[2023] **JMSC Civ 01**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2017HCV01491

BETWEEN	**NORMA SCOTT**	**CLAIMANT**
AND	**TOMIJAM COMPANY LIMITED (T/A Rick's Convenience Store)**	**DEFENDANT**

IN OPEN COURT

Mrs Dameta Gayle Franklin instructed by Gayle Franklin and Co for the claimant

Mrs. Pauline Brown-Rose and Miss Kaedeen Davidson instructed by Pauline Brown-Rose for the defendant

Heard: April 20, 2022 and January 16, 2023.

Negligence - Occupiers Liability - Quantum of damages.

PETTIGREW COLLINS J

THE CLAIM

[1] The claimant Norma Scott by Further Amended Claim Form filed April 7, 2022, claims in negligence and/or breach of statutory duty against the defendant Tomijam Company Limited (trading as Rick's Convenience Store). She alleges that on November 27, 2016, while she was making her way into the defendant's store to purchase items, she slipped on a sticky substance on the floor at the entry way and fell. As a result, she claims that she experienced serious injuries, loss and incurred expenses.

[2] In her Further Amended Particulars of Claim, the claimant set out her particulars of injury as follows:

i. severe swelling and pain in the right and left shoulders with difficulty flexing, extending and weight bearing;
ii. severe swelling and pain in the right pelvis and right hip. Difficulty extending, flexing and supporting weight on the right side of the body.
iii. severe swelling and pain in the right knee, difficulty with inversion, eversion, flexing and extending
iv. soft tissue injury to the shoulders, pelvis, hips and knees
v. reduced mobility in the upper and lower limbs

[3] The claimant particularised the negligence as follows:

i. Failing to take any reasonable care to see that the claimant would be reasonably safe in using the premises as a customer.
ii. Causing or permitting the passageway to be or become or to remain a danger to persons lawfully using the same.
iii. Causing or permitting the floor to be unclean or allowing a sticky substance to be left in the store.
iv. Failing to give the claimant any or any adequate or effective warning of the presence of sticky substance on the floor.
v. Permitting the claimant to walk/hurry on the premises when they knew or ought to have known that it was unsafe and dangerous to do so.
vi. In the circumstances, failing to discharge the common duty of care to the claimant in breach of the Act.
vii. The claimant intends to rely on the doctrine of res ipsa locquitor

THE DEFENCE

[4] The defendant denies negligence and states that reasonable care was taken to prevent risk of injury arising from the use of its facilities. The defendant also denies that any report of an accident was made on the day the incident is alleged to have taken place. Further, the defendant also takes issue with causation and quantum and put the claimant to strict proof. In the alternative, the defendant says that the accident was caused and/or contributed to by the claimant.

THE ISSUES

[5] The issues in this case are:

i) whether the claimant fell inside the defendant's premises and was injured; and if she did,

ii) whether the defendant was negligent in allowing liquid to remain on the floor of its store;

iii) whether the injuries the claimant complained of were caused by the fall.

The issues will be discussed together.

CLAIMANT'S CASE

Claimant's evidence

[6] Mrs Scott gave evidence that she is a 73-year-old housewife. In her witness statement filed January 27, 2022, she stated that the incident giving rise to her injuries occurred on November 27, 2016. She sought to correct that date to November 27, 2015, when she was permitted to amplify her witness statement. She stated that she entered the defendant's store, Rick's Convenience Store where she regularly shops for grocery. Mrs Scott disclosed that she knew most of

the employees including the cashiers and some of the pump attendants there. She said that as she was about to enter the convenience store, she put her left foot in first and upon immediate entry, she slipped and fell to the floor. Her further evidence was that it appeared that there was water, juice or oil on the floor as the ground was very slippery.

[7] Mrs Scott said that during the course of falling, she collided with a young man who was also in the store. She said she fell on her knee frontward and used her hand to brace the fall. Afterwards she heard a loud cracking sound and felt numbness in her leg.

[8] Her further evidence was that the young man with whom she collided helped her from the floor but she was unable to stand in her usual way so she called out to her taxi driver who assisted her to the car. It was also her evidence that while she was walking to the taxi, she saw one of the supervisors, Ann Marie Taylor whom she immediately advised of her fall.

[9] During cross examination Mrs Scott gave evidence that she was well known by some of the staff at the store. She stated further that there was no step up at the entrance to the store and that she did not see a mat at the front of the store when she entered.

[10] Her further evidence during cross examination was that when she went to the store it was about 5:00 going to 6:00 in the evening and there were staff members outside and that only the cashier and a customer were there. She later stated that apart from the young man that took her from the floor, one other man was there. When it was brought to her attention that she made no reference to the cashier in her witness statement, she stated that the cashier was at the counter. Her evidence was that where she fell, the cashier could have seen her if she was looking.

[11] She said in cross examination that the young man held her hand and carried her to the counter. She said she was trembling and feeling pain and that she rested

her hand on the counter. When it was suggested to her that she did not say anything to the cashier while she was resting her hand on the counter, her response was that she told the cashier that she needed a bottle of water and some pampers. She later stated that after she fell, she finished shopping. She also explained however, that the young man who took her up, picked up the things for her. She said she did not spend much time in the store after her fall as she was alone in there.

[12] She said further, that when she came outside, Miss Taylor was at the pump still checking. She maintained that she reported the accident to Miss Taylor the same evening. She denied that Miss Taylor ever told her that she was going to investigate the matter. She said Miss Taylor knew she fell and she patted her on the shoulder.

[13] Mrs Scott stated that she did not show anyone the liquid on the floor. She said she did not show it to Miss Taylor because Miss Taylor was outside. Her further evidence in cross examination when asked if she looked to see what was on the floor, was that it was oil or water. She said it could even be syrup. Ultimately, her evidence was that she did not know what substance was on the floor.

[14] In her witness statement Mrs Scott gave evidence that on the day of the incident, she immediately reported to her doctor, Dr Sandra Nesbeth because she was experiencing severe pain in her shoulder, hip and knees. Her evidence was also that she went home and had to be on complete bed rest as she was advised to refrain from walking that week. Mrs Scott said that she was not able to do anything for herself not even her household chores. She stated that at all material times, she was on analgesics and muscle relaxants.

[15] Further, she gave evidence that doing her regular chores at home and regular duties would cause back pain and so she had to hire help from December 2016 until December 2018. Since then, she has hired help on and off because she is unable to afford it. Further, she stated that she continued to experience severe

pains in her knee and occasional pain in her lower limbs and that she continued to visit Dr Nesbeth who prescribed her medication. According to her, due to the consistent pain, she was referred to a specialist Dr Ian Neil, Consultant Orthopaedic Surgeon. In cross examination, she denied having arthritis in her knee before she fell. When she was asked if she accepted the finding of the doctor that she had arthritis she responded many years before.

Her evidence was that Dr Nesbeth referred her to physiotherapy. She said she did not have any money to go because her husband died. She disclosed that she was referred to physiotherapy while she was being treated by Dr Nesbeth. She denied that Dr Neil recommended surgery for her knee in August 2017. When it was suggested to her that she had not done the recommended surgery, she responded that she had not done the surgery yet.

Medical report of Dr Sandra Nesbeth

[16] Dr Nesbeth in her medical report dated June 1, 2017 stated that on November 27, 2016, the claimant attended upon her and after physical examination, the claimant was diagnosed with soft tissue injury to the shoulders, pelvis, hip and knees and reduced mobility in the upper and lower limb. She was treated with analgesics and muscle relaxants. Further that she was seen on a total of twenty-four occasions for treatment and follow up management.

[17] She further reported that X-ray of the claimant's knees showed moderate osteoarthritis in the right and mild in the left. She highlighted that the fall did not cause the osteoarthritis as it is due to her age but that the fall triggered it, causing the knees to become painful and swollen which subsequently caused fluid in the claimant's knees. This she said impaired the claimant's walking and caused her to limp.

[18] Dr Nesbeth further reported that the shoulders and left knee resolved as well as can be expected but the right knee continues to become swollen and painful. As a result, the claimant had to be constantly taking oral anti-inflammatories. She further

stated that the claimant will always have osteoarthritis of the right and left knee and that this condition causes inflammation and pain which are relieved by pain killers and anti-inflammatories. She recommended the claimant for physiotherapy, orthopaedic consultation and continued use of analgesics and anti-spasmodic whenever there is a recurrence of pain. She stated that the claimant was finally discharged on May 31, 2017, a total of twenty-six (26) weeks with no resolution. Further that this will be the permanent condition of the claimant for the rest of her natural life and that the injuries outlined in the report are consistent with the mechanism of the accident.

Medical Report of Dr Ian Neil

[19] Dr Neil prepared a medical report dated April 17, 2018 following his examination of Mrs Scott on August 14, 2017. At the time of preparing the medical report, he stated that he had for his perusal Dr Nesbeth's medical report dated June 1, 2017 and radiographs of Mrs Scott's knees and chest. He stated that X-rays reportedly done shortly after the injury were not made available to him.

[20] Dr Neil assessed the claimant as having:

I. soft tissue injury to the left shoulder largely resolved
II. soft tissue injury to the lower back, now largely resolved
III. a right rotator cuff injury with some persistent inflammatory activity around the shoulder. This requires an MRI to properly define the problem
IV. left knee osteoarthritis which was made temporarily symptomatic because of the injury but has returned to its pre-injury state
V. right knee osteoarthritis which became symptomatic after the injury. The injury is likely to have triggered the formation of the cartilaginous loose body or bodies which are considered the source of continuing knee pain and swelling.

[21] His report detailed that Mrs Scott had prior degenerative disease involving the knees and shoulders but she reported only minor symptoms until the accident occurred. Further, that there was relief of some symptoms but minimal improvement in other areas. Accordingly, he highlighted that Mrs Scott had not reached maximum medical improvement. However, despite stating that he deferred estimating permanent disability until she had appropriate specialist care, Dr Neil estimated that she had an overall 4% whole person disability attributable to the accident. He stated however, that with respect to the left shoulder, left knee and lower back any further problems could not be attributable to the accident since her initial injury related pain has resolved.

[22] He recommended MRI to define the problem in the right shoulder and treatment of same to include physiotherapy and pain management. He stated that if this fails, the claimant may need surgical intervention. He further recommended surgery for the right knee to return the joint to its pain-free state.

DEFENDANT'S CASE

[23] Miss Ann Taylor, manager of the defendant, gave evidence on its behalf. Her evidence was that she has complete operational responsibility for the defendant's premises. She said that early December 2015, Mrs Norma Scott, a frequent customer of the convenience store who was known by the staff, reported that on November 27, 2015, upon entering the store through the front entrance, she hit her foot and fell. She said Mrs Scott reported that the area where the incident had taken place was in front of the cashier and that she had made a report of the incident to the supervisor who was on duty at the time. Miss Taylor was allowed to amplify her witness statement. She denied that Mrs Scott told her on November 27, 2015 that she had a bad fall in the store. Miss Taylor recalled that Mrs Scott reported the accident to her on December 7, 2015 and that when she made the report, she did not report that the store was wet.

[24] In her witness statement, Miss Taylor said that the supervisor to whom Mrs Scott alleged a report was made, was not on duty at the date and time of the incident. She further stated that the front door is used by a number of other staff members recurrently and is monitored by a security camera and security guard during the afternoon. She said that upon conducting an internal investigation, it was found that no one had seen or heard of the incident.

[25] Miss Taylor said that same week she advised Mrs Scott of her findings and informed her that the supervisor whom she mentioned she had made the report to was not at work on the date of the alleged incident and the staff members who were at work had advised that they were unaware of the incident. She further gave evidence that the company had no recording of the incident on its security cameras. She denied that the claimant fell in the convenience store as alleged.

[26] During cross examination, Miss Taylor acknowledged that the staff knew Mrs Scott quite well. She said that Mrs Scott was like family to the store staff. She stated that on the day of the incident, she worked and left at 4:00 pm. so she was not there on the occasion of the alleged incident. When asked if the store would have been monitored on the day of November 27, 2015, Miss Taylor stated that it would theoretically be monitored. Her evidence was that as at 5:00 pm, a security guard would have been present. She acknowledged that a footage of the close circuit television from the store on November 27, 2015 was not provided. She also acknowledged that she did not disclose who the supervisor on duty was and that no statement was taken from that supervisor.

[27] Miss Taylor disclosed that she has been the manager of the defendant company since 2004. She agreed that checking for potential hazards or spillages was part of her job description as manager with complete operational responsibility. She agreed that she did not provide in her witness statement any proof of a policy that the defendant company had in respect of routinely checking the premises in or around November 2015.

[28] When it was suggested to her that there were no warning signs alerting Mrs Scott to the presence of oil or water or slippery substance on the floor, she claimed that there was a system in place. She further stated that there could not be water at the front door because at the point of the first step up, is a very rough surface and at the second step up, one is inside the front door of the store where a large industrial mat is located. She also went on to say that when it rains, there is a caution sign. She agreed that this was very important information and claimed that it was an error on her part not to have included it in her witness statement.

[29] She gave evidence that the report she generated after the investigation was at her office. She said the outcome of the investigation was only disclosed to Mrs Scott.

CLAIMANT'S SUBMISSIONS

[30] Mrs Franklin based her submissions on the common law of negligence which she observed imposes a duty of care on the occupier towards those coming onto premises. Further, she stated that this duty covers not only the occupiers negligent action, but the state of the premises. Counsel relied on the case of **Turner v Arding & Hobbs Ltd** [1949] 2 All ER 911 at page 912 and submitted that 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. Counsel also placed reliance on section 3(3), (4), (5) and (7) of the Occupier's Liability Act.

[31] Further, Mrs Franklin submitted that the fact that an event causing injury occurred, will of itself be sufficient to raise a rebuttable presumption of negligence. The most common example she stated is the presence of a contaminant on the floor of an occupier's premises such as in **Ward v Tesco Stores Ltd** [1976] 1 All ER 219. There will be evidence of negligence where the facts proven and inferences to be drawn from them are more consistent with negligence on the part of the defendant than with any other cause. She also relied on **Piccolo v Larkstock Ltd (trading as Chiltern Flowers) and others** [2007] All ER 251 and **Nance v British Colombia Electric Railway Co. Ltd** [1951] AC 601.

[32] In her skeleton submissions counsel argued that the claimant was an invitee to the defendant's premises as the defendant offered items for purchase which the claimant was at the defendant's premises to purchase. Counsel asked the court to accept that there was a slippery/watery substance on the floor of the store which caused the claimant to fall and there were no warning signs, nor mats or any of the defendant's employees wiping the slippery/watery substance. She maintained that in the circumstances, the defendant was under a common law duty of care to the claimant as imposed by the Occupier's Liability Act to ensure that the premises were then reasonably safe for a visitor to that premises. Further, she pointed out that there was no evidence that the claimant was intoxicated or wearing heels or walking too fast, accordingly, she submitted that the claimant took reasonable care for her safety and was not contributory negligent. In her closing submissions she highlighted that there is no other evidence to contradict what the claimant deposed.

[33] Given the nature of the defendant's business, counsel argued that it is highly likely that there could be spills from juices or oils or gas from a small gas station in an area which was traversed by members of staff and members of the public. Further, that the defendant exposed the claimant to unusual danger with the presence of slippery substance on the floor which resulted in her slipping and falling upon entering the store. Counsel emphasised that the substance on the floor was so slippery that on the claimant's account, both herself and another young man fell in the store. She submitted that as an elderly woman, the claimant would have been taking great care to walk, observing her steps. However, the defendant had no system in place for such contingency.

[34] Additionally, there was no evidence provided by the defendant as to any policy it had in place to prevent injury or for routine checking the premises for spills or any hazardous or dangerous conditions. Likewise, counsel argued, the defendant did not disclose to the court, what preventative measures was in place to avert the occurrence of slip and fall in their store. In these circumstances, she maintained that the defendant should have placed warning signs that the floors were slippery or sticky or wet and place a mat on the area, instruct its employees, servants or

agents to dry the floor knowing the potential hazards. Therefore, she submitted that as a store owner, the defendant should have exercised reasonable care to prevent injuries to customers and in the circumstances, counsel urged the court to attribute the claimant's fall to the defendant's negligence.

[35] She further argued that the defendant, having specifically pleaded contributory negligence on the part of the claimant, had a duty to provide evidence from which the court can accept, on a balance of probabilities that the injury of which the claimant complains resulted from the particular risk to which she exposed herself by virtue of her own negligence.

[36] Counsel in her skeleton submissions highlighted that the parties join issue as to whether the claimant slipped and fell while at the defendant's premises as a result of the defendant's negligence in the management of the premises under his control. She therefore submitted that the only credible evidence relating to the fact that the incident took place is that of the claimant on the day in question. She highlighted that the defendant's only witness stated that she was not present and did not witness the incident. Mrs Franklin argued that, that being the case, she cannot assist the court as to what happened and has therefore not provided any evidence from which the court can find, that the defendant or the claimant was negligent or contributorily negligent.

[37] In her closing submissions she argued that if Miss Taylor is to be believed, she cannot assist the court in determining whether Mrs Scott wholly caused or contributed to the accident. Counsel for the claimant urged the court to find Miss Taylor as an untruthful witness as it is quite coincidental that Mrs Scott identifies Miss Taylor as the supervisor to whom Mrs Scott gave the report on the day of the incident. According to Mrs Franklin, it is even more disconcerting that Miss Taylor confirms that the supervisor to whom Mrs Scott allegedly made a report was also not on duty at the date and time of incident and yet she does not state who the supervisor who was on duty was and whether in fact a statement was taken from

this supervisor. She urged the court to find that Miss Taylor as the supervisor to whom the report was made.

[38] She also referred to the defendant's evidence that the area where the incident occurred is usually manned by camera and a security guard yet the defendant did not provide any camera footage or even a witness statement from the security guard on duty on the day of the accident. Counsel asked the court to note that there is also no evidence from the cashier or any other worker as to what may or may not have seen. Accordingly, she urged the court to find that Mrs Scott did not contribute to the accident.

[39] Mrs Franklin further asked the court to note that the defendant's indication that there was a mat and there was a step down in the store is bare assertion without corroboration. In any event, Mrs Franklin argued that if there was in fact a step down, it would be incumbent on the defendant to notify invitees to its store of its presence. She further asked the court to note that the claimant expressed familiarity with the store, being a regular visitor to the property, a fact which was confirmed by the defendant, therefore, it was quite likely that the claimant would have been aware of the step down or location of a mat.

[40] It was counsel's argument that the defendant failed to discharge the duty for the reasons set out in the claimant's statement of case and as a result of the breach, the claimants suffered loss, injury and damage which were directly attributable to the fall in the defendant's store.

[41] Counsel submitted that special damages are quantified damages which must be particularised and proved. Mrs Franklin urged the court to consider under general damages, the nature and extent of the injuries sustained, the nature and gravity of the resulting physical disability, the pain and suffering which had been endured, the loss of amenities suffered and the extent to which pecuniary prospects are affected. She relied on the speech of Lord Hope of Craighead in **Wells v Wells** [1998] 3 All ER 481 where he observed that "*The amount of the award to be made*

for pain and 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."

[42] In light of the medical evidence contained in the medical report of Dr Sandra Nesbeth, counsel submitted that the claimant is entitled to recover damages for pain and suffering and loss of amenities. Counsel relied on **Dawnett Walker v Hensley Pink** (unreported) Court of Appeal, Jamaica Supreme Court Civil Appeal No. 158/2001 where the claimant suffered injury to the neck, right shoulder and upper back. She was referred to physiotherapy and diagnosed as suffering soft tissue injuries. Also, she would experience periods of pain to the neck and shoulder. Eight months after the crash, her injury was classified as class 2, cervical whiplash injury. She was diagnosed with PPD of 5% of the whole body. She was away from work for one year and four months due to her injuries. In December 2001 she was awarded $220,000.00 for general damages. On appeal she was awarded $650,000.00 which updates to $2,917,557.25

[43] Counsel also relied on **Powell v O'Meally** Khan's Volume 4 Pg 56 where the plaintiff sustained a severed ligamentum patella resulting in 4% whole person disability and was awarded $450,000.00 which updates to $3,187,951.80.

[44] Mrs Franklin asked the court to take into account the similarities and distinguishing features of the cases and submitted that the sum of $3,050,000.00 would be adequate compensation for pain and suffering. $508,161 for future medical care and corrective surgery and $345,392.68 for special damages.

DEFENDANT'S SUBMISSIONS

[45] Mrs Pauline Brown-Rose, in her skeleton submissions on behalf of the defendant proffered that there is dispute between the claimant and the defendant as to

whether the claimant visited the premises and whether she slipped and fell while entering same.

[46] She further argued that the doctrine of res ipsa loquitur is not applicable to the claimant as the conditions for its application were not present as the alleged accident could have happened without negligence and most importantly, the claimant stated that the alleged incident occurred because she slipped on a wet sticky substance on the floor of the defendant's store. Counsel also advanced that the claimant must prove on a balance of probabilities that the defendant owed her a duty of care, that it breached that duty and that she was injured and sustained loss as a consequence of that breach.

[47] In her closing submissions, counsel submitted that credibility plays a critical role in this exercise. She stated that there are several key areas of the claimant's evidence which call her credibility into question. Also, that the claimant's evidence lacks consistency. It was her further submission in closing that the claimant was plainly uncertain or vague as to what slippery substance was on the defendant's store floor and she brought no independent witness to verify this allegation. Moreover, on her evidence she showed that no one saw the wet slippery substance on the floor.

[48] On the other hand, she submitted that Miss Taylor maintained her composure under cross examination. In any event, she argued, it is the claimant who must prove her case. Accordingly, the failure of the defendant to disclose in her witness statement any policy that is in place in respect of checks and cleaning routine of the store should not be seen as evidence of negligence or breach of its statutory duty under the Occupier's Liability Act. Counsel urged the court to dismiss the claim against the defendant on the issue of liability and award cost to the defendant.

[49] As regards general damages, Mrs Brown-Rose in her closing submissions challenged Dr Nesbeth's and Dr Neil's medical reports. Counsel requested that the

court assess and determine what weight to give to each medical report. She highlighted that Dr Nesbeth's medical report referenced the November 27, 2016 date as the date of the accident and the date she treated the patient. However, the claimant stated in cross examination that the date of November 27, 2016 was a mistake, instead she fell on November 27, 2015. Counsel urged the court to consider whether Dr Nesbeth is also mistaken about the date of the accident and the date she treated the claimant.

[50] Further, that Dr Nesbeth noted that the claimant visited her office for treatment and follow up management on 24 occasions but Dr Nesbeth's report is silent as to the dates the claimant visited, the conditions she complained of on each visit and the specific medication prescribed on each occasion. Furthermore, counsel highlighted that no date was given for when the X-rays were requested. However, attached to the claimant's intention to tender hearsay document is a receipt in the sum of $6,600.00 dated April 26, 2017, for X-rays for both knees. Mrs. Brown-Rose argued that if the X-rays were paid for 1 ½ years after the accident, then it is highly probable that the X-rays were not contemporaneous with the incident the subject of the claim. Additionally, counsel challenged the report on the basis that Dr Nesbeth stated that she discharged the claimant on May 31, 2017, 26 weeks with no resolution. Counsel argued that this suggests that the claimant was only being treated by her for injuries received in her alleged fall for only six months. She highlighted however, that if the claimant was injured in November 2015 and was treated up to May 31, 2017, then she would have been treated for 17 months and not six months (26 weeks). Counsel therefore submitted that the court is left to speculate as to whether the claimant was treated by Dr Nesbeth for injuries which resulted from the fall in November 2015 or November 2016.

[51] With respect to Dr Neil's medical report dated April 17, 2018, counsel pinpointed that despite Dr Neil's recommendation for surgery and his warning that it is not advisable to estimate permanent disability until appropriate specialist care, he gave an estimate of the claimant's disability attributable to the accident. Therefore, counsel advanced that based on Dr Neil's disregard for his own advice, the

estimate of the claimant's disability should be rejected by the court for the following reasons:

i. The claimant on her own evidence stated that she did not avail herself to the physiotherapy and surgery recommended by her specialist.

ii. The claimant's last visit to Dr Neil was in August 2017 and there is no evidence before the court from 2017 until now to say that the claimant has an ongoing condition which would still warrant the recommended surgery.

iii. The court is placed in a state of uncertainty and is being asked to speculate on the claimant's present condition. Having regard to the severity and complexity of the claimant's pre-existing condition, the court will have to ask itself whether the claimant in the absence of any trauma to the knee would have become a candidate for the knee surgery.

iv. Given the diagnosis of severe pre-existing osteoarthritis, the doctor did not explain the basis on which 4% disability was attributed to the accident.

v. That the court is left in the dark, as the available report is silent as to whether her pain is of a continuing nature or whether her pain and suffering was limited to the time when she saw Dr Nesbeth and Dr Neil in 2017.

vi. There is no evidence that the claimant continues to suffer pain, there is no evidence that she continued to receive further treatment of her knee after she was discharged by Dr Nesbeth in May 2017.

vii. There is no evidence that she wants the recommended surgery. Based on the evidence, the claimants recorded history of pain and suffering is between November 27, 2016 (one-year post accident) and August 2017. The court is asked to take into account that at the trial five years later there were no further medical or other evidence in relation to the claimant's complainants and whether they have persisted. The court is left to speculate on the present medical legal status of the claimant.

[52] Mrs Brown-Rose relied on **Veronica Irving v Brian Rowe and Phillip Peart** (unreported), Jamaica, Supreme Court, Claim No. 2006 HCV03177. She submitted that there is no finding of facts given in the medical reports of Doctors Nesbeth and Neil that suggest that the trauma of the accident accelerated the claimant's pre-existing disease. There is also no evidence before the court that Dr Neil treated the claimant on any occasion prior to August 14, 2017 nor was he provided with a medical report that outlined the claimant's disability prior to the alleged incident. As such argued counsel, Dr Neil's report does not assist in establishing the nexus and the court ought not to abide by the submission that the claimant's osteoarthritis and symptoms worsened due to the alleged accident.

[53] Counsel recommended an award of $1,000,0000 for general damages in reliance on **Sherine Williams v The Attorney General Claim** No. 2013HCV02941 and Claim No. 2012HCV03747 **Kevin Brooks v Christopher Edwards et al** Consolidated with Claim No. 2012HCV05486 **Daliah Byfield v Christopher Edwards** given the uncertainty in the evidence as to the total incapacity.

[54] In relation to special damages, counsel in her skeleton arguments submitted that the claimant should be reimbursed for all her proven special damages which arise from the alleged incident. She asked the court to refuse the exhibits 16, 19 and 20 (receipts from Dixon Drug Store showing Ezetrol 10mg, Ednyt 10mg Tablet, Januvia, Diamicron MR 60mg and Prednisone) on the basis that these drugs are used to treat medical conditions unrelated to the accident and do not correlate with

the alleged injuries which arise from the alleged accident. In her closing submissions, she also urged the court to deduct from the special damages as pleaded the cost of $2400.00 for Valium and Alvarez (exhibit 8) which the claimant said was prescribed for her because she could not sleep. Counsel argued that the receipt was dated four years after the alleged incident in 2015 and there is no report from either doctor providing any evidence of this issue of sleep and whether it was as a result of the incident.

[55] Further counsel submitted that the court ought to refuse exhibits 11 and 13 as she should not be reimbursed for monies that were spent on a person who is not a party to the claim. She further requested that the court refuse the sums on exhibits 14 (receipt dated May 31, 2018 showing payment of $3650.38), 17 (receipt dated January 24, 2017 showing payment of $1842.88) and 18 (dated April 21, 2017 showing payment of $2,849.76) as there is no description provided on the receipts. And in light of the claimant having tendered into evidence several receipts for conditions unrelated to the subject claim. Counsel argued that the court is left to speculate as to whether the prescriptions noted in exhibits 14, 17 and 18 were for injuries she suffered as a result of the fall or whether the prescriptions were for the claimant's other health conditions.

[56] Mrs Brown-Rose further urged the court to reject the sums claimed for transportation, household help, costs of future surgery and costs of surgical equipment as they were not specifically pleaded and there was no evidence to support the sums claimed. Further it was submitted that these items of special damages were not pleaded. Counsel therefore requested that the court take into account that the Claim Form was filed on May 8, 2017 which was later amended on June 22, 2017. Further that up to April 2022 the claimant would have been able to establish exactly how much she is seeking to claim under this head of damages.

[57] Counsel further submitted that the claimant's medical evidence does not support her evidence that she sustained injury on November 27, 2015 but that she has other illnesses for which she was being treated by the same doctor.

[58] In closing, counsel submitted that the claimant has failed to establish a causal link between the accident and the medical expenses which she is seeking to recover. Further, that although some items of special damages were agreed, the evidence at the trial does not support that those expenses were incurred because of an accident on or about November 2015.

ANALYSIS

Liability

[59] There is some uncertainty about the date of the incident of which the claimant complains. It was stated in the claim as initially filed that the incident took place on November 27, 2017. The claim was amended to reflect November 27, 2015 as the date of the incident. The claimant in her witness statement said that it was 2016. Dr Nesbeth spoke of the claimant attending upon her in 2016. It is noteworthy that the defendant's witness spoke of a report being made to her in December 2015 about an incident.

[60] It is presumed that Dr Nesbeth had regard to her medical records in preparing the report. She noted in her report that the patient was discharged from treatment after 26 weeks. That evidence seems more consistent with the incident having occurred in 2016. This court accepts that the incident occurred in 2016. Although there is now confusion about the date, I am satisfied that the defendant's Manager Ms Taylor was alerted about the incident on the occasion it occurred.

[61] The question of liability is quite easily resolved in the claimant's favour. The basis for doing so is in part the acceptance of the claimant's evidence over that of the defendant's witness. The law of negligence needs no exposition. The case of **Turner v Arding & Hobbs Limited** [1949] 2 All ER 911 which was cited by the claimant's attorney at law, supports the position that there ought to be liability on the part of the defendant in this case.

[62] In that case, the plaintiff Miss Turner sued the defendant for damages in respect of personal injuries she received when she slipped on a vegetable matter and fell while shopping on the defendant's premises. At the time of the incident the shop was not crowded. It was held that there was a duty on the defendant to ensure that his floors were kept reasonable safe. The defendant failed to explain how the vegetable matter got onto the floor or give sufficient evidence of the state of the floor and its supervision prior to the incident. The plaintiff was therefore entitled to damages.

[63] Lord Goddard CJ at page 911

> *"The duty of the shopkeeper in this class of case is well established. 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. That was the view of Lynskey J in* ***Stowell v Railway Executive****. The injured person need only say: 'This was the trap which caused me to fall. It was something which ought not to have been there."*

[64] In this case, the defendant had a duty to use reasonable care to see to it that the floor of the shop, particularly the entry way that customers to the premises were bound to traverse, was kept reasonably safe. Liquid substance, whatever that substance might have been, was an unusual danger of which a customer such as the claimant would not have been aware and that substance was not expected to be present and ought not to have been present. I do not accept that the floor was being checked with any frequency so that any spillage would have been detected. There were no warning signs that there might have been danger so as to alert the claimant.

[65] **In the case of Nance v British Columbia Electric Railway Company Ltd** [1951] AC 601 Viscount Simon at page 611 made the following observation:

> *"The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as*

> *a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and careful examination of the authorities, by the English Court of Appeal in* ***Davies v. Swan Motor Co. (Swansea) Ld.*** *(19), to which the Chief Justice referred.*

[66] The defendant having raised the issue of contributory negligence, has not pointed this court to any evidence, whether on its case or on the claimant's case which could support the position that the claimant did not in her own interest take reasonable care of herself and thus contributed, by any want of care, to her own injury thereby grounding contributory negligence. Hence there can be no finding of contributory negligence in this instance.

Damages

Special damages

[67] Without detailing the evidence which emanated from cross examination, it became clear that the claimant has sought to overstate the sums she is entitled to in the way of special damages. A number of the receipts produced in evidence did not relate to the purchase of medication occasioned by the injury she sustained as a result of the fall. The claimant accepted that exhibits 11, and 13, related to her husband, that exhibits 16, 18 and 20 were for diabetes, high blood pressure high cholesterol medication, exhibits 8 and 9 related to purchase of sleep medication and exhibits 14, and 17 could not be explained. The claimant's explanation regarding the medication to assist her to sleep did not show any connection between her injury and her inability to sleep.

[68] Exhibit 10 evidences expenditure of $767.01 for Omni Gel made on the 31st of January 2020, being a topical used to treat pain, on a balance recovery is allowed. Exhibit 12 reflects that the sum of $2,772.67 was spent on Flexilor a pain killer indicated for use for arthritic and pain resulting from osteoporosis. The sum is in my view recoverable since the medical evidence shows that the claimant had pre-existing osteoarthritis which was aggravated by the fall resulting in pain which did not, prior to the fall, exist. Exhibit 15 represents expenditure of $4086.00 for Flexim, Gabamax and Omni Gel, which are pain killers used for a variety of purposes including injuries. The date of that expenditure is October 2020. On a balance, that sum is recoverable. Exhibit 21 is not a receipt but speaks to the likely costs of surgery and that sum is not recoverable as special damages but will be addressed at an appropriate juncture.

[69] This court agrees with the defendant that no claim for transportation, household help, costs of future surgery and costs of surgical equipment was specifically made in the particulars of claim. There was, contrary to counsel's submission however, evidence to support the claim for household help, cost of future surgery and costs of surgical equipment.

[70] In the case of **Claudette White v Cyril Mullings and Eldred Mullings** [2017] JMSC Civ. 111, in discussing the question of whether the claim is restricted to the causes of action specifically pleaded in the claim form, D. Frazer J (as he then was) made the following observation:

> *[15] In **Akbar Limited v Citibank** NA [2014] JMCA Civ 43, Phillips J.A. considering the issue of whether the defendant had specifically pleaded and proven his claim for special damages, observed at paragraph 64 that:*
>
> > *T]he important point is that the defendant must not be taken by surprise. The defendant is entitled to know the type of claim being made by the claimant and the amount that is being claimed. However, as stated by Harris JA in **Grace Kennedy Remittance Services Ltd v Paymaster (Jamaica) Limited and Paul Lowe**, SCCA No 5/2009, judgment delivered 2 July 2009, endorsing Lord Woolf's judgment/dicta in **McPhilemy v Times Newspaper** [1999] 3 All ER 775, once the general nature of a claim has been pleaded, if the witness statements are exchanged those statements may*

> *supply particulars of a claim. There is thus no longer the need for extensive pleadings. They are not superfluous, they are still required to mark out the parameters of the case of each party and to identify the issues in dispute, but the witness statements and other documents will detail and make obvious the nature of the case that the other party has to meet. In* ***Eastern Caribbean Flour Mills v Ormiston St Vincent and the Grenadines*** *Civil Appeal No 12/2006 delivered 16 July 2007, Barrow JA at paras [43] and [44] also endorsed the principles declared by Lord Woolf and stated: "[43] … therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand pleadings to mean with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case. [44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings…*
>
> *[16] It appears therefore that the concern of the court is to ensure that the defendant knows the case that he has to meet. The pleadings serve to establish the parameters of such a claim and the issues which arise. The witness statements and other documents should thereafter provide the details and particulars in relation to that claim.*

[71] Based on the above exposition of the law, the claimant may recover the items of special damages dealt with in her witness statement if the evidence and proof in respect of same is satisfactory, having regard to the civil standard.

[72] The claimant said that she paid for household help at the rate of $4000.00 weekly from December 2016 to December 2018. It is also noteworthy that the evidence was that doing her regular chores at home caused her back pain and so she hired help. The evidence is that by the time of her visit to Dr Neil on 14 August 2017, the back pain had been resolved. In all the circumstances, since her mobility was negatively affected, it would be reasonable to award her for approximately six months of help. That sum would be $96,000.00. It is not in the ordinary course of things, expected that a householder will be able to provide receipts in respect of payments made to a domestic helper and so the absence of receipts will not be a bar to recovery.

[73] The defendant does not dispute certain expenditure and consequently, that if liability is determined in favour of the claimant, she could recover the related sums. I conclude accordingly because certain documents were agreed. The following expenditures were not disputed:

Exhibit 3 evidencing payment of $98,050.00 for medical report, office visits, knee wrap and Cataflam injections.

Exhibit 4 evidencing payment of $37,800.00 for diagnostics tests;

Exhibit 5a receipt evidencing expenditure of $6000.00 for orthopaedic consultation;

Exhibit 5b receipt evidencing expenditure of $4000.00 for follow up visit to Dr Neil;

Exhibit 6 receipt evidencing expenditure of $70,000.00 for medical report from Dr Neil.

[74] It is noteworthy that the claimant insisted that she made some 25 office visits to her general practitioner Dr Nesbeth, on account of the injury and denied that those visits included visits and treatments for her other illnesses. For each visit, she claimed $1500.00. She accepted that during the period, Dr Nesbeth was also treating her for diabetes and high cholesterol. It is however the information contained in Dr Nesbeth's report that the claimant visited her office on 24 occasions for treatment and follow up management during the course of her recovery. There was nothing in Dr Nesbeth's report to suggest that her visits in relation to her other conditions were included. It is quite instructive that the claimant did not secure a receipt on each visit but instead, the claim for the visits was supported by the Doctor's invoice in a total sum of $37,500.00. This sum is included in the invoice for $98,050.00.

[75] It would be difficult for this court to accept that all of the claimant's visits to Dr Nesbeth were related to the injury sustained as a result of the fall, notwithstanding

what is contained in the doctor's report. If indeed all the visits were in relation to injuries sustained, it would mean that the claimant attended upon Dr Nesbeth on a weekly basis in relation to the injury. That likelihood seems to be farfetched. Ultimately it is the claimant who must prove her case. Since this aspect of the evidence regarding special damages is rejected, this court cannot speculate as to how many of those visits were in fact related to her injury and will therefore make an award only in relation those visits which have been clearly proven. I am satisfied that she did in fact make a visit on the occasion of the incident giving rise to the claim and also on the occasion she obtained the medical certificate. It was also revealed in the doctor's report that the claimant visited twice weekly for Cataflam injections for a period of 4 weeks. This court cannot say how many other visits were made and there will be no award in respect of them.

[76] The claimant is entitled to recover those sums as represented in exhibits 4, 5a, 5b, and 6, and those sums indicated in exhibits 10 and 15 as special damages. The sum of $22,500.00 is to be deducted from the $98,050.00 represented in exhibit 3. The claimant will recover special damages in the amount of $296,975.68.

General damages

[77] In assessing the claimant's injury resulting from the accident, it is important to bear in mind the injuries for which she claims, juxtaposed against the findings of the doctors. The injuries as particularized, reflect essentially the complaints that the claimant had post-accident. The critical question is to what extent are these complaints as a result of the accident. Emphasis must be placed on Dr Neil's assessment that Mrs Scott had prior degenerative disease involving the knees and shoulders but that she had reported only minor symptoms before the accident occurred. Also critical are his findings that by August 14, 2017 when he examined her, the soft tissue injury to the left shoulder and to the lower back had by then, been largely resolved and that with respect to those areas as well as the left knee, any further problems could not be attributable to the accident since her initial injury related pain had resolved. He emphasized that the left knee osteoarthritis which

was made temporarily symptomatic because of the injury had returned to its pre-injury state. He further opined that the right knee osteoarthritis became symptomatic after the injury and that the injury likely triggered the formation of cartilaginous loose body or bodies which are considered the source of continuing knee pain and swelling.

[78] A defendant has to consider that he must take his victim as he finds him. Thus, a defendant will be liable to a claimant if the defendant's breach of duty has caused or materially contributed to the injury suffered by the claimant, notwithstanding that there are other factors for which the defendant is not responsible, which contributed to the injury. See **McGhee v National Coal Board** [1972] 3 All ER 1008.

[79] It appears that the doctor never attributed the right rotator cuff injury associated with persistent inflammatory activity around the shoulder to the fall. He determined that in order to properly define the problem and assess that condition, an MRI was required. Nevertheless, the existence of pain after the fall should be taken into consideration.

[80] The defendant has severely criticized Dr Neil's estimate that the claimant has an overall 4% whole person disability which is attributable to the accident. He made this finding notwithstanding his statement that he deferred estimating permanent disability until she had appropriate specialist care. Assessment of disability cannot be precise. The evidence shows a basis on which the doctor could have made the assessment. The evidence is that there was an aggravation of an existing condition. As noted earlier, the soft tissue injury to the left shoulder, left knee and lower back had by the time of Dr Neil's last examination, been largely resolved. The evidence is also that any further problems to those areas could not be attributable to the accident. Further Dr Neil's opinion as indicated, is that the problem with the right rotator cuff injury had not been properly defined. It follows that he would not have considered those injuries as contributing to the overall 4% whole person disability.

[81] Admittedly, there has not been any later examination to show the status of the right knee with the osteoarthritis which Dr Neil opined became symptomatic after the injury which he said is what is likely to have triggered the formation of cartilaginous loose matter which he considers to be the source of the continuing knee pain and swelling. However, it follows that he must have considered that outcome serious enough and sufficiently permanent in nature so as to result in a 4% disability. The court is mindful that that assessment is to be viewed as provisional.

[82] It is not accurate to say as the defendant submitted, that there is no finding of facts given in the medical reports of Doctors Nesbeth and Neil which suggest that the trauma of the accident accelerated the claimant's pre-existing disease. Dr Nesbeth stated in her report that the claimant had osteoarthritis of the right and left knee but that she had the condition without the swelling or pain before the fall, but that the fall "triggered a cascading sequelae of problems for the [claimant] The fall caused swelling and pain, subsequently fluid in her knee. This impaired her walking and caused her to limp". In the case of **Wilsher v Essex Area Health Authority** [1988] A. C. 1074, referenced in the case of **Kevin Brooks v Christopher Edwards** [JMSC Civ 167 it was said that the "***but for causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury"***

[83] In this instance, the injury that has persisted is that to the right knee. The other injuries affected the claimant for a period of 8 months at most. It is evident that the case of **Sherine Williams v The Attorney General** cited by the defendant takes into consideration one injury only. That of **Kevin Brooks** addressed a scenario where the claimant suffered knee, shoulder and neck injuries. Mr Brooks also received a fracture of his left foot to his knee. The award made to Mr Brooks was in fact $2,750,000.00 in 2018, and not $900,000.00 as the defendant said.

[84] A severed patellar ligament as suffered by the claimant in **Powell v O'Meally** is in my view a more serious injury than that suffered by the claimant in the instant case.

The claimant in **Dawnett Walker v Hensley Pink** suffered a PPD of 5% and was away from work as a result of her injuries for a period of 1 year and four months. The injuries are not the same but may be regarded as comparable in terms of seriousness, but there is no indication that there was any underlying contributing factor in the latter case as there is in the instant case. Thus the instant claimant would not be entitled to as much compensation as the claimants in **Powell v O'Meally** and **Dawnett Walker v Hensley Pink**. Having regard to the cases commended by both sides, this court thinks that an award of two million four hundred thousand dollars ($2,400,000.00) for general damages for pain and suffering and loss of amenities is appropriate.

Future medical care

[85] Regarding the cost for future medical care, Dr Neil indicated in his report that surgery is recommended for the right knee in order to return the joint to its pain free state. The claimant said she has not done the surgery as yet, which is an indication she intends to do it. The document admitted in evidence as exhibit 21 shows that in 2017 the cost for surgery was $439, 370.32. It is evident that at this time, the cost would be considerably more. The onus was on the claimant to provide an updated proposed cost. She did not. She is awarded the mentioned sum for her intended surgery. Exhibit 22 reflects that the equipment to be used in connection with the surgical procedure would have cost $68,791.57 in 2017. The claimant is entitled to those sums.

[86] I extend apologies to the parties for the length of time it took for the judgment to be delivered. My vacation intervened.

ORDERS

[87] Based on my findings, I make the following orders:

1. Judgment for the claimant against the defendant.

2. Special damages are awarded in the sum of $296,975.68 with interest at the rate of 3% per annum from November 27, 2016 until the date of judgment.

3. General damages are awarded in the sum of $2,400,000.00 with interest at the rate of 3% per annum from May 12, 2017, (the date of the service of the claim form) until judgment.

4. The sum of $508,161.89 is awarded for future medical care.

5. Costs to the claimant to be taxed if not sooner agreed.

A. Pettigrew-Collins
Puisne Judge