

**COMMONWEALTH OF THE BAHAMAS**  
**IN THE SUPREME COURT**  
**COMMON LAW AND EQUITY DIVISION**  
**2006/CLE/GEN/00369**

**between**

**BRUCE FREY**  
**First Plaintiff**

**and**

**DALE FREY**  
**Second Plaintiff**

**and**

**POOP DECK LIMITED**  
**Defendant**

**BEFORE:** His Lordship The Honourable  
Mr Justice K Neville Adderley

**APPEARANCES:** Mr Richard L Boodle, Ms Lillith Smith and Ms Julika  
Thompson with him, for the plaintiffs  
Mr Dwight Glinton for the Defendant

**28 May, 18 June, 20 July and 8 October 2009**

**D E C I S I O N**

## **Adderley, J**

The plaintiff aged 62 at the time of the accident and 68 at the date of trial was a tourist visiting The Bahamas with the second plaintiff, his wife, and his son. On 25 November 2005 the day he was scheduled to leave The Bahamas he had lunch at the Poop Deck restaurant located on East Bay Street, Nassau, New Providence. In the process of exiting the restaurant while descending the stairs he fell from the top to the bottom of about 20 flights of stairs. He relies on the maxim *res ipsa loquitur*.

2. His claim is that he fell because he slipped on a clear oily substance at the top of the stairs and suffered injury. He now sues the defendant for negligence. It was agreed that a decision as to liability only would be rendered by the court at this stage.

3. His evidence is that he was leaving the restaurant followed closely by his wife and son. His wife confirmed that he made a free fall such that she feared that he would break his neck. He said he weighed probably in the 280's, 290's, 300 or as much as 325 pounds. She confirmed that she saw a clear substance on the floor after he fell but she avoided it.

4. He received an examination by his doctor at Palm Beach Gardens Hospital after he arrived in the United States and was found to have 6 broken ribs, injury to his spine and neck, and numerous bruises and contusions. His wife stated that he was in Hospital for one month and was unable to sleep properly during that period.

5. The plaintiff said that there were no warning signs. His recollection was that the stairs were made of wood and had no railing. He said that when he returned for this trial he visited the restaurant and found the restaurant had been

remodeled: that the wooden stairway had been replaced with one containing red tiles and a railing had been installed.

6. The acting manager on duty that day, Ms Fredrica Hayling, in her evidence stated that she was informed of the accident and made a report to the owners in line with normal procedure. She said that the stairs were routinely cleaned early in the morning before the restaurant opened, at around 11:00 am after receipt of deliveries which are made in the stairwell area, and again at about 4:00 pm unless before then there was a spill on the floor that needed attention. As a part of her job she regularly checked the bathrooms the floor and the like. They did not, however, keep a written log of when the stairs were cleaned.

7. She stated that while it is possible that during a take-out order a greasy substance could fall out of a bag she had checked several times on the day in question and never saw a greasy substance on the floor and had checked shortly after the accident at the top of the stairs where the accident was said to have occurred and did not see any substance, spills, or liquids on the stairs. She said that the restaurant had, maybe, 10 slips and fall per year. Each year minor renovations are done to the restaurant and since the accident as part of their normal renovations they may have changed a few tiles but the stairs were always tiled and never wood and always had a handrail.

8. Mr Martin Cooper the security officer said he was on the verandah near the kitchen when the accident happened. He saw Mr Frey and his wife coming out of the restaurant laughing and talking as he was descending the stairs. He did not see the fall but he heard the second plaintiff scream. He went there and found the plaintiff lying on the ground at the bottom of the stairs. He helped him up and offered to call an ambulance but the plaintiff refused and so he helped him to his car. The car departed. He had worked there for 3 years and the stairs had always been tiled and there was always a handrail.

9. There was an instructive exchange in cross examination of Mr Cooper by Mr Boodle about the alleged greasy substance on the stairs. The 18 June transcript beginning at page 30 line 16 reads as follows:

- “Q. Now Mr Cooper, did you do an examination of the area after this accident?  
A. Yes I did.  
Q. And what were your findings?  
A. That the steps were as they were before I went up the stairs, which there was nothing on the stairwell.  
Q. Can you be certain of that?  
A. I can guarantee that there was nothing there.  
Q. You ever see people leaving the POOP Deck with carry bags carrying out food?  
A. Yes.  
Q. Don’t you think it is possible that something can drip out of that bag and drip on the stairs? Do you think that is possible?  
A. It is possible, but it didn’t happen.  
Q. Can you be sure.  
A. I can be 100% certain because I walked those stairs prior to the gentleman coming to the restaurant, and I walked those steps prior to him leaving the restaurant.  
Q. And you are 100%?  
A. I am 100%. I am that efficient.”

Mr Cooper worked at the Poop Deck until 2005 and the security company with which he worked ended its contract with the restaurant in 2006, so at the time of the trial he no longer worked at the Poop Deck.

10. This above exchange about the alleged greasy substance is to be contrasted with the cross examination of the plaintiff by Mr Glinton beginning at p.9 line 24 of the 28 May transcript. The exchange went as follows:

- “Q. So you saw the oily substance?  
A. I didn’t know until my feet went out from under me. My feet hit it, I just went down.  
Q. Could you describe the oily substance?

- A. To my knowledge, when I hit the top of the stairs, my feet, it slipped from under me. It was clear. It must have been a grease of some kind or food that was taken out. I didn't go back to examine it because I was at the bottom of the staircase with multiple injuries and just wanted to get to a doctor and get home.
- Q. Did you see this greasy substance before you slipped?
- A. No.
- Q. Well how was it you were able to describe it was a clear substance?
- A. I didn't notice it was not clear. I hit it.
- Q. You hit what?
- A. My feet hit the substance and slid. My heels slid from under me and I went down the stairs.
- Q. Was your wife, who was behind you descending the stairs, did she step on the greasy substance?
- A. No, she didn't step on it and she came--- you know, her main concern was to come to my aid along with my son.
- Q. And your son went down the stairs before you, he did not fall on the greasy substance.
- A. He did not. He did not go before me, he was behind me.
- Q. Mr Frey, there was no greasy substance on the stairs, was there?
- A. Pardon?
- Q. There was no greasy substance on the stairs, was there.
- A. I believe there was"

The second plaintiff had said in her evidence that she did not slip on the oily substance because she saw it and avoided it and it was not there when she entered the restaurant.

## THE LAW

11. In accordance with the general law the burden of proof is on he who asserts unless the burden has been shifted by statute. The burden has not been shifted by statute so the burden is on the plaintiff to prove his case on the balance of probabilities. In ***Ng Chun Pui v Lee Chuen Tat*** [1988] R.T.R. 298 PC Lord Griffiths in delivering the decision of the Judicial Committee (Lord Bridge of Harwich, Lord Fraser of Tullybelton, Lord Griffiths, Lord Ackner and Sir John Stephenson) said this in referring to that personal injury action where *res ipsa loquitur* was pleaded:

“In so far as resort is had to the burden of proof the burden remains at the end of the case as it was at the beginning upon the plaintiff to prove that his injury was caused by the negligence of the defendants.”

12. The familiar principles to prove negligence at common law are set forth in the well known case of *Donoghue v Stevenson* [1932] A C 562: the defendant must owe a duty of care to the plaintiff, must have breached that duty, and the breach must have caused harm that was reasonably foreseeable. It is common ground that the defendant, its servants or agents in the course of their employment owed the plaintiff a duty of care.

13. It was agreed that the first plaintiff was an invitee of the Poop Deck. The common law duty which an occupier owes to an invitee is succinctly summarized in Halsbury’s Laws of England 1912 Edition Volume XXI at paragraph 656 as follows:

“656. The duty of the occupier of premises on which the invitee comes, is to take reasonable care to prevent injury to the latter from unusual dangers which are more or less hidden, of whose existence the occupier is aware or ought to be aware, or, in other words, to have his premises reasonably safe for the use that is to be made of them. If this duty is neglected, an invitee who is injured thereby can recover damages in respect of his injuries...”. See for example *Indermaur v Dames* (1866) L.R. 1 C.P. 274 and *Griffiths v London and North-Western Rail. Co.* (1866) 14 L.T. 797.

14. In *Scott v London and St. Katherine Docks Co* (165) 3H&C 596 it was established that a plaintiff can rely on what has become to be called the maxim *res ipsa loquitur*. The meaning of the maxim is “the thing speaks for itself” on the basis that prima facie such an accident could not have happened without negligence on the part of the occupier his servants or agents. Once this claim is raised, and it does not have to be specifically pleaded, it raises a rebuttable inference or prima facie case that there was negligence on the part of the defendant.

15. In *Ng Chun Pui v Lee Chuen Tat* Lord Griffiths clarified how the evidential process should work:

“...So in an appropriate case the plaintiff establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. Loosely speaking this may be referred to as a burden of the defendant to show he was not negligent, but that only means that faced with a prima facie case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the prima facie case.”

## CONCLUSION

16. After a careful review of the evidence, observing the demeanor of the witnesses during their cross examination and re-examination and applying the principles, I am of the view that the plaintiff did not discharge the burden of proof and that the defendant rebutted the inference of negligence. The evidence of the first plaintiff was uncertain and weak. Among other things he seemed uncertain about the nature of the substance, if any, that caused his fall, and apparently had the physical characteristics of the stairs all wrong (that they were wooden with no railing). Furthermore the circumstances in which the second plaintiff is said to have observed the alleged substance, while her husband was falling headlong down 20 flights of stairs, raises the question of how reliable could such an observation of a substance at that time be. As she said to Mr Ginton in cross examination “...*but I will tell you, once he fell, I was totally concentrating on him, totally.*”

17. In contradistinction there is the clear evidence of Ms Hayling, the acting general manager of the defendant, and Mr Cooper. Mr Cooper gave precise and very clear evidence as to a plausible reason why the plaintiff was distracted and

may have tripped and fallen, of his examination of the stairs before and after the fall which revealed no substance, and of the description of the stairs. Mr Cooper's evidence, unlike the others, was prima facie not self serving because he discontinued working for the defendant since 2005. I prefer the evidence of Mr Cooper and Ms Hayling to that of the plaintiffs.

**RULING**

18. For the foregoing reasons, the court finds that the plaintiff has not proved on the balance of probabilities that the defendant was negligent and dismisses the action with costs to be taxed if not agreed.

Dated the 8<sup>th</sup> day of October 2009

**K Neville Adderley**  
**Justice**