COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2019/CLE/gen/01444

BETWEEN

ORNAL GILBERT

Plaintiff

-AND-

NASSAU FLIGHT SERVICES

Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Ms. Vanessa Carlino with Ms. Ilsha McPhee for the Plaintiff

Mr. Joseph D'Arceuil with Mr. Kenyatta Gibson for the Defendant

Hearing Dates: 15 February 2022 and 14 March 2022

Negligence – Health and Safety at Work Act, Ch. 321C of 2002 ss 5 and 6 – Whether the Defendant (who was not employer of Plaintiff) owed him duty of care – Whether the Defendant as owner of equipment bore the duty of ensuring that it was safe – Occupier's liability – Damage from "unusual danger" - Res ipsa loquitur –Defendant filing bare defence – Parties bound by pleadings

Damages – Personal injuries – Measure of damages – Assessment of damages - Special damages - Must be pleaded, particularized and proven – Family nursing care – Loss of overtime pay – Loss of earnings from business - General damages – Pain, suffering and loss of amenities – Smith v Manchester award - Judicial College Guidelines – Not to slavishly followed

The Plaintiff is employed by Jet Aviation, the ground handler at the airport. The Defendant leased Airstairs to Jet Aviation. The Plaintiff commenced this action against the Defendant for negligence and breach of statutory duty under the Health and Safety at Work Act for personal injuries after an accident where the Plaintiff fell through the platform of an Airstair provided by the Defendant. The Plaintiff alleged that the fall was caused by the Defendant's negligence in providing a defective Airstair.

In its Defence, the Defendant denied liability and put the Plaintiff to strict proof of his assertions. It did not, however, assert its own version of events or deny the existence of a duty of care (at common law or under the Health and Safety at Work Act), that the duty was breached or that the breach of duty caused the accident.

The Plaintiff made a preliminary objection with respect to the Defendant's Defence: that it was a bare Defence, thereby disentitling it from advancing certain arguments.

HELD: finding that the Plaintiff's injury was caused by the Defendant's negligence; the Plaintiff is entitled to damages in the total sum of $128,411.58 with costs to be taxed if not agreed

1. Parties are bound by their pleadings and a party cannot generally seek to advance a case that is not expressly raised in his pleadings. Pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader and the court is obligated to look at the witness statements to see what the issues between the parties are, The Defence must: (a) indicate(i) which parts of the claim the defendant admits; (ii) which parts it denies; (iii) which parts it doubts to be true (and why); (iv) which parts it neither admits nor denies, because it does not know whether they are true, but which it wishes the claimant to prove; (b) give the defendant's version of the facts in so far as they differ from those stated in the claim – **Bahamas Ferries Limited v Charlene Rahming** SCCivApp & CAIS No. 122 of 2018; **Glendon Rolle v Scotiabank** 2017/CLE/gen/01294; **Ralph Gooding v Elizabeth Ellis and National Workers** 2020/CLE/gen/00272 and **SPI North Ltd v Swiss Post International (UK) Ltd and another** [2019] EWCA Civ 7 applied.

2. Section 5 of the Health and Safety at Work Act imposes a duty on every employer in conducting his business to take reasonable steps to ensure the safety of persons who, although not in his employ, are affected thereby. Under section 6, the Defendant had a duty to take reasonable steps to ensure that the Airstair that it was supplying to Jet Aviation was designed and constructed so that its use would be safe. The Defendant also had a duty to carry out or arrange for testing of equipment as the supplier of Airstairs and other equipment.

3. The owner of premises has a duty to use reasonable care to prevent damage to the Plaintiff from unusual danger – **Cox v Chan (c.o.b. East Street South Supermarket)** [1991] BHS J. No. 110; **Rahming v Bahamas Ferries Limited** [2018] 1 BHS J. No. 55 applied.

4. As the owner and lessor of the Airstair, it was the Defendant, and not Jet Aviation who bore the responsibility of ensuring that the Airstair was safe for use.

5. Special damages must be specifically pleaded, particularized and proved: **Ilkiw v Samuels and others** [1963] 2 All ER 879 applied; **Chandler v Kaiser et al** [2007] 4 BHS J. No. 22 distinguished.

6. Even where the caretaker has not foregone wages, the Plaintiff is entitled to recover for nursing care where the caretaker bears many more duties as a result of the Plaintiff's disability - **Mills v British Rail Engineering Ltd.** [1992] PIQR Q130 applied.

7. The possible loss of earning capacity was not a "notional" loss but a real risk - **Smith v Manchester City Council (or Manchester Corporation)** (1974) 17 KIR 1 applied. In assessing damages for this loss, the multiplier/multiplicand is unhelpful. **Moeliker v A Reyrolle & Co. Ltd.** [1977] All ER 9 applied.

8. When calculating damages under the various heads of damages, regard must be had to the effect that each separate award for each separate head of injury may have on the size of the global sum: See **Brown v Woodall** [1995] PIQR Q36.

9. In assessing damages for pain, suffering and loss of amenities, the approach of Bahamian Courts is to have regard to but not to slavishly apply the Judicial College Guidelines - **Scott v The Attorney General and Another** [2017] UKPC 15; **Angelina Turnquest v Stephen Rahming** [2022] 1 BHS J. No. 8 applied.

JUDGMENT

Charles Snr. J:

Introduction

[1] By Generally Indorsed Writ of Summons filed on 10 October 2019 and Statement of Claim filed on 28 February 2020, the Plaintiff ("Mr. Gilbert") claims against the Defendant ("NFS") damages for personal injuries caused by the negligence and/or breach of statutory duty which resulted in an injury from an accident which occurred on 6 November 2018. On that date, as he was conducting his work of making an Aistair belonging to NFS available for an aircraft, he fell through the top platform which was damaged (unbeknown to him).

[2] In his Statement of Claim, Mr. Gilbert alleged, among other things, that NFS acted negligently and/or in breach of the Health and Safety at Work Act, Ch. 321C of 2002 ("the Act") by, among other things, failing to efficiently maintain the Airstair, failing to ensure that it was suitable for use and failing to warn him of its dangerous conditions or otherwise preventing him from using it.

[3] In its Defence filed on 18 March 2020, NFS merely denied Mr. Gilbert's allegations and put him to strict proof.

Background facts

[4] Mr. Gilbert was, at the material time, employed by Jet Aviation as a Line Service Technician and Supervisor.

[5] NFS were the ground handlers at the Sir Lynden Pindling International Airport with the responsibility of providing aircraft ramps and stairways for alighting aircrafts.

NFS leased to Jet Aviation an Airstair so that it could carry out its function as ground handlers.

[6] On 6 November 2018, the Airstair was moved to the back door of an aircraft. In his normal course of duties, Mr. Gilbert climbed the steps of NFS's Airstair and fell through the top platform which was damaged, defective, unfixed and/or loose.

[7] Mr. Gilbert suffered a torn Right Rotator Cuff as a result of the fall.

Preliminary issue: Parties bound by pleadings

[8] A preliminary issue arose with respect to the assertions that NFS is permitted to raise (or the assertions of Mr. Gilbert that it is entitled to oppose) based on NFS's bare Defence.

[9] At the beginning of the trial, Learned Counsel Mr. D'Arceuil, who appeared with Mr. Gibson for NFS, asserted that one of the issues that arise is whether NFS owed a duty of care under the Act. While Mr. Gilbert pleaded that NFS breached its duty under the Act, NFS did not deny the existence of the duty in its Defence, In fact, there was no mention of the statutory duty at all as its Defence consisted of bare denials without any explanation.

[10] The Court brought to Mr. D'Arceuil's attention that NFS did not plead the opposition to the existence of a duty of care under the Act. Mr. D'Arceuil, at the trial, asked to amend the Defence.

Pleadings in a nutshell

[11] In his Statement of Claim, Mr. Gilbert alleged that NFS acted negligently and/or in breach of its statutory duty under the Act by, among other things: (i) failing to ensure that the Airstair was in good condition; (ii) failing adequately or at all to examine, inspect, repair or maintain the Airstair which was loose, insecure, defective and dangerous; (iii) failing to warn Mr. Gilbert of the dangerous condition of the Airstair; (iv) causing or permitting the Airstair to come to be or remain loose, insecure, defective and dangerous; (v) exposing Mr. Gilbert to a danger or a trap

or the foreseeable risk of injury and (vi) failing to maintain in an efficient state, in efficient working order and in good repair the Airstair.

[12] The Defence of NFS consisted of bare denials. In order to have a better appreciation for the preliminary issue, it is helpful to reproduce NFS's Defence in full.

> *"1. As regards Paragraphs 1, 2 and 3 of the Plaintiff's Statement of Claim, the Defendant is unable to admit or deny such allegations made out in the said Paragraphs and puts the Plaintiff to strict proof thereof.*
>
> *2. As regards Paragraph 4 of the Plaintiff's Statement of Claim, the Defendant is unable to admit or deny that the Plaintiff on the 6th November, 2018 was acting in the course of his employment during a routine inspection of the Airstair owned, rented, leased or loaned by the Defendant to Executive Flight Support Limited and the Defendant puts the Plaintiff to strict proof thereof. Additionally, the Defendant is unable to admit or deny whether or not the Plaintiff fell through the top of the platform of the said Airstair and the Defendant puts the Plaintiff to strict proof thereof. Additionally, save and except the foregoing allegations which the Defendant is unable to either admit or deny, the Defendant denies each and every allegation made by the Plaintiff in Paragraph 4 of the Plaintiff's Statement of Claim and the Defendant puts the Plaintiff to strict proof thereof.*
>
> *3. Paragraph 5 of the Plaintiff's Statement of Claim is denied and the Defendant puts the Plaintiff to strict proof thereof.*
>
> *4. Paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the Plaintiff's Statement of Claim is denied and the Defendant puts the Plaintiff to strict proof thereof.*
>
> *5. Save as hereinbefore expressly admitted, the Defendant denies each and every allegation contained in the Plaintiff's Statement of Claim as if the same were set forth herein and specifically traversed and averred seriatim."*

Defendant's duty to set out case

[13] In **Glendon Rolle v Scotiabank** 2017/CLE/gen/01294, this Court restated the well-settled principle that parties are bound by their pleadings and therefore cannot generally seek to advance a case not expressly raised in its pleadings. At paras 38-42, this Court heavily relying on Sir Michael Barnett JA (as he then was) in **Bahamas Ferries Limited v Charlene Rahming** SCCivApp &CAIS No. 122 of 2018, stated:

> **"[38] It is therefore necessary for me to say something on pleadings. The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. The pleadings must be precise and disclose a cause or causes of action. Evidence need not be pleaded because that will come from the affidavits and cross-examination thereon or by oral evidence.**
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> **[39] In Bahamas Ferries Limited v Charlene Rahming SCCivApp & CAIS No. 122 of 2018, our Court of Appeal held that the starting point must always be the pleadings. At paras. 29-33 and 37-39 of the judgment, Sir Michael Barnett JA (as he then was) stated:**
>
> > **"29. The real difficulty in the judgement of the court below is that the finding of negligence was not one that was pleaded by the respondent. This is ground 10 of the appellant's grounds of appeal.**
> >
> > **30. The trial judge rejected the particulars of negligence pleaded and founded liability on a ground not pleaded in the statement of claim.**
> >
> > **31. In our judgment this is not proper and manifestly unfair to the appellant.**
> >
> > **32. Negligence was clearly pleaded and particularised as set out in paragraph 6 above.**
> >
> > **33. That was the case the appellant had to meet. There was no assertion that it was negligent in failing to delay boarding because of the rain. If that had been the case the appellant may have been able to lead evidence explaining why it did not delay further the boarding process or stop the respondent from attempting to board.**
> > **…..**
> >
> > **37. This is not an arid pleading point.**

38. In Nada Fadil Al Medenni vs. Mars UK Limited [2005] EWCA Civ 1041 Dyson LJ giving the decision of the English Court of Appeal said:

> **"It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by each other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting then in certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."**

39. The starting point must always be the pleadings. In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:

> **"In Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER 775 Lord Woolf MR observed at 792-793:**
>
> > **'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings 15 should make clear the general nature of the case of the pleader.'" [Emphasis added]**

[40] At paragraph 40 of the Judgment, Sir Michael went on to state:

> **"It is on the basis of pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary for trial."**

[41] In Montague Investments Limited v Westminster College Ltd & Another [2015/CLE/gen/00845] – Judgment delivered on 31 March 2020 (Reported on BahamasJudiciary.com Website), this Court applied the principles emanating from Bahamas Ferries Limited and emphasized the necessity for proper pleadings. Pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader and the court is obligated to look at the witness statements to see what the issues between the parties are.

[42] Shortly put, parties are bound by their pleadings and a party cannot generally seek to advance a case that is not expressly raised in his (her) pleadings".

[14] More specifically, the inadequacy of bare denial defences was dealt with by this Court in **Ralph Gooding v Elizabeth Ellis and National Workers Co-operative Credit Union Ltd (NWCCU)** 2020/CLE/gen/00272. The Plaintiff applied to strike out the Second Defendant's defence. The Ruling emphasized that issues arise from both parties clearly stating what their assertions are. In paras 7-10, the Court stated:

"<u>Contents of defence</u>

<u>Defendant's duty to set out case</u>

[7] The Defence must set out all the facts on which the defendant relies to dispute the claim. Such statement must be as short as practicable.

[8] The Civil Procedure Rules (UK) provides some helpful guidance on the content of a defence. It states:

"(1) In his defence, the defendant must state –

(a) which of the allegations in the particulars of claim he denies;

(b) <u>which allegations he is unable to admit or deny, but which he requires the claimant to prove; and</u>

(c) which allegations he admits.

(2) Where the defendant denies an allegation –

(a) he must state his reasons for doing so; and

(b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version.

(3) A defendant who-

1. fails to deal with an allegation, but

2. has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant; shall be taken to require that allegation to be proved."

(4) …….

(5) Subject to paragraphs (3) and (4) a defendant who fails to deal with an allegation shall be taken to admit that allegation."[Emphasis added]

[9] A defendant may not rely on any allegation or factual argument which is not set out in the defence but which could have been set out there, unless the court gives permission. The court may give permission at the case management conference.

[10] A defendant may not meet the plaintiff's particulars of claim with a bare denial; he must state which allegation he admits, which he denies (with reasons for doing so) and which allegation he is unable either to admit or deny but nevertheless requires the plaintiff to prove."

[15] In passing, I observe that Part 10.5 of our Civil Procedure Rules, 2022 (promulgated but not implemented) mirrors the UK Civil Procedure Rules on **"Contents of Defence: Defendant's duty to set out case"**.

[16] The Court in **Ralph Gooding** relied on **SPI North Ltd v Swiss Post International (UK) Ltd and another** [2019] EWCA Civ 7, an English authority that applied the Civil Procedure Rules (UK) to a defendant asserting that it is "*unable to admit or deny*" an allegation. Henderson LJ had this to say at [49]:

"In my judgment, a number of factors point towards the conclusion that a defendant is "unable to admit or deny" an allegation within the meaning of rule 16.5(1)(b) where the truth or falsity of the allegation is neither within his actual knowledge (including attributed knowledge in the case of a corporate defendant) nor capable of rapid

ascertainment from documents or other sources of information at his ready disposal. In particular, there is no general obligation to make reasonable enquiries of third parties at this very early stage of the litigation. Instead, the purpose of the defence is to define and narrow the issues between the parties in general terms, on the basis of knowledge and information which the defendant has readily available to him during the short period afforded by the rules for filing his defence."[Emphasis added]

[17] The Court stated that, although the excerpt applies to the new CPR in England, it is equally applicable to The Bahamas. It is made clear in O. 18 r. 3 of the RSC that in defences, general denials of allegations are not sufficient to oppose allegations or fact made in Statements of Claim. The rules provides:

"(1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.

(2) A traverse may be made either by a denial or a statement of non-admission and either expressly or by necessary implication.

(3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be, and a general denial of such allegations, or a general statement of non-admission of them is not a sufficient traverse of them".[Emphasis added]

[18] In **SPI**, Henderson LJ addressed this issue at [34-36] as follows:

"34 In interpreting the provisions of rule 16.5, the court is obliged by rule 1.2 to "seek to give effect to the overriding objective". The overriding objective is formulated in rule 1.1(1) as "enabling the court to deal with cases justly and at proportionate cost", and this is amplified in rule 1.1(2) which states that:

> **"Dealing with a case justly and at proportionate cost includes, so far as practicable - (a) ensuring that the parties are on an equal footing;(b) saving expense;(c) dealing with the case in ways which are proportionate – (i) to the amount of money involved;(ii) to the importance of the case;(iii) to the complexity of the issues; and (iv) to the financial position of each party;(d) ensuring it is dealt with expeditiously and fairly;(e) allotting to it an**

appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and (f) enforcing compliance with rules, practice directions and orders."

35 Since the CPR introduced "a new procedural code "with the overriding objective which I have just quoted, it is doubtful whether any real help in interpreting the requirements of rule 16.5(1)(b) can be gained from a comparison with the provisions of the RSC which it replaced, or even from the analysis and recommendations of Lord Woolf in his Interim and Final Access to Justice Reports in 1995 and 1996 respectively, important though they are by way of general background. Nevertheless, I think it is instructive to compare the wording of CPR rule 16.5(1) with RSC Order 18 rule 13, headed "Admissions and denials", which provided that:

> **"(1) Any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.**
>
> **(2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.**
>
> **(3) Every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them."**

36 Those provisions thus enabled a defendant to "traverse" any allegation of fact in the statement of claim either by denying it or by not admitting it, and although there was authority to the effect that a defendant ought to admit facts which were not controversial, or were known to him, practitioners whose memory stretches back that far will remember the stonewalling defences, replete with non-admissions, which obstructive defendants were prone to plead, relying on the choice of response afforded to them by rule 13. This was clearly part of the mischief that Lord Woolf's reforms were designed to address, as may be seen from Chapter 20 of his Interim Report. Similarly, in paragraph 16 of Chapter 12 of his Final Report, Lord Woolf proposed that:

> **"The defence must: (a) indicate (i) which parts of the claim the defendant admits, (ii) which parts he denies, (iii) which parts he doubts to be true (and why), (iv) which parts he neither admits nor denies, because he**

> **does not know whether they are true, but which he wishes the claimant to prove; (b) give the defendant's version of the facts in so far as they differ from those stated in the claim....”**[Emphasis added]

[19] In **Ralph Gooding**, the Court determined that the Second Defendant's Defence consisted of bare denials since in every single paragraph of its Defence, the Second Defendant neither admitted nor denied the Plaintiff's allegations but put him to strict proof. NFS has done exactly the same thing. NFS merely neither admitted nor denied Mr. Gilbert's allegations and put him to strict proof without stating its own version of events or objecting to the existence of a duty of care. As such, NFS is not entitled to raise an affirmative Defence in answer to the facts and assertions alleged by Mr. Gilbert, including that it did not owe Mr. Gilbert a duty under section 5 of the Act.

[20] Notwithstanding NFS' failure to plead that it did not owe Mr. Gilbert a statutory duty, Mr. Gilbert must still prove it since he is a plaintiff and the normal rule in civil cases is "he who asserts must prove".

[21] With respect to the last minute "oral application" to amend the Defence, I rejected Mr. D'Arceuil's request to do so.

Issues arising

[22] The principal issues in this case are:

1. Did NFS owe Mr. Gilbert a duty of care?
2. Whether NFS breached that duty?
3. Whether NFS is liable for the injuries suffered by Mr. Gilbert?
4. If so, what is the measure of damages?

Discussion

Whether NFS owed Mr. Gilbert a duty of care

[23] In the recent decision of **Desmond Andrew Darville v Minister Responsible for Education Science & Technology and AG** 2017/CLE/gen/00377, this Court reiterated the ingredients necessary to prove negligence in tort at para 49:

> **"It is trite that to successfully prove a negligence cause of action, the plaintiff must prove that the defendant acted negligently and that such negligence caused the plaintiff's damage. The plaintiff bears the burden of proving that (i) the defendant owed him a duty of care, (ii) that duty was breached and (iii) such breach caused the damage. It follows that it is not in every accident that a defendant may be negligent. As such, not every accident is actionable in negligence. As Lord Wright explained in *Lochgelly Iron and Coal Co. Ltd. v John McMullan* [1934] AC 1 at p. 25:**
>
> > **"…in strict legal analysis, "negligence" means more than heedless or careless conduct whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."**

[24] In submitting that NFS owed a duty of care to Mr. Gilbert, Learned Counsel Mrs. Carlino, who appeared as Counsel for Mr. Gilbert, insisted that despite Mr. Gilbert being an employee of Jet Aviation and not an employee of NFS, NFS owed him a duty of care both at common law and under the Act. With respect to the statutory duty, Mrs. Carlino relied on section 5 of the Act which provides for the general duties of employers to persons other than their employees. Having regard to the explicit application of the duty of employers to persons not in his employment, NFS cannot contend that it did not owe Mr. Gilbert a statutory duty. Further, according to Mrs. Carlino, section 6 imposes a duty on persons who design, manufacture, import or supply articles for use at work or any article of fairground equipment to take all reasonable steps to ensure that its use by others is safe. NFS supplied the Airstair to Jet Aviation and, by extension, its employees including Mr. Gilbert. I agree. Mrs. Carlino further correctly stated that once the existence of a statutory breach is proven, the employer must then plead and prove that, notwithstanding his breach of statutory duty, he took all reasonable steps to ensure the safety. In support, she relied on **Butler v Swann** SCCivApp No. 61 of 2013, at para 21 where Adderley JA (in delivering the Judgment of the Court) stated:

> **"If, however, a breach of statutory duty is proven then comes the second stage. At this stage the burden shifts to the employer. He must plead and prove that notwithstanding his breach of statutory duty he had done all that was reasonably practicable to keep the employee safe in the circumstances. If on a balance of probability he**

satisfies that burden he is not liable under the Bahamian Act, otherwise he is liable."

[25] Mrs. Carlino submitted that although **Butler v Swann** concerned a breach by an employer to an employee under section 4 as opposed to an employer and a non-employee under section 5 or section 6, as in this case, the evidential principle applies equally here.

[26] Section 5 imposes a duty on every employer in conducting his business to take reasonable steps to ensure the safety of persons who, although not in his employ, are affected thereby. As the business of NFS was providing Airstairs (among other things) to employees of Jet Aviation to use, Mr. Gilbert, as one of Jet Aviation's employees, falls squarely within the class of persons who are affected by the conduct of NFS' business to which the duty applies. Further, and in any event, I agree with Mrs. Carlino that under section 6, NFS had a duty to take reasonable steps to ensure that the Airstair that it was supplying to Jet Aviation was designed and constructed so that its use would be safe, to carry or arrange for the carrying out of testing of equipment. NFS was the supplier of Airstairs and other equipment.

[27] Mr. D'Arceuil submitted that section 6 applies only to manufacturing or equipment, which takes the provision outside the scope of the case. He stated that the section means that NFS would warranty the materials used in the manufacturing of the Airstair. However, the application of that section is not limited to manufacturers. It applies to persons who design, manufacture, import or supply articles for use at work or any article of fairground equipment. As I stated, the application of section 6 to NFS is based on it being the supplier of the Airstair.

[28] With respect to the existence of a common law duty of care, Mrs. Carlino contended that NFS had a duty under occupier's liability.

[29] The duty of the owner of premises to occupiers was stated in **Turner v Arding & Hobbs Ltd** [1949] 2 All ER 911. Lord Goddard CJ 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."**

[30] In **Cox v Chan Cox v Chan (c.o.b. East Street South Supermarket)** [1991] BHS J. No. 110. Sawyer J. (as she then was) 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] This is how she explained it at para 21:

> **"21 On that assumption, it is clear from the decided cases, including Indermaur v. Dames, that the duty of care which a person like the defendant owes to a person like the plaintiff is not an absolute duty to prevent any damage to the plaintiff but is a lesser one of using reasonable care to prevent damage to the plaintiff from an unusual danger of which the defendant knew or ought to have known and, I may add, of which the plaintiff did not know or of which he could not have been aware. If it were otherwise then the slightest alleged breach of such a duty would lead to litigation and could, perhaps, hamper the progress of quite lawful and needful businesses."**

[32] Applying the law to the facts of the instant case, I do not accept Mr. D'Arceuil's argument that Jet Aviation bore the duty of inspecting the Airstair because a central part of their role was embarking and disembarking passengers. As the company conducting the business of providing the stairs for ground handlers, it was NFS and not Jet Aviation who ought to have inspected it. It was reasonable for Jet Aviation/Mr. Gilbert to assume that the stairs would be fit for its purpose.

[33] I therefore accept Mrs. Carlino's argument that NFS owed a duty of care to Mr. Gilbert in occupier's liability. In my judgment, there is no reason that an Airstair which NFS offered for passengers to board a plane should not be considered premises for the purposes of occupier's liability in the same way that a building is

considered premises. Mrs. Carlino stated that in **Rahming v Bahamas Ferries Limited** [2018] 1 BHS J. No. 55, this Court determined that a boat, which is moveable was considered premises for the purpose of occupier's liability.

[34] Accordingly, NFS owed a duty of care to Mr. Gilbert to take reasonable care to prevent damage to from unusual danger.

Whether NFS breached the duty of care

[35] Learned Counsel Mrs. Carlino correctly stated that NFS failed to plead or produce evidence that it took reasonable steps to ensure Mr. Gilbert's safety. No evidence was adduced with a view to proving that the Airstair was tested or that any effort was made to examine its state before having it delivered to Jet Aviation for use by Mr. Gilbert.

[36] Mr. Gilbert's evidence was that his duties included all aspects of providing ground handling services to private aircrafts including but not limited to conducting routine inspections of the Airstair, towing aircrafts, fueling, servicing (ice, water, catering, coffee, lavatory, newspaper) and aircraft arrival and departure (marshalling, chalking, coning). Under cross-examination by Mr. D'Arceuil, Mr. Gilbert explained that his duty to inspect the Airstair consists of ensuring that the stabilizers are down, removing any debris and putting up the safety rail. He maintained that it is not their [Jet Aviation's] duty but the duty of NFS to inspect the Airstair for defects.

[37] Geoffrey Rolle, Mr. Gilbert's co-worker who was present on the day of the incident but did not witness the accident gave evidence. He said that after he was told about the incident, he went up the stairs to determine what caused Mr. Gilbert's accident. Under cross-examination, he maintained that it was obvious to him that the platform of the Airstair was damaged. There was rust in the corners that appeared to have resulted in the platform giving way under Mr. Gilbert.

[38] The uncontroverted evidence of Mr. Gilbert and Mr. Rolle, whose evidence I accept as credible, was that the platform of the Airstair was defective. The uncontroverted and credible evidence of Mr. Gilbert and Winston Newton, the Concierge

Supervisor and Training Coordinator, was that Mr. Gilbert's duties did not include examining the Airstair for defects. Had NFS examined the Airstair before delivering it to Jet Aviation, the broken stair would have been discovered. Mr. D'Arceuil submitted that NFS is not liable for the accident because the Airstair is a piece of equipment that Mr. Gilbert is familiar with. If I understand him correctly, Mr. D'Arceuil intimated that the accident was caused by Mr. Gilbert. This submission is untenable.

[39] As I stated, Mr. Gilbert's uncontroverted evidence was that the Airstair that he was using at the time of the accident was defective. As such, his familiarity with the Airstair is irrelevant because his contention is that the fall was directly caused by the defect of the Airstair. Falling through a step is unusual harm that NFS, as the owner of the Airstair, is liable for in occupier's liability. Accordingly, NFS is liable both at common law and under its statutory duty.

Doctrine of res Ipsa loquitur

[40] Mrs. Carlino further argued that, in any event, NFS' negligence can be proved by the doctrine of res ipsa loquitur. In **Angelina Turnquest v Stephen Rahming** [2022] 1 BHS J. No. 8, this Court explained the doctrine. It is a doctrine by which the Plaintiff proves that the facts and circumstances of the case were such that the Plaintiff's loss and/or damage must have been caused by the Defendant's negligence: At paras 44-45 of **Angelina Turnquest**, the Court stated:

> **"Doctrine of res ipsa loquitur**
> **[44] Res ipsa loquitur is a doctrine by which the plaintiff can prove negligence on the defendant's part in circumstances where the facts show that the defendant must have acted negligently. The doctrine was most succinctly defined in the celebrated speech of Erle CJ in Scott v London and St. Katherine Docks (1865) 159 ER 665 at 667:**
>
> > **"Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."**

> **[45] In Airport Authority v Western Air Limited SCCivApp No. 275 of 2012, the Bahamian Court of Appeal explained (and the Privy Council later affirmed) that both conditions must be present for a defendant to be able to rely on the doctrine 16 of res ipsa loquitur. At paragraph 35 of the Court of Appeal's judgment, John JA said that the doctrine applies only when:**
>
> > **"(1) the occurrence is such that it would not have happened without negligence and (2) the thing that inflicted the damage was under the sole management and control of the defendant, or someone for whom he is responsible or whom he has a right to control. Provided those two conditions are satisfied, then, on a balance of probability, the defendant must have been negligent."**

[41] I agree with Mrs. Carlino that both conditions of the doctrine are present in the instant case. First, the Airstair was under the management of NFS, its servants and/or agents. Second, Mr. Gilbert falling through the Airstair would not occur if NFS used proper care in managing it. There was no evidence adduced by NFS as to a reasonable explanation for the accident.

Measure of damages

[42] The assessment of damages for injuries sustained as a result of an accident falls under two (2) broad heads, namely general damages and special damages.

[43] The objective of the courts in assessing compensation for plaintiffs was stated by Lord Blackburn in **Livingstone v Raywards Coal Company** (1880) 5 App. Cas. 25 at 30 (an appeal from the House of Lords from Scotland):

> **"I do not think there is any difference of opinion as to it being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."**

[44] A reasonable sum for general damages is determined based on comparable awards in similar jurisdictions where the socio-economic conditions are similar. English awards and practice are used as guidance. In particular, the UK practice

of Kemp and Kemp on Damages. This practice was used in the Bahamian case of **Matuszowicz v Parker** [1987] BHS J. No. 80.

[45] The leading consideration for awards for damages is fairness and reasonableness. In **H. West & Son Ltd v Shephard** [1964] AC 326 at p. 364, Lord Pearce explained that:

> **"The court has to perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgment for what it considers to be a reasonable sum."**

[46] The Court is also mindful that damages are awarded to individuals and not to "*an average person*" of a particular class or an actuarial calculation. Since the defendant must take the plaintiff as he finds him and the object of an award is to put the plaintiff in the same position that he would have been in if the tort had not occurred as far as practicable, the contingencies, chances for better or worse inherent to the plaintiff at the time of the tort and contingencies affecting the plaintiff must be considered.

The nature and gravity of the physical disability

[47] Mr. Gilbert was 39 years old at the date of the accident. He called Dr. Robert Gibson, orthopaedic surgeon as an expert witness.

[48] Learned Counsel Mr. D'Arceuil did not challenge the quantum of damages claimed by Mr. Gilbert. He agreed to the medical report of Dr. Gibson and elected not to cross-examine him. Mr. Gilbert's evidence in chief is contained in his Witness Statement filed on 5 February 2021. It ran into nearly 23 pages. He left nothing unsaid. Dr. Gibson's evidence is contained in his medical report dated 5 February 2022. Although the quantum of damages has not been challenged, the Court still retains the residual duty of ensuring that the measure of damages is based on reasonableness and it should not be a windfall.

[49] The facts relevant to the assessment of damages are not disputed between the parties. Mr. Gilbert was diagnosed as suffering a torn Right Rotator Cuff as a result of falling through the Airstair. Mr. Gilbert stated that he suffered extreme pain

immediately following the accident and moderate pain throughout his surgeries and treatment. His first surgery took place on 7 February 2019. After several sessions of physiotherapy failed to relieve the pain and an MRI that revealed biceps rupture and a lateral tear, Dr. Gibson referred Mr. Gilbert to Dr. Yagnik at West Kendall Baptist Hospital in Miami, Florida, USA. Mr. Gilbert's post-operative recovery was described by Dr. Gibson as '*prolonged pain and discomfort that required extended Physical Therapy sessions and the use of medication*.' Mr. Gilbert continued to suffer pain and following further exploration it was discovered that the rotator cuff injury which he suffered had not resolved.

[50] Mr. Gilbert underwent the second surgery on 4 December 2019 in Miami, Florida. Unfortunately, Mr. Gilbert still complains about pain.

Special Damages

[51] Special damages are quantified damages of which a plaintiff has already spent as a result of loss and damage. Special damages must be specifically pleaded, particularized and proved. This was made clear by Lord Diplock in **Ilkiw v Samuels and others** [1963] 2 All ER 879 at 890:

> **"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."**

[52] The position was also stated by Sir Michael Barnett CJ in **Michelle Russell v Ethylyn Simms and Darren Smith** [2008/CLE/gen/00440] at para 43:

> **"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…."**

[53] Undoubtedly, it is for Mr. Gilbert to prove his damage. He claims the following as special damages:

1. Medical report of Dr. Gibson $500.00

2.	Rental Insurance fee	$171.98
3.	Airline ticket – Sheena Gilbert	$267.75
4.	Airline ticket – Sheena Gilbert	$316.35
5.	Report of Dr. Yagnik	$1,000.00
6.	Federal Express Fee	$41.00
7.	Family Nursing Care following accident and first surgery	$10,899.00
8.	Family Nursing Care following second surgery	$16,695.00 (continuing and for the foreseeable future)
9.	Loss of earnings from his business to date	$60,000.00
10.	Loss of overtime pay	$3,300.00
	TOTAL	**$93,191.08**

[54] With respect to the special damages pleaded, Mr. Gilbert has provided receipts as proof of special damages for the rental insurance fee and airline tickets. I will make that award.

Family nursing care

[55] With respect to the nursing care claimed for, Mrs. Carlino submitted that Mr. Gilbert is entitled to recover for the care provided by his wife. The amount sought was claimed by reference to the rate of minimum wage in The Bahamas. There was no evidence that Mr. Gilbert's wife forewent work to provide him with nursing care but the evidence of both Mr. Gilbert and his wife was that she took on many extra duties to assist him. However, the case of **Mills v British Rail Engineering Ltd.** [1992] PIQR Q130 makes it clear that even where the caretaker has not foregone wages, the plaintiff is entitled to recover for nursing care where the caretaker bears many more duties as a result of his disability. Dillon LJ said:

> **"To my mind there can be no justification in principle for differentiating between full-time care needing really a trained nurse and full-time care needing a carer giving love and affection to the patient, the dying person, to a degree far more than would be**

> **expected in any ordinary way of life. In principle it must be, in my judgment, a matter for an award only in recompense for care by the relative *well beyond the ordinary call of duty* for the special needs of the sufferer. The basis, as explained by O'Connor L.J. in his judgment in *Housecroft* v. *Burnett*, is that the court will make an award to enable the sufferer or his estate to make reasonable recompense to the relative who has cared so devotedly. So it must indeed *only be in a very serious case* that an award is justified—where, as here, there is no question of the carer having lost wages of her or his own to look after the patient … To my mind however, if one looks at Miss Sergeant's schedule for a wife's care beyond what she would anyhow have been doing for her husband in her part of the household tasks and cooking, it comes out too high. She had a lot of extra duties put upon her. Because of his illness she rightly thought that it would be wrong to leave her husband on his own. She took him out from the house either in a wheelchair that was obtained or for a drive in the car, but not otherwise; he did not walk outside the house; he could walk a little, but without ease, in the house or occasionally out to the back of the garden. He had been keen on do-it-yourself and on gardening and was an active man. Those are matters taken into account in other heads of special damage which were not in dispute. She was understandably afraid of what might happen if he pottered out in the garden on his own. The quality of his life had been reduced and that meant more care from her was needed. But I take the view that the figure that the judge awarded, having regard to the way Miss. Sergeant's schedule is made up and the extent to which it goes back, was too high. I would accordingly reduce this award from £8,000 to £5,000. It is not possible to make a really precise calculation."**

[56] The rate of care submitted as reasonable was $5.25 for 12 hours a day, 7 days a week for both the periods (i) 7 November 2018 (the date of the accident) to 29 May 2019 (the date Mr. Gilbert returned to work after his first surgery) and (ii) 3 December 2019 to 4 March 2020 (the time that it took to recover from his second surgery). Although Mr. Gilbert's evidence was that his care burdened his wife more than usual, there was no evidence that she forewent wages. As such, 12 hours a day is, in my judgment, excessive for the care rendered by her. A more suitable multiplier for the care is 6 hours.

[57] In respect of the first period of care, $5.25 multiplied by 6 hours a day, which equals $31.50 for 204 days totals $6,426.00. In respect of the second period of care, $5.25 multiplied by 6 hours a day for 93 days totals $2,929.50. The full amount recoverable for family nursing care is $9,355.50.

[58] Mrs. Carlino submitted that Mrs. Gilbert's evidence was unchallenged but this does not mean that the Court should not take an objective view of the issue.

Loss of overtime pay

[59] Mrs. Carlino submitted that prior to the accident, Mr. Gilbert consistently earned overtime pay. Mr. Gilbert's pay stubs show that he earned approximately $115.17 in July 2018. After he was on sick leave as a result of the accident, he earned $0.00 in overtime pay. Mr. Gilbert's lost earnings while incapacitated during 7 November 2018 to 29 May 2019 relative to the first surgery and 3 December 2019 to 4 March 2020 relative to the second surgery. He is entitled to loss of overtime pay in the amount of $3,000.00. I make this order.

Loss of earnings from business

[60] Mr. Gilbert's evidence was that, prior to the accident, he owned and operated a business called 'You Nailed It Construction' from which he earned approximately $44,000.00 annually. As a result of the accident, Mrs. Carlino submitted, Mr. Gilbert lost earnings from the business for thirty one (31) months from January 2019 to August 2021, which equates to $113,666.70. The sum of damages pleaded under this head of damages was $60,000.00 to the date of the filing of the Statement of Claim. Mrs. Carlino urged the Court to accept Mr. Gilbert's evidence where he stated at para 49:

> **"Prior to the accident I started a business that I proposed to undertake in addition to my work with Jet Aviation. The nature of the business was General Maintenance, Building Repair and renovation including painting and general services. I applied for and obtained a business licence for the business in the name of 'You nailed it Construction.' Prior to the accident I submitted a bid which was accepted for repairs to the Doris Johnson Senior High School located on Prince Charles Drive in the amount of $44,560.93. As a result of the accident I was unable to undertake any additional work at great financial loss to me."**

[61] In support, she relied on the Bahamian case of **Chandler v Kaiser et al** [2007] 4 BHS J. No. 22 where the Court accepted the testimony of the Plaintiff's brother

that prior to the accident she earned $50.00 per week cleaning his home. That case is, however, distinguishable. The evidence of the Plaintiff's brother was acceptable to prove that income because he was the person paying it to her. Further, the income was a fixed singular one. In the instant case, however, Mrs. Carlino is asking the Court to accept Mr. Gilbert's evidence as to his earnings generally, which more than likely came from many sources. Plaintiffs are expected to prove their losses. Ordinarily, entrepreneurs produce documentation to support the average sum that they claim as losses. Unfortunately, therefore, Mr. Gilbert has not proven this loss and cannot recover damages in respect of this head of damages.

[62] As Mr. Gilbert only proved damages for the rental insurance fee, airline tickets of his wife and nursing care, he can only recover as special damages the sum of $10,111.58 ($9,355.50 being nursing care, $171.98 for rental insurance and airline tickets of $267.75 and $316.35).

General Damages

[63] In **Scott v The Attorney General of Bahamas and another**, Lord Kerr, at paras 17 to 19, stated:

> **"17. General damages must be compensatory. They must be fair in the sense of being fair for the claimant to receive and fair for the defendant to be required to pay - Armsworth v South Eastern Railway Co (2) (1847) 11 Jur at p 760. But an award of general damages should not aspire to be "perfect compensation" (however that might be conceived) - Rowley v London and North Western Railway Co (3) (1873) LR 8 Ex at p 231. It has been suggested that full, as opposed to perfect, compensation should be awarded - Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, 39 per Lord Blackburn:**
>
> > **"where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong …"**

> **18. As Dickson J, in the Supreme Court of Canada, observed in Andrews v Grand & Toy Alberta Ltd (1977) 83 DLR (3d) 452, 475- 476, applying this principle in practice may not be easy: 22**
>
> > **"The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution."**
>
> **19. Accepting and following this approach, the Court of Appeal in England and Wales in Heil v Rankin [2000] EWCA Civ 84 at para 23 said:**
>
> > **"There is no simple formula for converting the pain and suffering, the loss of function, the loss of amenity and disability which an injured person has sustained, into monetary terms. Any process of conversion must be essentially artificial."** [Emphasis added]

[64] When calculating damages under the various heads of damages, regard must be had to the effect that each separate award for each separate head of injury may have on the size of the global sum: See **Brown v Woodall** [1995] PIQR Q36.

Loss of earning capacity

Smith v Manchester award

[65] Learned Counsel Mrs. Carlino submitted that as a result of Mr. Gilbert's frozen shoulder, his construction capability has been hindered. Although he has remained employed by Jet Aviation and thereby suffered no loss of earnings, if he loses his current job, he will be disabled on the job market due to his shoulder injury. Further, there are limited positions for which Mr. Gilbert is trained (senior linesman at a private airport). This kind of award, Mrs. Carlino correctly stated, is derived from **Smith v Manchester City Council (or Manchester Corporation)** (1974) 17 KIR 1. In that case, the Court held that the possible loss of earning capacity was not a "notional" loss but a real risk. The plaintiff, due to a work-related accident attributable to her employer's negligence, developed a frozen shoulder. While the plaintiff remained employed with the defendant company and had no loss of earnings, the Court of Appeal increased her award by £1,000 for future loss of

earning capacity. The Court reasoned that should the plaintiff become unemployed, she would find it difficult to obtain employment as opposed to an able-bodied person. Conclusively, the plaintiff's competitive position in the labour market was weakened. The Court of Appeal differentiated between instances where (i) there was present or foreseeable financial loss (where the multiplier/multiplicand approach was more suitable) and (ii) there was no present or foreseeable financial loss, but the possibility that the plaintiff could find themselves disabled in the job market. In the latter circumstance, the multiplier/multiplicand approach is impossible or inappropriate.

[66] The utility of the **Smith v Manchester** award was explained by the Court of Appeal in **Cadet's Car Rentals and another v. Pinder** [2016] 2 BHS J. No. 82. At para 28, the Court of Appeal stated:

> **"From the authorities of Smith v Manchester (supra), Moeliker v A Reyrolle & Co. Ltd *[1977] 1 WLR 132*, and the 2015 case of Billett v Ministry of Defence [2015] EWCA Civ. 773, it is clear that a Smith v Manchester award is warranted where there is no present or foreseeable financial loss, but there is loss which the claimant is likely to suffer in the future by reason of decreased difficulty in obtaining or retaining employment. It represents an award for damages which one is likely to suffer in the future by reason of increased difficulty in obtaining or retaining employment."**

[67] In **Moeliker v A Reyrolle & Co. Ltd.** [1977] 1 WLR 132, at pp. 141-142, Brown LJ gave guidance on the application of the **Smith v Manchester** approach. He said that although the multiplier/multiplicand approach is inappropriate, the starting point for determining a sum should be the plaintiff's earnings and an estimate of the length of the rest of his working life:

> **"Clearly no mathematical calculation is possible. Edmund Davies L.J. and Scarman L.J. said in *Smith v. Manchester Corporation,* 17 K.I.R. 1, 6, 8. that the multiplier/multiplicand approach was impossible or "inappropriate" but I do not think that they meant that the court should have no regard to the amount of earnings which a plaintiff may lose in the future, nor to the period during which he may lose them. What I think they meant was that the multiplier/multiplicand method cannot provide a complete answer to this problem because of the many uncertainties involved. <u>The court must start somewhere, and I</u>**

> **think the starting point should be the amount which a plaintiff is earning at the time of the trial and an estimate of the length of the rest of his working life. This stage of the assessment will not have been reached unless the court has already decided that there is a "substantial" or "real" risk that a plaintiff will lose his present job at some time before the end of his working life, but it will now be necessary to go on and consider — (a) how great this risk is; and (b) when it may materialise — remembering that he may lose a job and be thrown on the labour market more than once (for example, if he takes a job and then finds he cannot manage it because of his disabilities). The next stage is to consider how far he would be handicapped by his disability if he was thrown on the labour market — that is, what would be his chances of getting a job, and an equally well paid job. Again, all sorts of variable factors will, or may, be relevant in particular cases — for example, a plaintiff's age; his skills; the nature of his disability; whether he is only capable of one type of work, or whether he is, or could become, capable of others;[1977] 1 WLR 132 at 142whether he is tied to working in one particular area; the general employment situation in his trade or his area, or both. The court will have to make the usual discounts for the immediate receipt of a lump sum and for the general chances of life".**

[68] I agree that as a result of the residual effect on Mr. Gilbert's shoulder, he is likely to be somewhat handicapped on the labour market. I accept his evidence that he is still restricted with his work, which is consistent with the physiotherapy report.

[69] Mrs. Carlino submitted that a reasonable sum to account for likely loss of earning capacity is $50,000 since the Mr. Gilbert was 39 at the time of the accident and was making strides not only as a Supervisor for Executive Flight Support Limited, but as the owner of his own business. The Plaintiff has suffered a loss of earning capacity and is now handicapped on the labour market due to his injures. If he were to lose his present employment, he would find difficulty securing further employment of comparable seniority.

[70] In **Smith v Manchester**, the original award for loss of future earnings was £300 (approximately 4 months of her monthly wages), which was increased to £1,000. The Plaintiff had about 14 years of working life remaining. As Mr. Gilbert is currently 42, he has approximately 23 years remaining in his working life. His line of work is not extremely niche, but also not very common. His present base salary is $644.00 per week. Therefore, I am of the view that a reasonable sum to account for the

possible handicap on the job market is $40,000.00. The Court takes into account the usual discounts since Mr. Gilbert will be receiving a lump sum.

Pain, suffering and loss of amenities

[71] In **Wells v Wells** [1998] 3 All ER 481 at 507, H.L., Lord Hope of Craighead explained how awards for pain, suffering and loss of amenities are determined:

> **"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."**

[72] It is clear 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 claimant's necessary medical care, operations and treatment.

[73] In terms of loss of amenities, it is authoritatively settled that it is in respect of the objective loss of amenities that the damages will be determined. Hence, loss of enjoyment of life and the hampering effect of the injuries in the carrying on of the normal social and personal routine of life, with the probable effect on the health and spirits of the injured party, are all proper considerations to be taken into account. Amongst the loss of the amenities of life, there are to be considered: the injured person's inability to engage in indoor and outdoor games, any prejudice to his marriage and his inability to lead the life he was able to lead before the injuries. In this regard, the age of the injured person must be taken into account, since an elderly person or a very young child will not suffer the same loss as an adult in the prime of his life.

[74] It is not disputed between the parties that Mr. Gilbert suffered a lot of pain from the accident itself as well as the recovery periods from both surgeries and still suffers some degree of pain even now.

[75] Under “shoulder injuries” in The Judicial College Guidelines (formerly the JSB Guidelines) 2018 (“the UK Guidelines”), there are five (5) degrees of injury: (a) severe, (b) serious, (c) moderate, (d) minor and (e) fracture of clavicle. Mr. Gilbert’s injury is best categorized as “moderate” which expressly includes “frozen shoulder with limitation of movement and discomfort with symptoms persisting for about two years.” The award recommended is £7,890.00 to £12,770.00.

[76] **In Angelina Turnquest** [supra], this Court dealt with how Bahamian Courts should apply the UK Guidelines – not slavishly. At paras 75-77, I stated:

> **“[75] On the UK Guidelines, in Scott v The Attorney General and Another [2017] UKPC 15, a case from this jurisdiction, the issue before the Board was what is the proper approach to the assessment of general damages for PSLA; in particular whether damages assessed by reference to the UK Guidelines should be adjusted upwards to reflect the higher cost of living in The Bahamas. In delivering the Opinion of the Board, Lord Kerr stated at paras 25, 28 and 29:**
>
> > **“25. The Bahamas must likewise be responsive to the enhanced expectations of its citizens as economic conditions, cultural values and societal standards in that country change. Guidelines from England may form part of the backdrop to the examination of how those changes can be accommodated but they cannot, of themselves, 24 provide the complete answer. What those guidelines can provide, of course, is an insight into the relationship between, and the comparative levels of compensation appropriate to different types of injury. Subject to that local courts remain best placed to judge how changes in society can be properly catered for. Guidelines from different jurisdictions can provide insight but they cannot substitute for the Bahamian courts’ own estimation of what levels of compensation are appropriate for their own jurisdiction. It need hardly be said, therefore, that a slavish adherence to the JSB guidelines, without regard to the requirements of Bahamian society, is not appropriate. But this does not mean that coincidence between awards made in England and Wales and those made in the Bahamas must necessarily be condemned. If the JSB guidelines are found to be consonant with the reasonable requirements and expectations of Bahamians, so be it. In such circumstances, there would be no question of the English JSB guidelines**

> **imposing an alien standard on awards in the Bahamas. On the contrary, an award of damages on that basis which happened to be in line with English guidelines would do no more than reflect the alignment of the aspirations and demands of both countries at the time that awards were made for specific types of injury.[Emphasis added]**
>
> **28. It is likewise not to be assumed that the Court of Appeal decided that it need only apply the JSB guidelines to arrive at the appropriate amount, without regard to local economic conditions and the expectations of citizens of the Bahamas. As has been observed at para 25 above, if JSB guidelines happen to coincide with what is regarded as appropriate for the Bahamas, there is no reason that they should not be adopted….**
>
> **29. The Board is not in a position to say that the choice of the Court of Appeal to order that general damages should be in line with the JSB guidelines involved the application of a wrong principle of law or resulted in an inordinately low award. As has been said (at para 25 above), this is primarily a matter for Bahamian courts, familiar with local conditions and the hopes and aspirations of the society which they serve".**
>
> **[76] It is therefore incumbent on the Court not to slavishly adhere to the UK Guidelines unless those guidelines happen to coincide with what is regarded as appropriate for The Bahamas. If they are, then there is no reason why they should not be adopted. The guidelines can provide an insight but they cannot substitute for our own estimation of what levels of compensation are appropriate for this jurisdiction.**
>
> **[77] I shall therefore look at the UK Guidelines because, until we develop our own jurisprudence, they are useful. I shall also look at a few cases from this jurisdiction 25 (not necessarily the same injuries) to assist me in arriving at an award which is fair and reasonable."** [Emphasis added]

[77] Mrs. Carlino submitted that Mr. Gilbert ought to recover damages to account for the keyhole scarring on his right shoulder caused by the surgeries. In support, she relied on the chapter in the UK Guidelines titled "Scarring to Other Parts of the Body". She argued that Mr. Gilbert's scar fell within the most severe class: *''A large proportion of awards for a number of noticeable laceration scars, or a single disfiguring scar, of leg(s) or arm(s) or hand(s) or back or chest"*, which falls in the

bracket of £7,830 to £22,730. However, in my judgment, Mr. Gilbert's scar is best categorized as "*a single noticeable scar, or several superficial scars, of leg(s) or arm(s) or hand(s), with some minor cosmetic deficit*" which carries the range of £2,370.00 to £7,830,00.

[78] Mrs. Carlino also submitted that Mr. Gilbert lost the amenity of fishing due to the disability in his shoulder.

[79] The UK Guidelines state that the level of the award within the bracket will be affected by the following considerations namely (i) the presence and extent of pain; (ii) the degree of independence; (iii) depression and (iv) age and life expectancy. I bear these factors in mind.

[80] The following general principles apply: (i) damages must be fair and reasonable, (ii) a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and (iii) although it is impossible to standardize damages, an attempt ought to be made to award a sum which accords "*with the general run of assessments made over the years in comparable cases*": **Bird v Cocking & Sons Ltd** [1951] 2 T.L.R. 1260 at 1263, per Birkett LJ. It is important that conventional awards of damages are realistic at the date of judgment and have kept pace with the times in which we live: **Senior v Barker & Allen Ltd** [1965] 1 W.L.R. 429. There has been a gradual rise over the years of the "conventional" sum. Salmon LJ pertinently had observed in **Fletcher v Autocar and Transporters Ltd** [1968] 2 Q.B. 363 at 364 that "*the damages awarded should be such that the ordinary sensible man would not instinctively regard them as either mean or extravagant but would consider them to be sensible and fair in all the circumstances*." The award of damages is not meant to be a windfall but fair and reasonable compensation for the injuries suffered.

[81] Mrs. Carlino relied on **Turnbull et al v Benjamin** [2019] ECSC J0621-2 of the Eastern Caribbean Supreme Court, where the Plaintiff who suffered injury to her shoulder neck and back. She underwent surgery to her shoulder and was awarded

$35,000.00 in general damages. She also relied on the Bahamian case of **Chandler v Kaiser and another** [2007] 4 BHS J. No. 22, where the Plaintiff suffered a partial tear of the supraspinatus tendon, a major tendon in the rotator cuff. She was awarded $45,000.00 in general damages. In another Bahamian case **Knowles v Dupuch** [1999] BHS J. No. 59, the Plaintiff was awarded 100,000.00 for pain, suffering and loss of amenities for the pain and discomfort associated with two surgeries. She suffered tears to both her rotative cuffs.

[82] Applying the English Guidelines as well as our developing jurisprudence in this area, I am of the considered opinion that the sum of $75,000.00 represents a fair and reasonable award for Pain and suffering and loss of amenities. I also gave a slight increase to account for the cost of living in The Bahamas.

The outcome

Special damages	$10,111.58
General damages for Loss of earning capacity/**Smith v Manchester** (no interest)	$40,000.00
Damages for pain, suffering and loss of amenities	$75,000.00
Loss of overtime pay (no interest)	$3,300.00
TOTAL GLOBAL SUM	**$128,411.58**

[83] There will be interest on special damages at the rate of 6.25% per annum from the date of the accident (6 November 2018) to the date of judgment and interest on general damages (pain, suffering and loss of amenities) at the rate of 6.25% per annum from the date of the service of the Writ of Summons and Statement of Claim to the date of this trial: 15 February 2022.

[84] The total global sum awarded to Mr. Gilbert will be $128,411.58. Interest (as shown above) and interest at the statutory rate of 6.25% per annum from the date of judgment to the date of payment.

[85] As the successful party, Mr. Gilbert is entitled to his costs to be taxed if not agreed.

Dated this 31st day of October 2022

Indra H. Charles
Senior Justice