Plaintiff's Witness statement gives an account of his slip and fall and of his several medical treatments. Neither his Witness Statement nor other examinations referenced his "unfair termination" or the damages claimed. It is only in counsel's submissions that he addresses the unfair dismissal and the fact that the tiles had been recently pressure cleaned. None of this came out in the Plaintiff's witness statement or examination in chief. Regrettably, his evidence, even in cross-examination, was not strong or compelling enough to make a case of negligence. The Plaintiff's one witness did not add any value to his claim as he did not see the slip and fall take place. The Plaintiff had listed two further witnesses both of whom did not show. No medical witness was called. Notably, however, he had his last medical intervention in 2014, more than five (5) years ago. The Plaintiff closed its case at this point."**

31. Then at paragraph 7, 8 and 11 she said.

> **"7. The Plaintiff is under a duty to set out all the particulars/facts of his claim in his pleadings and such must be sufficient to establish negligence on the part of the Defendant. The Plaintiff has failed in this regard. There is no correlation between the negligence complained of, the injuries allegedly sustained, the damages, whether foreseeable or remote, and the amount of the damages claimed. The Court agrees with the Defendant's submission that " ... the allegations set out in the Statement of Claim are not adequately pleaded or particularized or adequately supported by evidence. Further, the facts as set out in the Plaintiff['s] Statement of Facts and Issues are not part of the pleaded case and lack any evidentiary basis". The onus is on the Plaintiff to prove his case."**
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> **"8. The Plaintiff called as his corroborating witness, Eric Tai, his former co worker. He confirmed his witness statement as presented and which did not corroborate the Plaintiff's story in any material particular...Of greater import was the fact that Tai did not witness the slip and fall."**
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> **"11. It was at this point that the Defendant's counsel stood to make a No Case to Answer Submission stating that the Plaintiff had not made out his case as against the Defendant. Counsel was not minded to call any witnesses for the Defence (Witness Statements having been filed). He placed before the Court the Plaintiff's evidence rendered in the trial stating that at no time did the Plaintiff prove the Defendant's negligence. He said the evidence presented did not meet the civil standard being on the balance of probability.**

32. And in paragraph 19, she concluded.

> **19"Sadly, there was no evidence which could be advanced to supplement or make the Plaintiff's case. The evidence led was inexcusably inadequate and insufficient to discharge the burden of proof necessary to make out a claim of negligence. The Court is satisfied that the Plaintiff has not discharged his burden of proof. He has not presented evidence sufficient to prove the alleged negligence nor did he call evidence in support of his claim for damages. No medical evidence was adduced it substantiate the injuries sustained, prognosis or his inability to work. Having regard to the evidence of the two Plaintiff**

> **witnesses the Court upholds the Defendant's submission of no case to answer."**

33. Counsel for the appellant submitted, the judge was wrong to rule that there was no case to answer as the appellant established the respondent fell below the standard of a reasonable employer. They argue that there was sufficient evidence before the court showing that the appellant sustained his injuries because of the respondent's negligence and that such injuries were foreseeable.

34. We note there was no expert evidence to support the appellant's claims of injuries, although witness statements were available, and the court granted (on the request of the appellant) an adjournment to have the witnesses appear. The judge said in paragraph 9 and 10 of her ruling.

> **"9. At the conclusion of the first hearing day, counsel for the Plaintiff advised the court that he had two more witnesses to call Dr Magnus Ekedede and Ms K. Stuart Pratt. Unfortunately, neither witness was available on the hearing date. They requested Dr Magnus to attend and Ms Stuart Pratt was off the island. The Court afforded counsel an opportunity to call his witnesses, whom he said were important to his case. They adjourned the matter to 22nd November 2019.**
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> **10. On the return date, counsel for the Plaintiff informed the Court that witnesses were not available and that he closed his case without adducing further evidence."**

35. From the case management orders made by Charles J, prior to trial, the witnesses, including the expert, Dr. Magnus Ekedede were required to give evidence at the trial. At paragraph 2 of the Case Management Order it provides:

> **2. Both Parties are to file and serve witness statements for witnesses who will be called to give evidence at the trial on or before the 31st day of October, A.D., 2018. The Plaintiff will call four (4) witnesses including an expert witness and the Defendant will call two (2) witnesses. The report of the Expert Witness will stand as evidence in chief. If the Plaintiff does not comply with this paragraph, then the action may be dismissed with costs awarded to the Defendant. If the Defendant does not comply with this paragraph, then the Defendant may be precluded from filing any witness statements. [Emphasis added]**

36. The judge did not allow the witness statements to be admitted in the absence of cross-examination, nor was there an application by the appellant to treat the expert evidence in the witness statement of Dr. Magnus Ekedede as hearsay evidence. First, it seems to us that

the absent witnesses were in breach of the Case Management Order requiring their attendance at the trial. Second, the appellant failed to comply with the condition on which the judge granted the adjournment, which was to have Dr. Magnus Ekedede and Ms K. Stuart Pratt attend the hearing. **RSC 1978 O.38, r 34** provides.

> **"(1) Except with the leave of the Court or where all parties agree, no expert evidence may be adduced at the trial or hearing of any cause or matter unless the party seeking to adduce the evidence has applied to the Court to determine whether a direction should be given under rule 35, 36, or 39 (whichever is appropriate) and has complied with any direction given on the application". [Emphasis added]**

37. The judge refused to admit the witness statements of Dr Magnus Ekedede and Ms K. Stuart Pratt into evidence in the absence of the witnesses attendance.

38. From the evidence before the judge, she took the view the appellant failed to establish the required elements of negligence in this case. Although the respondent concedes it owed the appellant a duty of care as an employer, he is required to prove a breach of that duty and that the breach caused reasonably foreseeable injuries. The judge ruled they did not prove the essential ingredients of negligence on the evidence at the trial and we do not see where she was plainly wrong or that her conclusions were not based on the evidence before her.

39. In **Dawndenzza Sands v Hutchison Lucaya Limited** SCCivApp. No. 201 of 2016 this court said that an appellate court should be slow to interfere with findings of fact made by a trial judge. Isaacs J.A in delivering the judgment of the court said.

> **"As a matter of first principle it must be remembered that appellate courts are slow to interfere with findings of fact by the trial judge. In John Hanna v Imperial Life Assurance of Canada [2007] UKPC 29 the Privy Council held that the question which an appellate court should ask itself is whether there was no evidence to support the conclusion reached by the judge in the court below. In Messier-Dowty Inc. v Bahamasair Holdings Limited SCCivApp. No. 307 of 2014 I had set out the courts' approach to interfering with a judge's finding of fact at paragraphs 17 to 19:**
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> > **"The appellant invited us to enter into consideration of the facts of the case contrary to the usual approach of an appellate court not to interfere with a trial judge's findings of facts. Mr. Evans submitted that the Chief Justice had failed to utilize the opportunity he had to hear and observe the witnesses as they gave their evidence and thereby arrived at wrong conclusions on**

the facts. He referred us to the dictum of Lord Thankerton in Watt v. Thomas [1947] 1 All ER 582 at 587 where the learned Judge stated:

> **"The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that the court has not taken advantage of his having seen and heard the witness, and the matter will then become at large for the appellate court."**

As Conteh, JA stated recently in Beulah Rahming v The Mailboat Company Limited SCCivApp & CAIS No. 54 of 2015, ".. as an appellate Court, we do not easily or readily interfere with the findings of facts of a trial judge, unless he went plainly wrong or arrived at a conclusion not warranted by the facts and the applicable law.") At paragraph 56 of Rahming (supra) Conteh, JA referred to "Beacon Insurance Company Ltd v. Maharaj Bookstore Ltd. [2014] UKPC 21; 84 WIR (2014), 478, where the Privy Council stated generally for guidance on the role of an appellate court and its interference with findings of facts by judge at first instance"; and Lord Thankerton's dicta in Watt v. Thomas (supra)."

40. First, the statement of claim failed to set out the injuries, and the appellant led no evidence to prove the injury. In the note to O.18 r.12 on Negligence in **Supreme Court Practice (1985)** the following passage appears.

> **"Particulars must always be given in the pleading, showing in what respects the defendant was negligent. The statement of claim 'ought to state the (acts, upon which the supposed duty is founded, and the duty to the plaintiff with breach of which the defendant is charged" (per Willes J in Gautret v. Egerton (1867 L.R. 2 C:.P. 371, cited with approval by Lord Alverstone CJ in West Rand Central Gold Mining Co. v. R. _ 1905 2 K.B.391,and page 400; The Kanawha 1913 108 L.T. 433). Then should follow the allegation of the precise breach of that duty of which the plaintiff complains, and, lastly, particulars of the injury and damage sustained."**

41. Second, there was no medical evidence to prove that there was an injury or that the injury was because of negligence by the respondent. Third, there was no evidence that the respondent did not have a safe system of work. Bearing in mind that it is for the appellant

to prove there was a foreseeable risk and the respondent did not have the required system in place to safeguard his employees from injury.

42. In an alternative submission counsel for the appellant argued, the judge made an error in drawing an adverse inference against the appellant as opposed to the respondent for closing their case without calling its witnesses after a no case submission. Here is what the judge said at paragraph 18 of the said Ruling.

> **"An adverse inference could be drawn from the fact that the Plaintiff had failed to call witnesses whose evidence would have bolstered his case. Benham drew on the pronouncement of Brooke Li in the leading judgment in Wisnieswski v Central Manchester Health Authority ([19871 PIQR p 324 - Unreported) and adopted the principles set out therein.**
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> **"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.**
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> **(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.**
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> **(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.**
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> **(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."**

43. The judge considered adverse inferences but found in paragraph 19 of her ruling that there was **"no evidence which could be advanced to supplement or make the plaintiff's case"**. In addition, the judge found the absence of the respondent's witnesses explained, as they were required to close their case without calling evidence after submitting that there was no case to answer.

44. Counsel for the appellant submits the judge minimised the duty owed by the respondent to the appellant in concluding that the appellant had the sole responsibility as an employee of "the checking of potential hazards, lack of signage, lack of preventative measures". Counsel for the appellant referred us to the statement of Lord Wright in **Wilsons and Clyde Coal**

Company Limited v English [1937] UKHL J0719-325 where he describes the employer's duty towards the employee as **"a duty which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen..."**

45. The judge made the following findings in paragraph 6 of her ruling.

> **"The Plaintiff poses several questions as to the Defendant's liability. Considering the Plaintiffs expressed responsibilities and his knowledge of the working environment and protocols, he cannot assert that the Defendant should have recognized a dangerous wet floor and to remove the potential danger. The Plaintiff was not a guest/visitor; he was an employee who, being aware of such potential danger, should have removed the same. The submission raises a new issue of the "pressure cleaning", an issue that was not included in the Witness Statement or moved on cross-examination. It is agreed that injury resulting from a wet tile was foreseeable. However, it was the Plaintiffs responsibility to avert such a danger. Instead he lifted five (5) bags of towels before he slipped. He must have walked across that wet spot at a minimum of eight (8) times before he fell. It is true that the wet tile hazard could have been eliminated, the checking of potential hazards, lack of signage, lack of preventative measures etc. all fall squarely on the Plaintiff as an employee of the Defendant (servant or agent) who had that responsibility to ensure that none of these dangers were present. This presence of water at the Pool attendant's area did not arise from any want of care on the Defendant's part.**

46. The respondent argued the appellant failed to prove that the respondent did not do what was necessary to ensure a safe system of work. It is on the Appellant to provide evidence that there was a foreseeable risk and that the Respondent failed to have protocols in place to ensure a safe system of work. The Respondent hired workers, including the appellant, to prevent any risk or danger emanating from water spillage around the pool area. From the appellant's evidence, he was not aware of persons slipping and falling in the pool area.

1. Res Ipsa Loquitur and its application to the Appellant's Case

47. Res ipsa loquitur describes evidence from which one can draw an inference of negligence. The respondent contended that res ipsa loquitur was not an issue raised in this case. They argue that there was no reason for the court to consider the doctrine, as the appellant did not plead it, nor was it in their submissions. In **Bennett v Chemical Construction (G.B.) Ltd**. 1971] 1 W.L.R. 1571 the UK Court of Appeal held that res ipsa loquitur does not need to be specifically pleaded. In that case, the plaintiff was injured when a panel, being moved by employees of the defendant, fell. The judge held it was not possible to determine exactly what happened, but took the view that it could not have occurred without the defendant's

employees being negligent. The plaintiff did not plead res ipsa loquitur, nor did it appear in the judgment. On appeal, the court held that the case was a classic case of res ipsa loquitur, which was covered by the allegation of negligence in the pleadings. Davies LJ said.

> **"In my view it is not necessary for that doctrine to be pleaded. If the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the defendants, then it is for the defendants to explain and show how the accident could have happened without negligence. The defendants made no attempt to do that in this case. In my judgment this is really a classic case of res ipsa loquitur. Here you have the panel being moved by the defendants' men, and it falls. It should not have fallen. The defendants might, as Edmund Davies L.J. said in the course of the argument, if it were so, have called evidence to show that one or more of the men had a sudden stroke or something of that kind, which no one could foresee. But here the panel fell, and I entirely agree with the judge that it could not possibly have fallen without some apparent negligence on the part of the defendants.**

48. The learned authors of Charlesworth & Percy on Negligence 14th Ed make the following statement on the application of res ipsa loquitur at paragraph 6-53.

> **"Negligence need not be disproved When res ipsa loquitur applies, it is not strictly necessary for the defendant to disprove negligence. It is sufficient for him to neutralise the effect of the presumption, raised by the res. In practice, the difference between neutralising the effect of the prima facie case and disproving the negligence may be so small as to be immaterial. The court has to judge, after all the evidence has been put before it, whether on balance the facts establish that the claimant has proved his case, the burden of which remains at the end, as it was at the beginning, on him to discharge. Where the claimant establishes a prima facie case by relying on the fact of an accident and the defendant adduces no evidence, the inference of negligence is not rebutted. But if evidence is adduced then it has to be evaluated to see if the inference of negligence is still one that should be drawn. If the defendant casts such doubt upon the claimant's account that the inference of negligence is regarded as unsafe, then the claim will fail.**

49. As we said above, the judge took the view that the appellant failed to establish the required elements of negligence needed to establish his case on a balance of probabilities. In those

circumstances, there is no evidence from which the court can draw the inference of negligence. Application of res ipsa loquitur would not have made a difference and the appellant's claim would fail.

VII. CONCLUSION AND DISPOSITION

50. For all the reasons we have set out above, the appellant's grounds of appeal are all without merit and we consequently dismiss his appeal and affirm the judgment in the court below with costs to the respondent to be taxed if not agreed.

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The Honourable Mr. Justice Jones, JA

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The Honourable Mr. Justice Isaacs, JA

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The Honourable Madam Justice Crane-Scott, JA