COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2016/CLE/gen/00112

BETWEEN

CHARLENE RAHMING

Plaintiff

AND

BAHAMAS FERRIES LIMITED

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Che Campbell-Chase of Chase Law for the Plaintiff
Mrs. Tanya Wright of World Legal Services for the Defendant

Hearing Dates: 2 May, 5 July 2017

Negligence – Occupiers' Liability - Duty of occupier at common law – Plaintiff a paying passenger on Defendant's boat and an "invitee" – Plaintiff slipping and falling on wet and slippery deck even with assistance - Duty to exercise reasonable care – Protection against "unusual damages" – Defendant in breach of duty of care

Damages – Special Damages – Special Damages must be strictly proved –General Damages for pain and suffering –Principles in *Cornilliac v St. Louis* (1965) 7 W.I.R. and *Wells v Wells* [1998] 3 All E.R. 481 applied – Costs – Reasonable Costs

The Plaintiff was a passenger on the Defendant's boat. It started raining heavily when the Defendant was boarding the passengers. The Defendant's employees urged the passengers to quicken their pace. The Plaintiff did so. Notwithstanding, she was very careful knowing that it was raining. When she stepped onto the deck from the ramp and although being assisted by an employee, her foot slipped causing her to fall to the ground. She instituted these proceedings against the Defendant claiming damages for personal injuries.

The Plaintiff contended that she slipped because the deck of the boat was wet and slippery. She further contended that the Defendant was in breach of its common law duty of care towards her because as an "invitee", the Defendant (i) failed to ensure her safety when boarding the boat; (ii) failed to warn her that the deck was wet; (iii) failed to place warning sign(s) indicating that the deck was wet and slippery; (iv) failed to place a mat on the deck knowing that it was wet and slippery; (v) failing to instruct its employees to mop the deck and (vi) failed to install any or any

adequate safely mechanisms when it knew or ought to have known of the dangers of the deck being wet.

The Defendant denied that it breached any duty of care. It contended that the accident occurred in circumstances over which it could not, notwithstanding the exercise of all reasonable care and skill, have exercised any control in that: (ii) on the day in question the weather condition was rainy. Many of the passengers of the boat delayed boarding and took refuge under a tented area until the rain had subsided; (ii) when the rain subsided, passengers began to board the boat and the moisture on the ramp was evident to all passengers who had experienced the downpour of rain just minutes before; and (iii) the conditions of the deck was such that it could be traversed safely and without incident by all passengers exercising the level of care required to ensure personal safety.

The Defendant also contended that the accident was wholly caused or contributed to by the negligence of the Plaintiff in that she failed to take reasonable care in all the circumstances for her own safety. The Defendant alleged that the Plaintiff (a) failed to exercise reasonable care and caution when traversing an area which, to her direct knowledge, was wet from recent heavy rain; (b) failed to heed the warnings being given to passenger while boarding the Defendant's boat and (c) failed to heed the caution being taken by other passengers who traversed the ramp recently wet by a downpour of rain.

HELD: Finding that the Defendant was liable for the accident and there was no contributory negligence on the part of the Plaintiff;

1. An occupier has to take reasonable care to see that his "invitees" are reasonably safe but he does not guarantee their safety. The duty is to use reasonable care to prevent damage to the Plaintiff from an unusual danger: **London Graving Dock Co. v Horton** (1951) 2 All ER 1; **Cox v Chan** (1991) Supreme Court, The Bahamas (No. 755 of 1988) (unreported) relied upon and **Laverton v Kiapasha T/A Takaway Supreme** [2002] EWCA 1656 distinguished.

2. The Defendant should have delayed the boarding process and wait until the rain subsided instead of accelerating it. Further, the Defendant could have mopped the deck before inviting passengers on board since it ought to know that wetness increases risks of slips and falls especially on boats. Also, there is a step down from the ramp to the deck and that, in itself, is risky even in dry weather. Furthermore, the uncontroverted evidence of the Plaintiff was that the deck was wet and slippery. The Court found her to be a credible and sincere witness and accepted her testimony.

3. Special damages are quantified damages of which a plaintiff has already spent as a result of the damage and loss suffered. This type of damages must therefore be pleaded for, particularized and proved: **Ilkew v Samuels** [1963] 2 All ER 879 and **Michelle Russell v (1) Ethylyn Simms and (2) Darren Smith** [2008/CLE/gen/00440] [Bahamas] [unreported].

4. The failure of the Plaintiff to prove loss of earnings means that she cannot recover anything under the sub-head. The claim is disallowed: **Asquith v Sheldon Bynoe** (Claim No. 463 of 2006) (unreported) – St. Vincent and The Grenadines; **Attorney General of Jamaica v Tanya Clarke (nee Tyrell)** SCCA No. 109 of 2002 (unreported) and **Bruce Beardsley (Executor of the Estate of Diane Beardsley, deceased) v**

Thomas Young et al (Claim No. C.L. 2002IB-262) Jamaica Supreme Court (unreported); **Grant v Motilal Moonan Ltd and Another** (1988) 43 W.I.R. 372 applied.

5. In assessing general damages, the Court would consider (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering which had been endured;(iv) the loss of amenities suffered and (v) the extent to which pecuniary prospects are affected: **Cornilliac v St. Louis** (1965) 7 W.I.R. 491 and **Alphonso and Others v Deodat Ramnath** (1997) 56 W.I.R. 183. For pain and suffering, I award $10,000 to the Plaintiff: **Wells v Wells** [1998] 3 All E.R. 481 at 507 applied.

6. In civil proceedings, costs are entirely discretionary but a judge must always exercise that discretionary power judicially: Buckley L.J. in **Scherer v Counting Instruments Ltd** [1986] 2 All E.R. 529 at 536-537.

JUDGMENT

Charles J:

[1] On a partially rainy day in August 2013, Charlene Rahming ("the Plaintiff") purchased a ticket to travel on the Seawind ('the boat"), owned and operated by Bahamas Ferries Limited ("the Defendant") from Fresh Creek, Andros to Potter's Cay Dock in New Providence. As the Plaintiff was entering the boat, she slipped and fell on the deck. She instituted this action in negligence claiming damages for the injuries which she sustained as a result of this unfortunate accident.

[2] In her Statement of Claim, the Plaintiff averred that the Defendant was under a duty of care to ensure that all of its passengers could safely board and/or disembark its boat. She stated that, on the day in question, the Defendant breached its duty of care by:

(i) Failing to ensure her safety when boarding the boat;

(ii) Failing to warn her that the deck of the boat was wet;

(iii) Failing to place any warning sign(s) indicating that the deck of the boat was slippery and wet;

(iv) Failing to place a mat on the deck of the boat knowing that it was slippery and wet;

(v) Failing to instruct its employees, servants or agents to dry the deck of the boat knowing that it was slippery and wet; and

(vi) Failing to install any or any adequate safely mechanisms when it knew or ought to have known of the dangers of the deck being wet.

[3] The Plaintiff claimed special damages of $4,832.72, general damages to be assessed, interest pursuant to the Civil Procedure (Awards of Interest) Act and Costs.

[4] In its Defence, the Defendant denied that it breached any duty of care. It averred that its duty to the Plaintiff was to take such care as is reasonable in all the circumstances to ensure that she and all of their passengers could safely embark and disembark the boat. The Defendant further averred that the accident occurred in circumstances over which it could not, notwithstanding the exercise of all reasonable care and skill, have exercised any control in that:

(i) On the day in question the weather condition was rainy. Many of the passengers of the boat delayed boarding and took refuge under a tented area until the rain had subsided;

(ii) When the rain had subsided, passengers began to board the boat and the moisture on the ramp was evident to all passengers who had experienced the downpour of rain just minutes before; and

(iii) The conditions of the deck was such that it could be traversed safely and without incident by all passengers exercising the level of care required to ensure personal safety.

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[5] Further, the Defendant averred that the accident was wholly caused or contributed to by the negligence of the Plaintiff in that she failed to take

reasonable care in all the circumstances for her own safety. The Defendant alleged that the Plaintiff (a) failed to exercise reasonable care and caution when traversing an area which, to her direct knowledge, was wet from recent heavy rain; (b) failed to heed the warnings being given to passenger while boarding the boat and (c) failed to heed the caution being taken by other passengers who traversed the ramp recently wet by the downpour of rain.

[6] At paragraph 5 of its Defence, the Defendant puts the Plaintiff to strict proof of her allegations. This was even more palpable when the Defendant chose not to file any witness statement and/or called any witness to testify on its behalf.

The issues

[7] In my opinion, this is a case of occupier's liability. The following issues arise for determination namely:

(i) Whether or not the Defendant took reasonable care to see that the Plaintiff was reasonably safe;

(ii) Whether or not the Plaintiff's slip and fall was caused as a result of the negligence of the Defendant;

(iii) Whether or not the Plaintiff wholly caused or contributed to the negligence and;

(iv) Is the Plaintiff entitled to damages? If so, what is the quantum of damages?

The evidence

[8] The Plaintiff gave evidence and called Dr. John Neely Jr. ("Dr. Neely") as her witness. She testified that on or about 9 August 2013, she bought a ticket to travel from Fresh Creek, Andros to Nassau on the boat. It was raining heavily at the time that she and the other passengers were boarding the boat. The ramp leading to the boat was exposed to the elements. Under cross-examination, she was unable to say what this means. She deposed that there were no warning signs posted to warn that the ramp and/or deck was slippery when wet or that the deck of the boat was wet. There were no mats on the ramp or on the deck. There

was no crew member with a mop or towel to ensure that the deck could be dried if it became wet. However, there was a crew member who assisted her to step down onto the deck from the ramp. When she stepped down to the deck, her foot slipped causing her to fall to the ground. She cried out loudly as she immediately felt severe pain in her right knee. Two crew members assisted her since she could not walk.

[9] When the boat arrived in Nassau, the Defendant took the Plaintiff to the Walk-In-Clinic where she was seen by Dr. Neely. According to her, she suffered a crushed fracture to her upper right tibia. She was prescribed analgesics and eight weeks of physical therapy. The Plaintiff testified that, initially, she was unable to walk without the assistance of a cane. She currently experiences barometric pain and walks with a slight gait.

[10] The Plaintiff stated that she was unable to work as a janitress at the AUTEC base for a combined period of seventy-nine days. Her total loss of earnings over that period was $3,931.04. She stated that she also incurred medical expenses of $341.68 and travel expenses of $560.00 to attend treatment and evaluation in Nassau. At the date of the accident in 2013, she was thirty-five years old.

[11] The Plaintiff was extensively cross-examined by learned Counsel Ms. Wright. She testified that, as soon as the passengers were boarding the boat, it started to rain. It rained heavily. There were many people, some ahead and some behind her waiting to board but she was not in a line. They started boarding the boat when a crew member told “everybody to come because it started to rain.” She observed that the ramp was wet. She took her time to walk as the crew member called in the passengers. Then it started to rain heavier and so, everyone started to walk faster. She also quickened her pace. She said that no one assisted her up the ramp. She would exercise more care on a wet surface than if she were walking on a dry surface. She stated that although there was no mat on the ramp, she did not fall. She nevertheless said that the ramp posed danger to her. Before she stepped down from the ramp onto the deck, she knew that it was wet.

Other persons including children who boarded before and after her did not fall. She was already on the deck in the boat when she fell. When she fell, her left foot twisted backwards. She had travelled on the boat before and as such, was quite familiar with its general layout.

[12] As to her claim for damages, she was also extensively cross-examined.

[13] The next witness, Dr. Neely testified. He was the doctor who attended to the Plaintiff on 9 August 2013 when she was taken to the Walk-In-Clinic. He testified that he examined the Plaintiff and later produced a Medical Report dated 20 February 2014 which accurately reflects his findings. In the Report, Dr. Neely stated that the Plaintiff "*presented with pain to the right knee secondary to an alleged fall that occurred while boarding the ocean going motor vessel that carries the name Bahamas Fast Ferry. She claims that as a result of the fall she sustained injuries to her right knee*." Dr. Neely testified that the Plaintiff said that the pain was so severe that she could not effectively ambulate on the right knee. He said that "*a focused examination of the said knee revealed tenderness at the region of the right quadriceps tendon*."

[14] Dr. Neely stated that an X-ray of the right knee was then requested. On review of the film, there was no evidence of any boney abnormality. The patient was discharged on medications and with knee brace. The X-ray report was generated two days later and showed the possibility of a crack fracture in the region of the upper right tibia.

[15] Under cross-examination, Dr. Neely testified that, after the Plaintiff told him what happened which is subjective, he examined the knee and found that its tenderness was in keeping with her subjective statement. He stated that he referred the Plaintiff to an orthopedic service/department. Upon re-examination, Dr. Neely stated that a review of the X-ray report was consistent with the symptoms presented to him by the Plaintiff.

[16] This was the extent of the evidence as the Defendant led no evidence at this action.

Submissions of Counsel

[17] Learned Counsel Mr. Chase submitted that the Defendant owed a duty of care to the Plaintiff not to expose her to an unusual danger which was within its knowledge. He next submitted that the Defendant failed to discharge the said duty for the reasons set out in her said Statement of Claim and as a result of the breach, the Plaintiff suffered loss, injury and damage which were directly as a result of the injuries which she sustained and which are amplified by the evidence of Dr. Neely.

[18] Mr. Chase asserted that, on the day in question, the Defendant did nothing to prevent or had no system in place to prevent exposing the Plaintiff to an unusual danger which resulted in her slipping and falling when entering their boat. He also submitted that the Plaintiff was taking great care to walk and it was one of the employees of the Defendant who encouraged the Plaintiff (and other passengers) to increase their pace as the rain had started to fall heavier. Counsel submitted that the Defendant had no system in place for such contingency, for example, mopping the floor or to dry the deck with towels or to have a mat on the deck which could have prevented her slippage and eventual fall to the floor.

[19] Learned Counsel Ms. Wright submitted that it is well established that an occupier of premises owes a duty of care to lawful visitors to ensure that the premises are reasonably safe and that the Plaintiff needs to satisfy the Court that the ingredients of duty, breach and resulting damage are made out in order for the Defendant to be held liable in negligence.

[20] Learned Counsel submitted that the ramp leading to the boat and how to traverse the ramp to the deck were both known to the Plaintiff as she had, on previous occasions, travelled on the boat. Therefore, she would have been aware prior to

the accident that a step down from the ramp to the deck was required and, as an adult, she would have also been aware that care and caution should be exercised in rainy conditions after having observed, according to her own evidence, that the deck was wet from the downpour of rain which had started to fall as the passengers were boarding the boat.

[21] Ms. Wright next submitted that there was no duty on the Defendant to ensure the Plaintiff's safety when boarding the boat as alleged by the Plaintiff. Counsel asserted that the duty, as stated by Sawyer J. (as she then was) in **Cox v Chan** (1991) Supreme Court, The Bahamas (No. 755 of 1988) (unreported), is to use reasonable care to prevent damage to the Plaintiff from an unusual danger. According to learned Counsel, the Plaintiff gave no evidence on which the Court could conclude on a balance of probabilities that there existed on the boat **an unusual danger of which the Defendant knew or ought to have known, and of which the Plaintiff did not know or of which she could not have been aware.** Ms. Wright argued that wetness/moisture on the deck of the boat, due to a recent downpour of rain, could not in all the circumstances be regarded as an unusual danger [Emphasis added].

[22] Learned Counsel submitted that nothing took the Plaintiff by surprise on the day in question as she was aware that the deck was wet and she saw the wetness before she stepped down.

[23] Additionally, learned Counsel submitted that, for the Defendant to be in breach of its duty, the Plaintiff would have to show that it would have been reasonable in all the circumstances for the Defendant to place warning signs and/or mats and/or mop the wet boat. She submitted that the Plaintiff knew that it was raining. It started raining as the passengers were boarding the boat and other passengers in front of her boarded the boat without incident. Further, learned Counsel submitted that the Plaintiff is unable to prove that the Defendant knew or ought to have known that the deck was "slippery and wet."

[24] The Defendant further submitted that it is an unrealistic expectation of the Plaintiff to expect the Defendant to put warning signs when she was aware that it was raining and the deck was wet. Learned Counsel submitted that the Defendant, as the invitor, is bound to take the kind of care which a reasonably prudent man in his place would take, neither more nor less: **Audrey Barratt v Hawksbill Limited** (Claim No. ANUHCV2009/0343) (unreported) referred to.

[25] Learned Counsel Ms. Wright fought hard to persuade the Court that the Defendant was not negligent. She submitted that the allegation that the Defendant failed to instruct its employees, servants or agents to dry the deck of the boat knowing the same was slippery when wet has no merit. According to her, the Plaintiff led no evidence on which the Court could conclude that the Defendant had any knowledge that the boat of the deck was "slippery when wet." She argued that the Plaintiff has not demonstrated or shown that drying the deck of the boat during the boarding process as the rain was coming down heavily would be considered a reasonable duty to impose on the Defendant in all the circumstances. The corollary to that, if I understood Counsel correctly, is that for the Defendant to be in breach of its duty, the Plaintiff would also have to demonstrate, on a balance of probabilities, that it would have been reasonable in all the circumstances for the Defendant to have employees constantly drying the deck of the boat throughout the boarding process notwithstanding that the rain started as passengers were boarding and it was raining heavily.

[26] She referred to a quote by Viscount Dilhorne in the case of **Wheat v E. Lacon & Co. Ltd.** namely "*My neighbour does not enlarge my duty of care for his safety by neglecting it himself*" and submitted that it is equally applicable in the present case.

Discussion

Occupier's Liability

[27] In The Bahamas, the liability of occupiers is governed by common law principles. Gilbert Kodilinye in his treatise, **Commonwealth Caribbean Tort Law, 3rd**

Edition, at page 64, states:

> **"There are a number of common situations in which it is well established that a duty of care exists, for example:**
>
> **(a) ……..**
>
> **(b) the occupier of premises owes a duty of care to lawful visitors to ensure that the premises are reasonably safe….."**

[28] At common law, the occupier of premises has to take 'reasonable' care to see that his visitors are 'reasonably safe'. He does not guarantee their safety. Lord Goddard CJ, in **Turner v Arding & Hobbs Ltd** [1949] 2 All ER 911 at p 912 puts the duty of a shopkeeper this way:

> **"It may be said to be a duty to use reasonable care to see that the shop floor, on which people are invited, is kept reasonably safe, and if an "unusual danger" is present of which the injured person is unaware, and the danger is one which would not be expected and ought not to be present, the onus of proof is on the defendants to explain how it was that the accident happened."**

[29] What constitutes an unusual danger was defined in **London Graving Dock Co. v Horton** (1951) 2 All E.R. 1 as follows:

> **"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... I think 'unusual' is used in an objective sense and means such danger as is not usually found in carrying out the task of 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..."**

[30] In **Cox v Chan** (supra), Sawyer J. pointed out that the occupier's duty 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 of which the plaintiff did not know or which he could not have been aware."** [Emphasis added]

[31] The evidence which was adduced at this trial came from the Plaintiff and her witness, Dr. Neely. The Defendant did not call any witness to testify on its behalf. So, there is no other evidence to contradict what the Plaintiff and her witness deposed. Both witnesses were exhaustively cross-examined and, in my opinion, they withstood the rigours of cross-examination. Having seen the witnesses and observed their demeanour, I found them to be credible and sincere in their respective testimony. I accept their evidence.

[32] From their uncontroverted evidence, I made the following factual findings. On 9 August 2013, the Plaintiff was an invitee on the Defendant's boat. In the process of boarding the boat with many other passengers, a heavy torrent of rain came down. A crew member encouraged the passengers to quicken their pace during the boarding process. He was saying "let's go; let's go." The Plaintiff accelerated her pace. She was still being careful. She was carrying a small hand bag with some overnight clothes. She was taking her time as she walked up the ramp without any assistance. As she approached the deck, a crew member, who was there, assisted her to step down from the ramp onto the deck but she slipped, fell backwards and twisted her foot. She had observed that the deck was wet. She was also familiar with the boat having travelled on it before the day in question.

[33] There were no warning signs or mats on the deck. There was no crew member mopping the water on the deck. Essentially, even with assistance, the Plaintiff fell and injured herself. This led me to accept her uncontroverted evidence that the deck was not only wet but slippery. Not even the crew member could have prevented her from falling.

[34] Even if I were wrong to accept her evidence that the deck was wet and slippery, at the very least, it is common ground that the deck was wet. The wetness from the rain was known to the Plaintiff as well as the Defendant as it was raining when the crew members commenced the boarding of the passengers. In addition, because of the heavy rain, the crew members requested passengers to quicken their pace.

[35] Now, in a situation like this where the deck becomes wet as a result of a downpour of rain, the question is what it is reasonable to expect the Defendant to do about it.

[36] Learned Counsel for the Plaintiff submitted that the Defendant should have (i) placed warning signs stating that the deck of the boat is slippery when wet; (ii) placed a mat on the deck knowing that it was slippery when wet; (iii) instruct its employees, servants and/or agents to dry the deck of the boat knowing it to be slippery when wet and (iv) install any or any adequate safety mechanisms when it knew or ought to have known of the dangers of the deck being wet. I agree with learned Counsel for the Defendant that the Plaintiff knew that it was raining and knew that the deck was wet. I also agree with Counsel that it was an unrealistic expectation for the Defendant to place any warning signs, mats, and/or safety mechanisms (which were not identified by the Plaintiff) that the deck was slippery when wet. It is even more unrealistic to expect the Defendant's employees to constantly dry the deck since it was raining throughout the boarding process.

[37] Learned Counsel Ms. Wright next submitted that other passengers boarded the boat without incident; the Plaintiff had been an invitee on the boat on several occasions and at no time prior to the accident had she any reason to question her safety when boarding the boat and more importantly; there was a crew member assisting passengers and indeed, she was assisted. Learned Counsel asserted that water on the deck of the boat from a downpour of rain could not be regarded an "unusual danger" **of which the Defendant knew or ought to have known and of which the Plaintiff did not know or of which she could not have been aware.**[Emphasis added]

[38] In my considered opinion, this was an isolated and unfortunate accident. Whilst it appears unreasonable and unrealistic to expect the Defendant to place warning signs, mats and mop constantly during a downpour of heavy rain, the Defendant could have delayed the boarding of passengers until the rain had subsided and

to mop the deck thereafter to ensure safety to all passengers. The fact that other passengers entered the boat without falling is neither here or there. Instead, it appeared that the Defendant was in a haste to depart on time since its crew members were inviting passengers to accelerate their pace. As boat owners, they ought to exercise reasonable care to prevent injuries to passengers. In the circumstances, I must attribute full negligence to the Defendant. The Defendant ought to know that wetness increases risks of slips and falls especially on boats. In addition, there is a step down from the ramp to the deck and this in itself, is risky, even in dry seasons. Besides, I found the Plaintiff to be a credible and sincere witness so I accepted her uncontroverted evidence that the deck was wet and slippery. The plain facts of this case demonstrated that even with the assistance of a crew member, the Plaintiff slipped and injured herself.

[39] Additionally, there was no evidence that the Plaintiff was intoxicated and/or wearing heels, as in the case of **Laverton v Kiapasha T/A Takaway Supreme** [2002] EWCA 1656. In **Laverton**, the Defendants owned a takeaway shop. The Plaintiff had been out in pubs and ending in a club. In the early hours of Saturday morning, she visited the Defendant's shop. She was wearing ankle boots with 1 inch cowboy style heels. She had drunk something in the region of 10 double bacardis or 20 units of alcohol according to the hospital which received her after the accident. The shop was about 12 foot 7 by 13 foot 5 in respect of the public area. There were about 30 people in the shop at the time. The floor of the shop was wet from rain being walked into the shop. The Plaintiff slipped and fractured her ankle.

[40] The shop floor had been re-laid with slip resistant tiles. The Defendant had two mops and a bucket at the back of the shop to deal with spillages. On busy nights, they mopped up 6 - 7 times but could not mop when the shop was full. The trial judge found that the Defendant had failed to take reasonable care in operating the cleaning system and particularly given that the tiles when slippery were wet and that there was no mat in place. No finding of contributory negligence was made. The Defendant appealed.

[41] On appeal, Lord Justice Mance (as he then was) (dissenting), it was held that it was not reasonably practicable perfection to expect the owner of the premises concerned to mop up rainwater as it came in. A doormat would not have prevented the excess of water on the floor of the premises. An accident would have been avoided if the customer concerned had taken reasonable care for her own safety.

[42] **Laverton** is an interesting case. However, its facts are quite distinguishable from the facts in the present case.

[43] Having found that the Defendant is liable in negligence and there is no contributory negligence on the part of the Plaintiff, I shall now assess the damages.

Damages

[44] The Plaintiff claims special damages of $4,832.72 and general damages to be assessed.

[45] Special damages are quantified damages of which a plaintiff has already spent as a result of the damage and loss suffered. This type of damages must therefore be pleaded for, particularized and proved. This was the view of Lord Diplock in **Ilkew v Samuels** [1963] 1 WLR 991 at 1006 where he said:

> **"Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized…it is plain law…that one can recover in an action only special damage which has been pleaded, and of course, proved."**

[46] In **Michelle Russell v (1) Ethylyn Simms and (2) Darren Smith** [2008/CLE/gen/00440] Sir Michael Barnett, CJ at [43] stated as follows:

> **"It is settled law that special damages must be pleaded and proven. The Court of Appeal in *Lubin v Major [No. 6 of 1990]* said:**
>
> > **43. "From the above reasoning, it is clear that what the learned Registrar is saying, correctly in our view is that a person who**

> **alleges special damage must prove the same. It is not in general sufficient for him merely to plead special damage and thereafter recite in oath the same facts, or give evidence in an affidavit without any supporting credible evidence aliunde, and sit back expecting the tribunal of fact to accept his evidence as true in its entirety, merely because the aforesaid evidence is not controverted, even though the particular damage in the sense of a loss having been incurred appears reasonably improbable and or the money value attributed to the said loss or damage appears unlikely and or unreasonable viewed in the context of the susceptibility of human beings in general to overestimate and exaggerate loss, damage, and suffering without any intention whatsoever of being deliberately dishonest…."**

[47] Unquestionably, it is for the Plaintiff to prove her damage. It is not enough to write down particulars, and, so to speak, throw them at the court and say "I am entitled to this."

[48] The Plaintiff claims the following as special damages

(a) Loss of wages	$3,931.04
(b) Medical Expenses	$ 341.68
(c) Travel Expenses	$ 560.00
TOTAL	**$4,832.72**

Loss of wages or earnings

[49] For loss of earnings, the Plaintiff claims $3,931.04. She testified that, at the time of the accident, she was thirty-five years old and was employed as a janitress at AUTEC Base in Andros, Bahamas. She was unable to work for seventy-nine (79) days. She stated that she is still employed with AUTEC but she struggles to manage the pain as her job requires long periods of standing.

[50] Learned Counsel for the Defendant submitted that the Plaintiff has not shown that she suffered actual loss of income. The Plaintiff produced confirmation of loss of salary from an employer for a period in July 2013 before the alleged incident. The Plaintiff swore her witness statement in November 2016 over three years from the accident yet was unable to furnish proof of employment beyond

July 2013. In her evidence she conceded that she did not even make a request from her employer to confirm that deductions from her salary were made.

[51] According to learned Counsel, Ms. Wright, a reasonable inference to be drawn is that:

1. The Plaintiff was not employed on 9 August 2013 (last employment record dated July 2013) or;

2. If employed, no deduction was made from the Plaintiff's salary and the Plaintiff is being dishonest about this loss;

3. The Plaintiff did not take the time off work prescribed by the sick slips (the Plaintiff also did not go to the prescribed physiotherapy either)

[52] Counsel relied on the case of **Asquith v. Sheldon Bynoe** [St. Vincent and The Grenadines] (Claim No. 463 of 2006) (unreported) in which the Plaintiff also did not produce evidence to support a claim for loss of earnings. In **Asquith**, apart from the certificate bearing a date which predated the accident, there was no proof of the wages paid and it is unclear whether the claimant was in the employ of Ms. France at the time of the assault. There was no evidence of loss from the employer. The learned judge stated "*I do not think it is unreasonable to expect Asquith or Ms. France to be able to produce some document to prove his earnings. In the end I can find no plausible evidence that Asquith was under the employ of Ms. France at the time of his injuries or that his injuries occurred while he was in the employ of Ms. France. Neither can I find any plausible evidence as to his loss of earnings."*

[53] In cases involving casual workers or self-employed workers, the courts have been inclined to assess some loss of earnings but learned Counsel Ms. Wright submitted that this should not be the approach to this Plaintiff who was either employed or not or who either lost fixed earnings or not. She cited the Court of Appeal decision of **Attorney General of Jamaica v Tanya Clarke (nee Tyrell)** SCCA No. 109 of 2002 (unreported) to bolster her submissions. One of the grounds of appeal was in respect of the award for Special Damages, which

included the sum of US$375.00 per visit to a gynaecologist in the United States without there being documentary proof of such expense. Cooke J.A. at pages 12 to 13 commented:

> **"I find the absence of evidentiary material more than a little surprising in view of the fact that the plaintiff and her legal advisers would have long known of the date of the trial."**
>
> **"…This is unlike the position of 'a sidewalk or push cart vendor.' It is impossible to imagine any insuperable difficulty which would preclude the plaintiff from obtaining some record of her payment."**
>
> **"…In this case it was not unreasonable to demand of the plaintiff more than her mere assertion."**

[54] In **Bruce Beardsley (Executor of the Estate of Diane Beardsley, deceased) v. Thomas Young et al** (Claim No. C.L. 2002IB-262) Jamaica Supreme Court (unreported), the court found that the claimant had failed to provide sufficient proof of his alleged loss of earnings to entitle him to an award under this head of damages.

[55] It is trite law that special damages must be strictly proved. The court should be very wary to relax this principle: **Radcliffe v Evans** (1892) 2 Q.B. 524. What amounts to strict proof is to be determined by the court in the particular circumstances of each case: **Walters v Mitchell** (1992) 29 JLR 173; **Grant v Motilal Moonan Ltd and Another** (1988) 43 WIR 372.

[56] In the present case, the Plaintiff averred, at paragraph 18 of her witness statement deposed to on 22 November 2016, that she is still employed however her job requires long periods of standing and she consistently struggles to manage the pain. She claims loss of earnings in the amount of $3,931.04. She must prove that she was not paid for the days that she was unable to go to work. She has woefully failed to do so even though she continues to work for AUTEC. I would imagine that the simplest thing was to obtain a letter from AUTEC, her present employer.

[57] I will disallow the claim for loss of earnings. .

Medical and travel expenses

[58] The Plaintiff pleads a claim for $341 for medical expenses and $560.00 for travel expenses. The Defendant vociferously challenged this claim. According to learned Counsel Ms. Wright, the claim for $341 has not been particularized as is required and also appears not to have been vouched. The claim for $560 comprises invoices for two sets of travel, one in August and one in September. Ms. Wright submitted that the invoice in August for $360 in no way related to the Plaintiff and appeared to represent a fare suggestive of the travel of more than one person. Furthermore, says Counsel, it is a general receipt with no factual connection between it and the Plaintiff.

[59] Under cross-examination by Ms. Wright, the Plaintiff testified that the receipt for travel on 16 August 2013 was to attend Princess Margaret Hospital ("PMH") and other related expenses. Under further cross-examination, she stated that it was for travel. However she did not give any evidence as to why it was almost twice the fare she claimed as opposed to the September trip. Ms. Wright further submitted that in addition, the letter from the Public Hospitals Authority ("PHA"), which is attached to the Plaintiff's bundle of documents confirms that she was first seen at PMH on 26 September 2013. She said in evidence that she attended PMH on the day she arrived but the PHA letter confirms otherwise.

[60] Ms. Wright further submitted that there is no evidence that she visited Nassau on or around 16 August 2013 for medical reasons. According to her, the discrepancies in the Plaintiff's evidence regarding the 16 August 2013 receipt raises serious issues as to the Plaintiff's credibility and if the Court holds the view that the Plaintiff's claim was dishonestly pursued then all expenses incurred as a consequence vouched or otherwise should be disallowed in its entirety.

[61] In an assessment of the Plaintiff, I found her to be a credible witness and I accepted her testimony. True, when it comes to claims, they could be

exaggerated and inflated, but at the same time, the Court is cognizant that you may pay for something and never contemplate to seek a receipt. Lay people, in particular, are not as careful as lawyers to request invoices/receipts. With the greatest of respect for learned Counsel Ms. Wright, I cannot disallow these claims. Even if the receipt for the August trip to Nassau suggests that two persons travelled, it was not unreasonable to seek the assistance of another person when she could not ambulate properly. The end result is that the Plaintiff was injured as a result of the negligence of the Defendant. The Defendant properly took her to the Walk-In Clinic when she arrived in Nassau. She was examined by Dr. Neely on the said day. Two days later, an X-ray report evidenced the possibility of a crack fracture in the region of the upper tibia. She had to return to New Providence for further treatment and she paid for these treatments as well as air-travel. The expenses associated with her visit to the Walk-In Clinic were paid for by the Defendant.

[62] In the circumstances, I will allow the expenses of $341.68 (medical expenses) and $560.00 (travel expenses) under this sub-head.

General Damages

[63] The next issue which falls to be determined is the quantum of damages which should be awarded to the Plaintiff as a result of the negligence of the Defendant.

[64] The leading West Indian authority on assessment of damages is the case of **Cornilliac v St. Louis** (1965) 7 W.I.R. 491. Sir Hugh Wooding CJ listed the main considerations in assessing general damages as: (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering which had been endured;(iv) the loss of amenities suffered and (v) the extent to which pecuniary prospects are affected.

[65] In **Cornilliac**, at 494 G-H, the Court of Appeal reminded us that it is not the practice to quantify damages separately under each of these heads or to disclose the build-up of the global award. But, it is imperative to keep these heads in mind

and make a conscious, even if undisclosed, quantification under each of them in order to arrive at an approximate final figure.

[66] In **Alphonso and Others v Deodat Ramnath** (1997) 56 W.I.R. 183, the Eastern Caribbean Court of Appeal, sitting in Tortola, British Virgin Islands, appropriately referred to the exercise of assessment as the judge's discretionary quantification upon the application of the principles. There are instances, however, in which a court has disclosed amounts awarded under one or several heads. In **Cornilliac**, for example, the sum that was awarded for loss of pecuniary prospects was quantified because of the extent to which the parties differed on that head.

[67] The practice is to grant a global sum for general damages for pain and suffering and loss of amenities. These are considered against the backdrop of the nature and extent of the injuries sustained and the nature and gravity of the resulting physical disability. There is usually an attempt to calculate pecuniary loss and, in addition, loss of earning capacity where applicable.

[68] In the present case, the Plaintiff stated that immediately after the fall, she felt pain. In fact, she screamed. Initially, she was unable to walk without a cane. The PHA Report indicates that she was prescribed a walking cane on or about 26 September 2013; that is, over a month after the fall. She was also prescribed physiotherapy but did not attend for lack of finance.

[69] Learned Counsel Ms. Wright submitted that the Plaintiff has failed to prove on a balance of probabilities that she suffered any injury as a result of the fall. She next submitted that there is no evidence on which this Court can conclude that she sustained an injury more severe than brief tenderness and discomfort which would have subsided after a few days unless the Court determines that she is credible.

[70] This, to my mind, is an astounding submission. The Plaintiff testified that when she fell to the ground, she cried out loudly as she felt immediate pain in her right knee. She was taken to the Walk-In Clinic by **the Defendant**. She testified that

she suffered a crushed fracture to her upper right tibia. She was prescribed analgesics and eight weeks of physical therapy. She did not do physiotherapy because she could not afford it. She currently experiences barometric pain and walks with a slight gait.

[71] Her evidence was substantially corroborated by Dr. Neely who was the first doctor to attend to her. In the Report, Dr. Neely stated that the Plaintiff "presented with pain to the right knee secondary to an alleged fall that occurred while boarding the ocean going motor vessel that carries the name Bahamas Fast Ferry. She claims that as a result of the fall she sustained injuries to her right knee." Dr. Neely testified that the Plaintiff said that the pain was so severe that she could not effectively ambulate on the right knee. True, it is subjective to the patient but he said that "*a focused examination of the said knee revealed tenderness at the region of the right quadriceps tendon.*"

[72] Dr. Neely stated that an X-ray Report to the knee was requested. The Report demonstrated the possibility of a crack fracture in the region of the upper right tibia. Dr. Neely stated that a review of the X-ray report was consistent with the symptoms presented to him by the Plaintiff.

[73] Then on 26 September 2013, the Plaintiff presented herself at PMH. A report dated 25 October 2013 and signed by Dr. Caroline Burnett-Garraway stated as follows:

> **"Ms. Rahming was first seen in the orthopedic clinic on 26 September 2013 where she was noted to have a pain in the right knee following a fall six weeks before presentation. X-rays were normal and she was prescribed Motrin, Osteobiflex and a walking cane. She was referred for physiotherapy and given an appointment to return in three weeks. Ms. Rahming was reviewed in the orthopedic clinic on 24 October 2013, when she complained of pain in the right knee. There was no leg laxity on examination and she was advised to continue physiotherapy and discharged from the clinic."**

[74] So, even up to 24 October 2013, subjective as it may be, the Plaintiff was still complaining of pain in her right knee and given pain killers and asked to continue

physiotherapy which might have assisted her but she was financially unable to pay for it.

[75] In assessing general damages for pain and suffering, in **Wells v Wells** [1998] 3 All ER 481 at 507, H.L., Lord Hope of Craighead observed that:

> **"The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum, within the broad criterion of what is reasonable and in line with similar awards in comparable cases, as represents the court's best estimate of the plaintiff's general damages."**

[76] It is obvious that damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the plaintiff's necessary medical care, operations and treatment. In the present case, I have no doubt that the Plaintiff suffered pain and as she said, she continues to experience barometric pain.

[77] Having regard to the evidence adduced and the submissions of both parties, I am of the considered opinion that an amount of $10,000 for pain and suffering meets the justice of this case. I so award.

Costs

[78] At the end of the trial, it was agreed that if the Defendant was successful, her costs would be substantially greater than that of Counsel for the Plaintiff. Counsel for the Plaintiff was satisfied to accept $15,000 if he were successful.

[79] In civil proceedings, costs are entirely discretionary. Section 30(1) of the Supreme Court Act provides:

> "**Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.**"

[80] Order 59, rule 2(2) of the RSC similarly reads:

> "**The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.**"

[81] Order 59, rule 3(2) of the Rules of the Supreme Court ("**RSC**") which states:

> "**If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.**"

[82] The discretionary power to award costs must always be exercised judicially. The Judge is required to exercise his discretion in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties' conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in **Scherer v Counting Instruments Ltd**.[1986] 2 All ER 529 at 536-537.

Reasonable costs

[83] In deciding what would be reasonable the court must take into account all the circumstances, including but not limited to:

a) any order that has already been made;

b) the care, speed and economy with which the case was prepared;

c) the conduct of the parties before as well as during the proceedings;

d) the degree of responsibility accepted by the legal practitioner;

e) the importance of the matter to the parties;

f) the novelty, weight and complexity of the case; and

g) the time reasonably spent on the case.

[84] Having considered these factors, I will make an award of costs in the amount of $10,000 to the Plaintiff. I have departed from the figure suggested by Mr. Chase because most of the arguments were advanced by Counsel for the Defendant who was successful in reducing the award of special damages. She fought hard and submitted comprehensive submissions on every point for which this Court expresses its sincere gratitude.

Conclusion

[85] In conclusion, the Court makes the following Orders:

1. Special Damages of $901.68;
2. General Damages for Pain and Suffering of $10,000.
3. Interest pursuant to the Civil Procedure Code (Award of Interest) Act; and
4. Costs of $10,000 to the Plaintiff.

[86] Last but not least, I am grateful to both parties as they waited patiently for the delivery of this protracted judgment. For this, I am very sorry.

Dated this 13th day of April A.D., 2018

Indra H. Charles
JUSTICE