

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA, FIJI ISLANDS

CIVIL CASE NO.: HBC 122 OF 2011

BETWEEN : **GAYLENE JUNE MANNING** of 10 Jacaranda Drive, Carrum
Downs, Victoria 3201, Australia.

PLAINTIFF

AND : **YANUCA ISLAND LIMITED** a limited liability company having its
registered office at Yanuca Island, Cuvu, Nadroga, Fiji Islands trading
as **SHANGRI-LA'S FIJIAN RESORT & SPA**

DEFENDANT

Appearances:

Mr Naidu D for the Plaintiff
Mr Krishna S for the Defendant

JUDGMENT

1. In these proceedings the Plaintiff claims from the Defendant;
 - (a) General damages;
 - (b) Special damages in the sum of \$138,554.00 and is continuing;
 - (c) Sum of \$6,250.00 per month until judgment;
 - (d) Interests in accordance to Statute;
 - (e) Costs on Solicitor/Client Indemnity basis;
 - (f) Such other and further reliefs as the Court may deem just;

2. The Statement of Claim;

- (i) The Plaintiff in her Statement of Claim recites that the Defendant is a limited liability company and also registered as a firm operating in the name and style Shangri-La's Fijian Resort and Spa and that at all material times she was a paying customer of the Defendant at its Resort on Yanuca Island, whilst she was holidaying in Fiji.
- (ii) On the 19th August, 2008 the Plaintiff whilst walking towards the Restaurant at the Resort tripped on a crumbled and uneven mat, as a consequence of it she received serious personal injuries and suffered other loss and damages. Particulars of injuries she received were detailed in paragraph 3 sub paragraph "(a)" to "(h)" of her Statement of Claim.
- (iii) The Plaintiff states that the Defendant was negligent and owed a duty of care to the Plaintiff and that the Plaintiff's injuries and other loss and damages were caused by the breach of duty by the Defendant, by itself, its servant or agents, and or breach of duty of the Defendant, by itself, *its* servants or agents. Particulars of negligence were detailed in paragraph 6 "(a)" to "(e)" of the Statement of Claim. Plaintiff also states that she will rely on the doctrine of "Res Ipsa Loquitur".
- (iv) The Plaintiff states further that the Defendant breached its duties under Occupiers Liability Act and failed in its duties pursuant to the Occupational Health and Safety Legislation. Particulars of breach under the Statutory provisions are detailed in paragraph 8 sub paragraphs (i) (v) of the Statement of Claim.
- (v) Particulars of special damages claimed by the Plaintiff were detailed in paragraph 10 sub paragraph "(a)" to "(d)" of the Statement of Claim.

3. Statement of Defence

- (i) The Defendant in its Statement of Defence deny that the Plaintiff tripped on a crumbled and uneven mat while walking towards the Restaurant and states that the Defendant is also unaware of the extent of injuries sustained by the Plaintiff.
- (ii) The Defendant admits in so far that a duty of care is owed to the Plaintiff, the extent of which will be particularized at the trial of this matter but denies that the Defendant was negligent as alleged by the Plaintiff in in her Statement of Claim.

- (iii) The Defendant denies the allegation that the Plaintiff's injuries and her other loss and damages were caused by the breach of duty by the Defendant as alleged in paragraphs 5 of the Statement of Claim.
- (iv) The Defendant denies that the Plaintiff has suffered injury loss and damage as a consequence of the Defendant's negligence and breach of statutory duty.
- (v) While denying the allegations contained in paragraphs 6 to 9 of the Statement of Claim, the Defendant states that any loss alleged by the Plaintiff was contributed to or solely caused by the negligence of the Plaintiff.
- (vi) Referring to the particulars of Special Damages contained under paragraph 10 of the Plaintiff's Statement of Claim, the Defendant states that it can neither admit nor deny the contents therein as the Defendant is unaware of any pain and suffering, loss of amenities and partial loss of earning capacity suffered by the Plaintiff.
- (vii) Further or in the alternative the Defendant states that the said injuries and losses and damages suffered by the Plaintiff were caused or alternatively contributed to by the negligence of the Plaintiff. Particulars of sole and/or contributing negligence of the Plaintiff are detailed in paragraph 7 sub paragraphs (i) to (v) of the Statement of Defence.
- (viii) The Defendant states further and in the alternative, the matters complained by the Plaintiff arose from the inevitable act carried out by the Plaintiff and notwithstanding the exercise of all reasonable care and skill on the part of the Defendant and in the alternative the Plaintiff suffered the alleged damage as she willingly accepted the risk of such damages by reason whereof the Defendant owed no duty in respect of which risks as alleged and/or matter complained of in the Statement of Claim or at all.
- (ix) The Defendant prays that the Plaintiff's Statement of Claim be dismissed with cost on indemnity basis.

4. **Reply to Statement of Defence**

- (i) In her reply to Defence the Plaintiff states that she contends and will contend that the injuries and damages suffered by her are in consequence of the negligence and breach of duty as particularised in her Statement of Claim and not in the manner as alleged in the Statement of Defence.
- (ii) She states further that the Defendant was negligent on putting a straight mat on a curved walkway and the mat was therefore puckered in the curved section of the walkway, creating an obstruction which resulted in her tripping

and falling and in consequence suffered the injuries as pleaded in her Statement of Claim.

- (iii) The Plaintiff was not walking from the pool to the Restaurant; she was walking from the only entry from her hotel room. Her grandchild was securely held on her back and she had her arms around the Plaintiff's neck and her feet around the Plaintiff's sides which the Plaintiff was holding onto with both of her hand and arms.
- (iv) She states further that she knew at all times where she was placing her foot or both feet and/or her legs or both legs.
- (v) She did not lower her grandchild to the floor on the walkway. They were not close to the Restaurant.
- (vi) She tripped on the mat and whilst falling she tried to grab the fence to prevent from falling. Whilst doing this she hit her right arm on the fence.
- (vii) She did not stagger to her right and fall on her shoulder.
- (viii) She took precautions and tried to grab the fence with her right arm to prevent the fall.
- (ix) The child was not at risk and the Plaintiff was nowhere near the passage and/or walkway standing line for the Restaurant which was not busy.
- (x) The Defendant failed to ensure that the walkway was in the condition that would not cause danger to visitors.
- (xi) She tripped on the mat before lunch time and tourist were tripping on the mat at the same spot that she did which was still puckered at dinner on the day of the incident.
- (xii) She would have tripped on the puckered mat regardless of whether she was carrying or piggy backing a small child or not.
- (xiii) She denies that the matter complained by her arose from inevitable act carried out by her notwithstanding the exercise of all reasonable care and skill on the part of the Defendant.

5. Agreed Facts and Issues according to the minutes of the pre-Trial Conference

A. AGREED FACTS;

- (1) *The Defendant is a limited liability company and also registered as a firm operating in the name and style Shangri-La's Fijian Resort & Spa.*

- (2) *At all material times the Plaintiff was a paying customer of the Defendant at its Resort on Yamuca Island, whilst she was holidaying in Fiji.*

B. AGREED ISSUES;

- (1) *Whether on the 19 August, 2008 the Plaintiff whilst walking towards the restaurant at the Resort tripped on a crumbled and uneven mat?*
- (2) *Whether the Plaintiff received injuries?*
- (3) *What is the extent of the injuries suffered by the Plaintiff?*
- (4) *Whether the Defendant was negligent to the Plaintiff and whether there was any sole or contributory negligence as pleaded on the part of the Plaintiff in regards to the injuries she sustained?*
- (5) *Whether the Plaintiff's injuries were caused by the negligence of the Defendant and/or its servants and agents?*
- (6) *Whether the Defendant breached their Statutory Duties under Occupiers' Liability Act and Occupation Health and Safety Legislation?*
- (7) *Whether by reason of the injuries sustained by the Plaintiff, the Plaintiff has suffered damages and has been put to loss and expense and to what extent is the Defendant liable for these losses and expenses?*
- (8) *Whether the Plaintiff wilfully accepted the risks of such acts and damages arising out from such acts by the Plaintiff, wherefore the Defendant owed no duty in respect of such risks and or such acts as alleged by the Defendant the Plaintiff was acting on as pleaded.*
- (9) *Whether the Defendant owed no duty in respect of which risk as alleged and/or matters complained of?*
- (10) *Whether the matters complained by the Plaintiff (which is denied) arose from the inevitable act carried out by the Plaintiff notwithstanding the exercise of all reasonable care and skill on the part of the Defendant?*
- (11) *Whether the Plaintiff is entitled to Special Damages, if so at what Amount?*
- (12) *Whether the Plaintiff is entitled to General Damages, if so at what amount?*

6. Issue of Liability to be tried First

- 6.1 It was agreed by the Counsel appearing for both parties that the issue of liability should be tried first. As such I will only deal with issue No.1, 4, 5,6, 8,9 and 10 which are relevant to determine the liability in this matter.

7. Evidence

- 7.1 The Plaintiff and her daughter gave evidence on behalf of the Plaintiff. Mr Seforana Rigamoto, Duty Manager of the Defendant Company and Mr Ledua Lesi, a waiter working in the Defendant Company gave evidence on behalf of the Defendant Company.

Evidence of the Plaintiff

- 7.2 The Plaintiff in her evidence said that she came with Ken Hawkins from Australia to Shangri-la Resort on the 18th of August, 2008 to join the other members of the family for a holiday. On the 19th of August, 2008 she was coming from her room towards the Lagoon Restaurant to have lunch. She walked on the footpath with a striped mat on it and near the entrance to the Restaurant she tripped on a puckered carpet and fell. As she fell she stretched her arm, that's the last thing she could remember. She said the carpet was a black one and she was not made aware that it was puckered. She revealed in evidence that at the time she fell she was piggy backing her grand-daughter and her daughter was walking ahead of her.
- 7.3 Answering in cross-examinations she admitted that document marked DE1 is the letter sent by her Lawyers to the Defendant Company and it's written on her advice. She also admitted that the letter states she tripped on an "unlevelled curved footpath".
- 7.4 When she was asked, she would have been more worried about the grand-daughter's safety than hers, she said it was not, when she fell she still had her grand-daughter and she tried to prevent the fall by stretching her arm. She denied that she came from the pool and said she came from the play centre.
- 7.5 Answering further questions she said her daughter is the one who saw the puckered carpet. She said she vaguely remember there were two railings along the footpath. Later she admitted she stretched her arm towards the wire not a rail and there was no fence along the footpath.
- 7.6 When it was put to her that she fell after losing her balance while trying to lower her grand-daughter at the entrance to the Restaurant, she denied it and said her daughter will explain, she was following the daughter.

- 7.7 When she was shown document marked "DE2" the Statement she had given to the Defendant Company two days after the incident she admitted signing it and said what is written there is not quite right. She said Hawkins was there when she signed it.
- 7.8 In re-examination the Plaintiff said the footpath was straight, but at the front of the Restaurant it was curved. She said her daughter Sandra was walking in front of her and she was blocking her front view.

Plaintiff's Witness No. 2

- 7.9 Next witness called by the Plaintiff was her daughter Sandra who said she was with her family at Shangri-la Resort in August, 2008 and her mother came there with her partner on the 18th of August, 2008.
- 7.10 She said further that she could recall 19th of August, 2008, on that day around 12 noon while going with her mother to the Restaurant to have lunch, her mother tripped on the mat and fell. She said at the time she was pushing a pram and her mother was on her right. When she heard a scuffle she turned and saw her mother stretching her right hand to avoid falling but she missed it and fell. She said this was at the entrance to the Restaurant where she saw the mat was puckered. She said the carpet was raised up at that point.
- 7.11 When it was put to her in cross-examination that there is a witness to say that her mother fell while she was trying to put her grand-daughter down she said it's incorrect. She admitted telling her mother to be careful. She said her mother was piggy backing her child.

Evidence of the Defendant

- 7.12 Mr Seforana Rigamoto called on behalf of the Defendant said he is the Front Office Duty Manager of the Defendant and he can remember 18th of August, 2008. On that day he was informed that a guest who was carrying a child on her back had fallen at the Restaurant. He said their staff tried to minimise the pain of the guest and transfer her to the hospital. He said when he went to the site where she had fallen it was normal, nothing wrong to be noted and there was an anti-slip mat at the spot which was not broken or raised. He said if the carpet had been raised not only him the staff would have noted it. He said after investigation he found no defect in the carpet and the footpath was also a level path.
- 7.13 The witness testified further that there was no issue of Occupation Health Safety to display a warning sign at the place where the incident happened.
- 7.14 When the witness was asked whether he was made aware what happened he said that the Plaintiff's daughter told him about her mum tripping and falling sideway because of the child.

- 7.15 He said within the 10 years of his service at the Restaurant no other person has fallen at the area where the Plaintiff fell.
- 7.16 In cross-examination the witness said he was a Guest Relation Officer in 2008 and he had not seen the CCTV recordings of the 19th of August, 2008. He said he assumed that he visited the site of the incident same day.
- 7.17 He admitted that there was a slight curve in the footpath. He said that when he went to the site mat was not curved and according to the required standard no mat should be curved. He also said the concrete path was flat and he did not see uneven spots on the footpath. He admitted that he did not see the place of the incident at the time of the accident.
- 7.18 In re-examination the witness said there was no CCTV coverage of the area where the Plaintiff fell.

Defendant's Witness No. 3

- 7.19 Next witness called by the Defendant is Mr Ledua Lesi, a Waiter employed by the Defendant company. He said he is working for Shangri-la Resort for the past 26 years and he has worked at the Lagoon Resort for 19 years. He said he could recall seeing a lady and daughter who were in a rush and the lady tripped and fell because of the weight she was carrying. He said further that the heavy weight was due to the grand-daughter the Plaintiff was carrying and he went to pull her up after she fell but couldn't. He identified the photos marked "D3" to be the photos of the area where the incident took place. He also said that there was a rubber mat at the place to prevent the people from falling and it was a flat one placed on top of the footpath and it's straight. He admitted that the footpath was even and said in his 19 years at the Restaurant this is the first time a guest has fallen on the footpath. Witness revealed in evidence that the Plaintiff was carrying a child on her back, the child's legs around her and the arms resting on her shoulders and when she bent to put the child down she fell. He said there is a wire along the walkway to the entrance of the Restaurant and the Plaintiff tried to grab it but failed due to the weight she was carrying.
- 7.20 In cross-examination the witness said the incident happened around 1.45 – 2.00pm and he was busy at the time serving about 80 to 90 guests with three other waiters. He said he was cleaning the tables when he saw the Plaintiff and her daughter rushing into the Restaurant before the closing time. He denied that the incident happened between 11.30 to 12.00 noon. He said he was in front when he saw them walking. He reiterated that the Plaintiff fell while she was trying to put the baby down.

7.21 When it was put to the witness that the Plaintiff came from her room with the grand-daughter not from the pool area, the witness said they come from the pool area. He denied that the Plaintiff fell because the carpet was crumpled. He said there were no CCTV cameras in the area where the incident took place.

8.0 Analysis and determination

- 8.1 In analyzing the evidence of the Plaintiff I find that the Plaintiff has not adduced any evidence to prove that the Defendant has breached any statutory legislation as alleged in her statement of claim. Therefore I will limit my task to determine whether the Plaintiff has proved on a balance of probability that the Defendant was negligent.
- 8.2 The principle of *Donoghue v Stevenson [1932] AC 562*, is that a person must take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure his neighbour.
- 8.3 There is no doubt that the duty of care existed between the Plaintiff and Defendant since the Plaintiff was a guest of the Defendant inviter. Hence what I must find out is whether there was a breach of that duty of care by the Defendant and /or its servants and/or its agents.
- 8.4 The Plaintiff in her evidence said that she tripped on a puckered carpet and fell near the entrance to the restaurant. She said she did not see that the carpet was puckered, but her daughter told her the carpet was raised at the place where she tripped and fell. She admitted in cross examination that letter marked DE 1 which was sent by her lawyers to the Defendant Company was written with her advice. However, in the said letter there is no mention of a puckered carpet. It only states that the Plaintiff tripped on an unlevelled curved footpath. There was no explanation given by the Plaintiff as to how her lawyers never mentioned of a puckered carpet.
- 8.5 In cross examination the Plaintiff also said that while she was walking with the granddaughter on her back her view of the footpath was blocked as her daughter was walking in front of her
- 8.6 When she was asked whether she would have been more worried about the grand-daughter's safety when she fell the Plaintiff said she still held her grand-daughter and stretched her arm to prevent the fall. She demonstrated to court how she was piggy backing her granddaughter, her hands turn around holding the legs of the baby and the baby holding on to her neck. She denied that she fell while she was lowering to put the baby down.

- 8.7 Furthermore in her statement to the hotel staff marked D2 made two days after the incident there is no mention about tripping on an uneven carpet. When the said statement was shown to her she said what is written there is not quite correct. However, she admitted that her partner was with her when she signed it.
- 8.8 In analysing the Plaintiff's evidence I find that;
- a) She had never seen a puckered or uneven carpet;
 - b) Her lawyers in the letter marked D1 has never mentioned about such a carpet;
 - c) Her front vision was blocked by her daughter who was walking ahead of her;
 - d) She did not concentrate what came in front as she was piggy backing her granddaughter;
 - e) She has never complained of a puckered carpet till she filed her claim;
- 8.9 I will next deal with the evidence of the Plaintiff's daughter. In her evidence she said that she heard a scuffle and when she turned around she saw her mother falling. She said further that it happened at the entrance to the restaurant and the mat which was there was puckered. When she was asked in cross examination whether the mat was a anti slip rubber mat she said she could not recall.
- 8.10 She said her mother was just behind her when they walked on the footpath. But later she said her mother was at her right.
- 8.11 In analyzing the evidence lead on behalf of the Plaintiff the question arises as to why the Plaintiff or her daughter failed to complain to the hotel authorities about the puckered carpet on which the Plaintiff alleges she tripped and fell. The Plaintiff's lawyer's letter refers to an unlevelled curved foot path and not a puckered carpet. Furthermore the Plaintiff in her reply to defence has stated that the tourist were tripping on the mat at the same spot where the Plaintiff fell, which was still puckered at dinner time on the day of the incident. If the plaintiff was taken to the hospital in the afternoon on the day she fell I wonder who was there watching the tourist falling on the same spot tripping on a puckered mat. Her daughter never said she saw anyone falling at the dinner time at the same spot.
- 8.12 Having analysed the evidence of the Plaintiff as above I will now consider the evidence lead on behalf of the Defendant. Defendant's witness Seforano Rigamoto said he went to the site where the Plaintiff fell to investigate and at

that time there was no crease on the mat. He also said the walkway was even and levelled and it was a sunny day. When he was asked whether there were similar incidents within his 10 years period of his service at the Resort he said there was none but the area is very busy always. He also said the mat was an anti slip flat mat and not a broken one and if the mat was raised not only he the other employees would have noticed it. He also said that the Plaintiff's daughter told him about the Plaintiff falling because of the child.

- 8.13 Answering in cross examination he said he did not see the CCTV recordings of that particular day. Though he admitted that there was a slight curve on the footpath he said the mat on it was not curved. In re-examination the witness said there was no CCTV covering the area where the incident took place.
- 8.14 Next witness Ledua Lesi the waiter working at the restaurant said in evidence that he was working in the restaurant for 19 years and this was the first time he saw a guest falling on the footpath. He confirmed the earlier witness's version that there was no crease at the edge of the mat. He said he saw the Plaintiff walking carrying a child on her back and the child's legs were around her and the arms were resting on her shoulders. He said further that he saw the Plaintiff bending to put the child down and as she lost the balance due to the weight she fell.
- 8.15 In cross examination he confirmed that he saw the Plaintiff and the daughter rushing towards the restaurant before the closing time as he was in front of the restaurant cleaning the tables. He denied that the Plaintiff tripped on a crawled carpet. He also said that there were no cameras at the area where the incident took place.
- 8.16 From the evidence as analysed above I find that the Plaintiff has failed to establish on a balance of probability that the Defendant had breached its duty of care it owes to the Plaintiff by laying an uneven/puckered mat on the footpath at the entrance to its restaurant. What I find from the evidence adduced at the trial is that the Plaintiff had fallen not due to tripping on a puckered carpet but due to losing her balance while she was trying to keep the child down whom she was carrying on her back. By carrying a child on her back and walking behind her daughter without having a clear view of the footpath where she was placing her foot she had open herself to risk of meeting with an accident. This is established by her daughter telling her to be careful minutes before she fell.
- 8.17 The Plaintiff has not made the allegation of the puckered carpet at the time she gave the Statements to the Hotel authorities. There is no mention of a puckered carpet in the letter sent by her lawyers to the Defendant 8 months

after the incident. Therefore I find that the said allegation is an afterthought of the Plaintiff which she failed to prove at the Trial.

9.0 Conclusion


9.1 From all what I have said as above I find that the injuries sustained by the Plaintiff is due to the sole negligence of the Plaintiff and that the Defendant has not breached the duty of care towards the Plaintiff. As such I hold that the Plaintiff has failed to establish, on a balance of probabilities that the Defendant was negligent.

9.2 Accordingly I make the following Order:

- a) The Plaintiff's Statement of Claim is struck out and dismissed
- b) The Plaintiff to pay the Defendant a sum of \$2000 as costs summarily assessed.



At Lautoka
6th June 2016


Lal S. Abeygunaratne
[Judge]