

Claim No: SKNHVC2020/0102
Formerly Claim No. SKBHCV2018/0168

Claimant

AND

Defendant

BEFORE: His Lordship, the Honourable Justice Ermin Moise

APPEARANCES:

Mr. Dane Hamilton Q.C. with Mr. Dane Victor Elliott-Hamilton of counsel for the claimant.
Mr. Garth Wilkin with Ms. Danni Maynard of counsel for the defendant

2021:	September, 23 rd October, 11 th (submissions)
2022:	March, 10 th

JUDGMENT

[1] **Moise, J:** This is a claim for damages against the defendant on the grounds of negligence and occupier's liability. The claimant (Ms. Archibald) claims that she suffered personal injury whilst a visitor on premises owned and operated by the defendant. As a result of those injuries she claims to have suffered loss and damages. The defendant denies liability and contends that the injuries, if any, were suffered solely as a result of the negligence of the claimant. Having examined the evidence and considered the submissions of counsel, I have determined that the claimant has made out her case and would grant her the remedies she seeks subject to the assessment of her damages. These are the reasons for my decision.

The Facts

- [2] The defendant (more commonly referred to as TDC) is a registered company operating within Saint Kitts and Nevis. One of its operations is the TDC Home and Building Depot located at the Industrial Site in Basseterre. It is Ms. Archibald's case that TDC owes a duty of care to customers traversing and/or utilizing the parking area leading into the store. That duty was to ensure that the area was reasonably safe for persons visiting the store.
- [3] Ms. Archibald states that at approximately 11:45am on 21st December, 2016 she entered the parking lot with the intention of entering the store. As she exited her vehicle and began walking to the building, she slipped on some white paint which was lying on the ground of the parking lot and fell. She attributes this to the negligence of the defendant.
- [4] In her witness statement, Ms. Archibald gives a more detailed account of what she claims occurred on that day. She states that the entire area, including the parking lot is fenced. She entered the parking lot by driving through the gate. There were signs directing the flow of traffic and markings to indicate where one can park. After entering the gate, she made a right turn and parked her vehicle in the upper parking lot before exiting. She walked towards the rear of her vehicle and immediately started sliding "feet forward". She looked down and noticed that she had stepped into a pool of white paint. She tried to break her fall and held on to her vehicle for support. She however could not get a firm grip and twisted her back and neck, eventually falling on her buttocks. She states that there was no sign or barrier indicating that there was an imminent hazard or puddle of paint.
- [5] It was Ms. Archibald's evidence that she tried to get up quickly but realized that she was in some pain on the right side of her lower back. However, she nonetheless got up and proceeded to the store. Further down the parking lot she came across an employee of TDC by the name of Linda Huggins and had a conversation with her. She continued to feel pain towards her lower back but treated it as a minor strain. She went in and browsed through the store.
- [6] Ms. Archibald states further that she attempted to climb the stairs to go to the second floor and it was at that point that she felt such discomfort that she decided to report the incident. She did not continue shopping as the pain seemed to be gradually getting worse. She went back downstairs and reported

the incident to Mrs. Michelle Lake. She states that at the time of the making of this report, the supervisor was sitting in the office. She was informed by Mrs. Lake that she had observed some paint was spilt in the parking lot and that she had in fact picked up the tin and asked an employee to clean up the spill before someone got hurt. Ms. Archibald states that Mrs. Lake showed her some of the residue of the paint on her fingers. Ms. Archibald went on to point out the paint on her own shoe and right foot to Mrs. Lake. Ms. Archibald was then advised to provide a written account of the incident; which she did. This report was tendered into evidence and, save for a few discrepancies, largely corresponds to what Ms. Archibald had to say during the trial.

- [7] Ms. Archibald goes on to state that although she continued to experience some pain on the evening of the incident whilst at home, it was not until the following day, when she was at work, did the pain and discomfort greatly worsen whilst climbing a flight of stairs. On that evening she decided to seek medical attention and visited the office of Dr. Daryl Warner. She was prescribed medication for pain, inflammation and given muscle relaxers. She was also administered a dose of Vitamin B Complex by way of an injection.
- [8] It was Ms. Archibald's evidence that she continued to experience pain throughout the Christmas season that year. She decided therefore to rest and hired paid assistance to enable her to do the usual Christmas house cleaning. On 4th January, 2017, she again sought medical attention as a result of the pain, which by then had worsened and extended to her lower back. She claimed to have been experiencing extreme discomfort when performing normal tasks such as sitting, climbing stairs and wearing heels. She was then certified unfit for work. The pain nonetheless continued to worsen and she visited Dr. Warner again towards the end of January, 2017, at which point an X-Ray of her back was recommended. She has travelled to the United States on a number of occasions to obtain further treatment for her condition.
- [9] Ms. Archibald continues in her witness statement to describe the impact the injuries had on her life. I will address these later in this judgment in my assessment of the damages which she claims to have suffered. In summary however, she claims to have been unable to return to work and therefore retired early. It is her assertion that in travelling for medical treatment she has to bring someone along with her as she continues to experience significant pain in carrying out her daily functions.

[10] In cross examination Ms. Archibald stuck to her evidence and insisted that she did fall in a puddle of paint. She denied that she was not paying attention and stated that she simply was not expecting that there was paint on the parking lot. She was shown a number of photos of the area and the alleged puddle of paint; which appears to have dried at the time. She acknowledged that there was paint in the photo but that it was much wider than how it was on the day in question and that there was no spread at the time she fell.

[11] Ms. Archibald was also pointed to a walkway towards the front of where her vehicle was parked. It was put to her that this walkway leads to the store. I take the cross examination to have suggested that if Ms. Archibald had used the walkway towards the front of her vehicle she would not have had to step into the paint. She stated however, that she did not know whether this walkway led into the store. What she did was to exit her vehicle and turn towards the back; which was where she slipped over the paint.

[12] Ms. Archibald also recounted a conversation with Ms. Linda Huggins, whom she met after she fell in the paint. She is familiar with Ms. Huggins from prior to the incident. She acknowledged pointing out the white paint on her pants to Ms. Huggins but denied that she had ever told Ms. Huggins that she was experiencing back pains prior to the day of the incident. I will go on further to examine Ms. Archibald's cross examination in relation to the injuries she claimed to have suffered later on in this judgment.

The Medical Evidence

[13] Dr. Daryl Warner appeared as a witness in this case. He presented his medical reports of his examination, referrals and treatment of Ms. Archibald. He reported that Ms. Archibald visited his practice on 23rd December, 2016 with complaints of lower back pain after a fall on 21st December, 2016. It was his evidence that his examination revealed some swelling and tenderness from the lower back to the shoulder and neck area. He confirmed that he had prescribed medication for pain, inflammation and given her some muscle relaxers. He also administered a dose of Vitamin B Complex by way of an injection. Despite this, Ms. Archibald returned on 4th January, 2017 complaining that the pain had worsened and had extended to her upper back. She was experiencing extreme discomfort in undertaking certain normal activities. Dr. Warner then certified her temporarily unfit for work and recommended that an X-Ray be done on her back.

[14] One month later, Ms. Archibald again returned to Dr. Warner's office complaining that the pain had intensified. She was now experiencing pain additionally to her shoulders and neck. Lying on her left side was the only way of obtaining any relief. An MRI was recommended. It was revealed that there was an intersomatic tear disc posterior annular tear in the L5/S1 region. She was recommended medication and advised to rest.

[15] Due to the continued complaints of pain, Dr. Warner recommended that Ms. Archibald be examined by a neurosurgeon. After being examined by two neurosurgeons it was revealed that Ms. Archibald also suffered from sacroiliac dysfunction, bursitis and osteoarthritis. He opined that these are all associated with sudden trauma such as an accident or injury. It was also suspected that Ms. Archibald suffered from sciatic nerve damage. A CT Scan was recommended. Dr. Warner also indicated that there was evidence of bilateral nerve root canal narrowing and nerve compression. She was referred overseas for further treatment where she was diagnosed with fibromyalgia.

[16] In his report, Dr. Warner described Fibromyalgia as a condition which refers to pain in the fibrous tissue of the body. It is believed to be triggered by a physically or an emotionally stressful event. This illness has many symptoms which vary from person to person. However, the chronic pain, fatigue and other symptoms associated with fibromyalgia often makes normal day to day activities extremely difficult. On that basis, Dr. Warner concluded that it was uncertain as to when Ms. Archibald would be medically fit for work.

[17] In cross examination Dr. Warner acknowledged that experts have not been able to determine what actually causes fibromyalgia. Potential causes have been considered. However, based on his evidence it appears that much of the research has not concluded an actual cause of this disease.

[18] Dr. Warner was also pressed on the findings of the MRI. He stated that the spinal tear just means that there is another finding identified in the MRI. He stated that the osteoarthritis would have caused the root canal narrowing and that it is a degenerating process. It's not a singular incident process.

[19] Dr. Daveen Wilkin also appeared as an expert witness in this case. She tendered a report dated 30th November, 2020 which highlighted her interactions with, and treatment of, Ms. Archibald. She was referred to her office by neurosurgeon, Dr. Geoffrey Liburd. Ms. Archibald visited Dr. Wilkin's office

on 27th November and 18th December, 2017. She also visited her on 29th January, 2018. At each visit she complained about the pain she was experiencing. Dr. Wilkin states that the initial diagnosis of fibromyalgia was confirmed and that Ms. Archibald was encouraged to continue taking the medication which she had previously been prescribed. Dr. Wilkin last saw Ms. Archibald on 22nd June, 2018 and states in her report that her condition remained the same.

[20] Dr. Wilkin was also cross examined on the diagnosis of fibromyalgia. She too indicated that there is no known scientific cause of fibromyalgia. With regard to a number of issues raised in her own report, Dr. Wilkin indicated that there was a past medical history of thyroid disease. This simply meant that this was a diagnosis provided by the claimant prior to her interaction with her. She stated in her report that Ms. Archibald was found to have suffered from an L5/S1 intersomatic disc posterior annular tear associated to the PLJ osteoarthritis leading grade I-II right foramina stenosis. This was part of the findings of the MRI which had previously been recommended.

[21] In cross examination Dr. Wilkin indicated that what she meant by this was that the tear that Ms. Archibald had would lead to the PLJ. She also stated that sometimes stenosis can be congenital. This means that a person is born with it. Foramina Stenosis can be something that a person is born with and becomes aware of later in life because of an incident. Sometimes it can be secondary to degeneration. Degeneration means something that happens over time. In the medical reports disclosed it is also the case that Ms. Archibald had been diagnosed with hyperthyroidism in 2010 and fibrocystic disease in 2014. When pressed with these previous conditions, Dr. Wilkin indicated that a full medical history would have been helpful in further investigation of those issues as it relates to the pain which Ms. Archibald was suffering from.

The Defendant's evidence

[22] The defendant first led evidence from Ms. Linda Huggins. In her witness statement, Ms. Huggins is described as Credit Manager for TDC. She states that she knows Ms. Archibald very well and that she was a family friend. She also asserts that prior to this incident, Ms. Archibald had informed her that she was suffering from back pains. Ms. Huggins states that on 21st December, 2016 she was on vacation and went up to the Home Depot to purchase some items. Her car was parked by the fence in the TDC Home Depot parking area. It was approximately 12:30pm.

[23] Whilst walking towards her vehicle, she saw another car enter the parking lot. She saw the person drive through a puddle of wet paint in the parking area and parked the car facing the wall of the material storage area. It was Ms. Huggins' evidence that the puddle of paint was in the entry way of the parking space that this person had now occupied; more towards the left side of the vehicle.

[24] Ms. Huggins states that she then observed Ms. Archibald exit the right side of the same vehicle and walk to the back of the vehicle looking down. She states that she had asked Ms. Archibald why she drove in the paint despite seeing it there. Ms. Archibald's response was "look how they throw down the paint and nobody clean it." Ms. Huggins then held a conversation with Ms. Archibald which included her stating that Ms. Archibald could have parked somewhere else. There were other parking spaces available in the parking lot. She also indicated that Ms. Archibald pointed out some paint towards the bottom of her shoe. Her clothes did not appear to be dirty with paint and Ms. Huggins states that she did not observe Mr. Archibald fall and slip at all. Ms. Huggins then went into her vehicle and drove off. She then made a report to TDC of her observations on 2nd March, 2017. I note however, that Ms. Huggins had made these allegations of fact whilst also stating that she was leaving the parking lot in a hurry to meet her sister at the airport. She also claims to have observed the tin of paint despite Mrs. Lake's response that the tin of paint had been removed earlier.

[25] In cross examination Ms. Huggins largely stuck to her evidence. She did indicate however, that having observed the paint on the ground she did not inform TDC of this; despite her being an employee. She states that she was on vacation at the time. She stated that when she saw Ms. Archibald she had not passed the paint that was spilt. She was standing in it. It was right there. Her shoes were dirty. She stated that she did not see Ms. Archibald fall. Ms. Huggins indicated that she was not aware that Ms. Archibald had made a report of her injuries until March, 2017. That was when she was asked to give her own account of what she had observed.

[26] Evidence was also led from Mr. Iston Williams, who is a senior manager with TDC. Mr. Williams' witness statement was rather brief and he simply indicated that Ms. Archibald did in fact make a report of the incident to Mrs. Lake, who was the Manager at the time. He tendered into evidence, the Incident Report submitted by Mrs. Lake as well as the letter of 4th January, 2017 written by Ms. Archibald highlighting her version of what transpired. The incident report did indicate that Mrs. Lake

was aware that paint had been spilt on the ground in the parking lot. Mrs. Lake reported that she also noticed the actual tin of paint on the ground and had moved it and requested that an employee put some sawdust onto the paint. She stated that some 45 minutes later, Ms. Archibald must have slipped in the paint prior to the sawdust being placed on it.

[27] There is one discrepancy between Mrs. Lake's report and that of Ms. Archibald as it relates to the time. Mrs. Lake reported that she had seen the paint about 12 noon and that Ms. Archibald must have slipped in it about 45 minutes later, prior to any sawdust being placed on it. Ms. Archibald's evidence however was that she entered the parking lot at approximately 11:45am. If the timing is to be considered, that would have therefore placed her in the parking lot prior to Mrs. Lake's observation of the paint. Ms. Huggins also claimed to have made her observations about noon; therefore placing Ms. Archibald in the parking lot around the same time which Mrs. Lake claimed to have seen the paint. Mrs. Lake was not present to clarify her comments. It may very well be that she was generally mistaken about the time. However, having examined the evidence of Ms. Archibald alongside that of Ms. Huggins, I find on balance that Ms. Archibald encountered this paint prior to any sawdust having been placed on it.

[28] Mr. Williams also tendered photographs of the paint which he states had been spilt in the parking lot on that day. Much of Mr. William's evidence as adduced in cross examination centered on a description of the parking lot and the elevation and decline leading into the store from the parking lot. It is not necessary for the court to recount this evidence in any detail at this stage.

The Issues

[29] There is no dispute that TDC owed Ms. Archibald a duty of care to ensure that the parking lot was reasonably safe. The main issues for consideration in this case are whether there was a breach of that duty. Counsel for TDC has also asked the court to find that if Ms. Archibald did fall in the paint, it was as a result of her own negligence and not that of TDC. If Ms. Archibald is successful on the issue of liability, one must then go on to consider the extent of her injuries and the damages to which she is entitled.

The Duty of Care

[30] In the case of **Wheat v. Lacon & Co. Ltd**¹ Lord Denning described the duty of care of the occupier as ***“simply a duty to take a reasonable care to see that the premises were reasonably safe for people coming lawfully on to them...”*** This duty is further highlighted in the earlier case of **Indermaur v. Dames**² where Willes J stated that:

“And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined ... as matter of fact.”

[31] It is therefore observed that the duty of the occupier is to take reasonable care to prevent any damage which may occur as a result of any unusual danger which he either knows or ought to have known existed on the property. If such a danger exists and is not removed, the occupier is obligated to provide adequate notice so as to alert the visitor of the presence of this unusual danger. However, Willes J also goes on to point to the visitor's own duty to take reasonable care for his or her own safety and states that the court must consider whether there has been any contributory negligence on his or her part.

[32] As to what constitutes an unusual danger, Lord Bridge noted the following in the case of **London Graving Dock Ltd. v. Horton**³:

“I think “unusual” is used in an objective sense and means such danger as is not usually found in carrying out the task or fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises.”

¹ [1996] 1 All ER 582

² (1866) L.R. 1 Cp 274

³ [1951] 2 All ER 1

[33] The occupier may therefore be deemed to have known or ought to have known of the unusual danger and carries the burden of ensuring that visitors to the premises do not suffer harm as a result of this danger. One effective way of doing this is to alert the visitor to the unusual danger. However, in this very same case, Lord Norman outlines what constitutes knowledge on the part of the visitor; as it is also clear that where the visitor himself has knowledge of the danger, the occupier may yet escape liability, whether this knowledge is by way of notice or otherwise. He states as follows:

“When there is already knowledge, notice or warning will have no effect and the omission of it can do no harm. So, the defendant who has failed to give warning may yet succeed if he proves that the injured person had knowledge of the unusual danger. But whether it be knowledge gained without a warning or knowledge conveyed by a warning, it must be sufficient to avert the peril arising from the unusual danger. The knowledge must, therefore, be full knowledge of the nature and the extent of the danger.”

[34] The question of whether the occupier took all reasonable care in the circumstances must be considered in light of the facts of each case. As counsel for TDC pointed out, this duty ***“... is not ‘to prevent damage’ but to ‘use reasonable care’ to prevent it and it has to be determined what is reasonable care.”***⁴ Counsel refers the court to the Bahamian case of ***Cox v. Chan***⁵ where Sawyer J stated the following:

“... 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.”

⁴ see Lord Porter in ***London Graving Dock Ltd. v. Horton*** (above)

⁵ (1991) Supreme Court, Bahamas, No. 755 of 1988

[35] For my part, whilst I take no issue with the general thrust of the learned judge's observations in **Cox v. Chan**, I would not go so far as to say that the duty of the occupier is limited to those usual dangers which the visitor did not know or **could not have been aware** of. To my mind, at least the 2nd half of that proposition amounts to a different test from that which has been established by the case law. Simply saying that a visitor could have been aware of the danger is not what the law requires in order to absolve the occupier of his duty; unless of course he proves that the visitor was actually aware of it. The issue of reasonable care is one which calls upon the court to consider the actions of the occupier and what steps were in fact taken to alert the visitor to the unusual danger. However, the cases do suggest that the court should not consider this issue in isolation to the visitor's own actions if it is found that he or she could have also avoided the injury by exercising reasonable care to avoid a danger which was **"open for all to see"**⁶ or which, it is proven that he or she was actually aware of. In light of this it is important to be reminded of the words of Lord McDermott in the case of **London Graving Dock Co.** where he stated the following:

"I see nothing in all this to bear harshly on the occupier. He controls the premises, he serves his own interest by the invitation, he has left to him all the pleas open to one accused of negligent conduct. Why should he be exonerated, or partly exonerated, from the duty of taking reasonable care?"

[36] Ultimately, the claimant bears the burden of proving that there was an unusual danger which caused the injury which she has suffered. As was stated in the case of **Ward v. Tesco Stores Ltd.**, she must also prove that, in the absence of any explanation, the injury was more consistent with fault on the part of the occupier. If and when this has been established, the defendant can escape liability if it shows that the accident ***"must have happened, or even on a balance of probabilities would have been likely to have happened, even if there had been in existence a proper and adequate system, in relation to the circumstances to provide for the safety of customers."*** The burden of establishing this defence is that of the defendant.

[37] In applying these principles to the present case, there would be no controversy in saying that paint spilt in a parking lot is an unusual danger and that TDC did owe a duty of care to Ms. Archibald as a

⁶ see Maraj J in the case of *Harripersad v. Mini Max Limited*, Trinidad and Tobago HC. No. 564 of 1973

visitor to take all reasonable steps to ensure that she was alerted to this. The evidence suggests that Mrs. Lake was aware of the spill and also of the dangers it posed. To this end, she did instruct that sawdust be placed on the spill. However, that was not done for a full 45 minutes after her instructions were issued. Counsel for TDC argues that this proves that TDC did take steps to eliminate the danger and it would not have been reasonable to demand that the manager stand guard over the spill until the issue is rectified. Unfortunately, Ms. Archibald's injury occurred before those instructions were carried out.

[38] However, in my view, the issue here is not merely the steps taken to remove or reduce the danger, but whether adequate steps were taken, even in the interim, to alert Ms. Archibald of the presence of the danger. That is what the law requires and it ought not to have taken as much as 45 minutes to accomplish this. Even if the sawdust had not yet been placed, the priority, according to law is not to remove the danger but to alert the visitor to it. I am not satisfied that this duty was carried out.

[39] I am of the view that one must observe that the premises are operated by TDC as a building depot. It would appear that the very nature of the items on sale at that depot include items of paint. It would not be that far outside of reasonableness to conclude that adequate provision can and should be made for circumstances in which dangers in a parking lot of such an establishment can be adequately brought to the attention of patrons to the store. This may include brightly coloured cones or some other item which may alert the public to the presence of such a danger. Whether the manager stood near the puddle or not does not absolve TDC from the fact that adequate steps were simply not taken in reasonable time to alert the public to the danger of the spill. There was therefore a clear breach of that duty.

[40] Ms. Archibald insists that she was not aware of the puddle of paint. However, counsel for TDC argues that she ought to have been aware as it was white paint on a grey surface that the average person would have noticed. I do not agree with that submission. I accept Ms. Archibald's evidence where she stated that it was a relatively busy day, being in the Christmas season. She parked her vehicle without observing that there was a puddle of paint which ended up towards the back side of the vehicle. I do not find that the reasonable person making use of such a parking lot would have necessarily observed the puddle of paint, even if he or she was to take reasonable care for his or her own safety. Having parked, she decided to go towards the back of her vehicle when she slipped

and fell. I can find nothing unreasonable or culpable about her actions. The fact that she did not use to the front walkway does not make her negligent. In light of this I find that she did slip and fall and did suffer injuries for which TDC is liable. The question however, is the whether she has proven the extent of that injury. She has claimed an extensive amount of damages based on medical reports filed in this case. TDC has argued that the extent of her injuries was not caused by the fall. The court must now consider this issue in some detail.

The Medical Findings

[41] The issues associated with Ms. Archibald's medical condition and the accident can be addressed by considering whether, on a balance of probabilities, it can be said that the fibromyalgia was caused by the accident in the TDC parking lot, and whether some of the pain she suffers from was occasioned by previous medical conditions which are degenerative rather than caused by the trauma of the accident. This calls for some consideration of the diagnosis of fibromyalgia in general.

Fibromyalgia

[42] It appears from the evidence presented in this case, that a diagnosis of fibromyalgia is a somewhat controversial issue in medical science. The cause of fibromyalgia appears to not be scientifically known. That much was admitted by the medical experts in this case. In the English case of ***Joanne Kirk v. Carol Walton***⁷ it was noted that “... ***fibromyalgia is a controversial and non-specific diagnosis, with a spectrum of symptoms which may be variable...***” That case, and a subsequent one involving the same parties⁸, had to grapple with a diagnosis of fibromyalgia as well as previous medical conditions suffered by the claimant. Whilst it involved an allegation of contempt of court, an extensive amount of evidence appeared to have been led by medical experts. It was apparent that medical doctors disagreed to some extent on the question of whether a diagnosis of fibromyalgia ought to have been made and the question of whether the pain suffered by the claimant was as a result of the accident. One expert expressly stated that he found a diagnosis of fibromyalgia to be difficult to make. It was also apparent that there may be some medical opinion that fibromyalgia

⁷ [2008] EWHC1780 at paragraph 35

⁸ [2009] EWHC 703 (QB)

may cause a more exaggerated perception of, rather than an actual, physical disability. One expert witness in that case noted that ***“the perception of disability in many patients with Fibromyalgia is different than the reality.”***

[43] What can be gleaned from the cross examination of the doctors in this case, and also from the few cases one can find on the topic, is that a diagnosis of fibromyalgia takes one into a challenging realm of medical science. The issue is that on the face of it, what appears to be a minor injury comes across as having a rather exaggerated effect on the claimant. A minor fall from which Ms. Archibald was able to quickly stand up and head towards the store has now led to an allegation of her complete inability to work and a complaint of chronic pain which seems rather disproportionate to the injury she has suffered and her original diagnosis and treatment by Dr. Warner. One may be left to wonder whether the issues may be more psychological than physical. In light of that I refer to the dicta of Gonthier J in the Canadian case of ***Nova Scotia (W.C.B.) v. Martin***⁹ where he describes the issue in the following manner:

“Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers’ compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real. While there is at this time no clear explanation for chronic pain, recent work on the nervous system suggests that it may result from pathological changes in the nervous mechanisms that result in pain continuing and non-painful stimuli being perceived as painful. These changes, it is believed, may be precipitated by peripheral events, such as an accident, but may persist well beyond the normal recovery time for the precipitating event. Despite this reality, since chronic pain sufferers are impaired by a condition that cannot be supported

⁹ [2003] 2 S.C.R.

by objective findings, they have been subjected to persistent suspicions of malingering on the part of employers, compensation officials and even physicians.”

[44] In order to broaden the research on the manner in which such cases have been addressed in common law jurisdictions, I also refer to the case of ***Green-Younger v. Barnhart***¹⁰ which emanates from the United States District Court for the District of Connecticut in its appellate jurisdiction. The plaintiff in that case had made an application for disability benefits after having been diagnosed with fibromyalgia, as well as other illnesses such as degenerative disc disease, chronic low back syndrome, and peroneal neuropathy associated with her back pain. Her application was denied. One of the main grounds for doing so was that the medical doctor who made the diagnosis also pointed out that although fibromyalgia is typically characterized by severe fatigue, diffuse muscular soreness and tenderness which in certain instances can be debilitating, there is difficulty in proving disability on this basis because of the absence of objective evidence to quantify the severity of the pain. It was held on appeal that the judge was wrong to find that the diagnosis of fibromyalgia has to be substantiated by objective findings. It was held that the diagnosis had in fact corroborated the plaintiff's evidence insofar as it related to the symptoms she claims to have been experiencing. The court went on to note the following:

“a growing number of courts, including our own, see Lisa, 940 F.2d at 44-45, have recognized that fibromyalgia is a disabling impairment and that “there are no objective tests which can conclusively confirm the disease.””

[45] In my view, the court is entitled to rely on the medical evidence and the findings that Ms. Archibald does in fact suffer from fibromyalgia and that this is the reason for the pain she is suffering. Indeed, although counsel for the defendant has raised the question of the difficulty in diagnosing fibromyalgia, the primary focus of the defendant's submission is whether the fall in the parking lot is in fact the cause of this pain. Given that there is a difficulty in diagnosing the disease, there is also an equal difficulty in determining its cause. In this case, the argument for the defendant is that there were previous medical challenges faced by Ms. Archibald which may very well be the cause of her pain. Counsel argues that she had been diagnosed with hyperthyroidism in 2010 and fibrocystic disease

¹⁰ Docket No. 02-6133.

in 2014, for which she endured surgical intervention. The argument therefore, is given that fibromyalgia may be degenerative as well as occurring as a result of physical or psychological trauma, it cannot be said on a balance of probabilities that the incident in the parking lot is the cause of her pain.

[46] However, having examined the evidence I have come to the opposite conclusion. The medical evidence presented before me states that symptoms of fibromyalgia normally begin to appear after physical trauma such as an injury, emotionally stressful event or significant psychological stress. Although Ms. Archibald had previous challenges with hyper-thyroidism and fibrocystic disease, there is no evidence before the court to suggest that any of these, on balance, caused the fibromyalgia she has suffered. The evidence suggests that whatever treatment she received for these illnesses was successful and she appears to have been able to carry on with her life thereafter. It was her evidence that the back pains she suffered occurred only after the fall. To my mind, the medical evidence appears to corroborate this rather than undermine it. I do not accept Ms. Huggins' evidence to the contrary, neither do I accept the argument that Dr. Warner had confirmed that Ms. Archibald was suffering from back pains before her fall. It seems to me to be the case that her symptoms emerged after the traumatic experience of the fall in the TDC parking lot and I find as a matter of fact, on a balance of probabilities, that this is the cause of her fibromyalgia. TDC must therefore be liable for the damages which arise from this injury.

Assessment of Damages

General Damages for Pain, Suffering and Loss of Amenities

[47] The starting point in assessing the general damages for pain, suffering and loss of amenities to which Ms. Archibald is entitled is for the court to consider the factors outlined in the case of ***Cornilliac v St. Louis***¹¹. These are i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the

¹¹ (1965) 7 WIR 491

resulting physical disability; (iii) the pain and suffering endured; (iv) the loss of amenities; and (v) the impact the injuries had on the claimant's pecuniary prospects.

(i) The nature and extent of the injuries sustained

[48] The claimant has been diagnosed with fibromyalgia and I have outlined in some detail the nature of this diagnosis earlier in this judgment. The medical evidence also suggests that she suffered from intersomatic tear disc posterior annular tear in the L5/S1 region. In addition to that Dr. Warner indicated that Ms. Archibald suffered from sacroiliac dysfunction, bursitis and osteoarthritis. It was also suspected that Ms. Archibald suffered sciatic nerve damage. A CT Scan indicated that there was evidence of bilateral nerve root canal narrowing and nerve compression. These are generally an outline of the nature of the injuries suffered by Ms. Archibald.

(ii) The nature and gravity of the resulting physical disability

[49] Based on the medical evidence presented, it was determined that Ms. Archibald is not able to return to work. The evidence is that the pain suffered in her back was such that she was unable to undertake normal activities such as sitting, climbing stairs and wearing heels without extreme discomfort. In January, 2017 she was certified by Dr. Warner as being temporarily medically unfit to return to work. One month later, it was reported that Ms. Archibald's pain had intensified and she was unable to perform basic every day activities. She only got relief when lying on her left side. However, by September, 2017 Dr. Warner indicated that it was uncertain as to when Ms. Archibald would be able to return to work. By January, 2018, Ms. Archibald was finding it difficult to walk or use her right hand. The doctors have continued to insist that she is unable to return to work as a result of her injuries.

(iii) The pain and suffering endured

[50] Ms. Archibald stated that initially she did not experience much pain from this accident. However, overtime she states that the pain increased and she uses terms such as extreme and discomfort to describe it. Although she was prescribed pain medication, this continued to worsen over time. She could not perform basic household functions even over the Christmas season as a result of the pain.

By January, 2017 this pain had extended to her upper back and she describes the “extreme discomfort” when undertaking such activities. She stated that she had difficulty in even using the toilet, standing or walking or even laying down. Tasks such as brushing her teeth, combing her hair or clipping her nails are difficult to perform.

[51] She goes on to state that her physical, mental and emotional wellbeing was being affected by this. Her body also goes into spasmic episodes when she stands or tries to sit for long periods of time. She uses cushions to sit on harder surfaces and her arms and feet were swollen. She gets bouts of irritable bowel syndrome and bladder issues. Her suffering includes episodes of nausea and pain when cold air touches her feet. Ms. Archibald also complains of burning pains to her body if it gets too hot as well as extremely bad headaches and excruciating pain in her chest and side. Although she experienced some relief from physiotherapy, this was discontinued as she could not afford the expense.

(iv) The loss of amenities

[52] Ms. Archibald states that she was unable to attend church, takes walks on the beach and attend family gathering and social events, due to this injury. She was no longer able to perform certain exercises which she had used to keep fit. She states that she had to abandon her planned vacation as a result of her injuries. She had to make alterations to her diet and was also unable to complete law exams she claims to have been writing. The emotional bonding between herself and her partner has diminished and her family life in general has been affected. She has also had at times to pay for assistance with chores at home. During her travels, she has had to bring someone else along with her as she is unable to travel alone due to the pain and discomfort she experiences.

The impact the injuries had on the claimant’s pecuniary prospects

[53] The medical evidence in this case states that the pain and suffering endured by Ms. Archibald affected her ability to work. The doctors have all certified that the pain she has endured would make it difficult to continue in her employment as a Permanent Secretary in the government. The evidence suggests that she has in fact been retired from the public service and obtained certain benefits. This

however, according to her evidence has reduced her income and brought forward her retirement. There would therefore certainly have been an impact on her pecuniary prospects.

- ***The award***

[54] It is therefore left for the court to consider the issues outlined above in order to determine an appropriate award to be made for the pain, suffering and loss of amenities suffered by Ms. Archibald. In doing so it is important to consider awards made by the court in similar cases. Although I can find no cases in our jurisdiction which directly addresses the issue of fibromyalgia, the court has considered cases of lower back pain which outlines similar symptoms to that of Mrs. Archibald. Her counsel has asked that consideration be given to the case of ***Faucher v. Donacien***¹² where the court awarded the sum of \$130,000.00EC in general damages. Counsel also referred to the case ***Myers v. Dickenson Bay Hotel Management Ltd.***¹³ where the court awarded the sum of \$95,000.00EC for pain and suffering where the claimant suffered serious spinal injury in the lower back area. In that case the claimant could no longer work and lift heavy objects.

[55] On the other hand, counsel for the defendant refers to the case of ***Sparman v. Jolly Beach Resort***¹⁴ where the sum of \$65,000.00EC was awarded in general damages in circumstances where the claimant suffered from lower back pain as well as pain to her right hip and lower limb. She experienced pain in her spine due to sacroiliitis with L5-S1 disc bulge and sensory paresthesia which progressed to mild discal dehydration. She also had L4-5 and L5/S1 radiculopathy sensation reflex. She too could not return to work or perform her duties as a chef.

[56] Counsel then referred to the case of ***Hope v. Lake***¹⁵ where the claimant suffered a severe whiplash injury and loss of balance. He was prescribed medication to suppress his immune system and decrease inflammation. He was hospitalized for a period of 5 days, although his condition did in fact improve. Despite this, he experienced pain to his left side and lower lumbar area which restricted his movements. After six months he was deemed to have recovered and an MRI revealed that he suffered muscle spasm, a cervical sprain and injury to the L3-L4 L4-L5 and L5-S1 discs. He was

¹² SLUHCV2013/0964

¹³ ANUHCV2013/0231

¹⁴ ANUHCV2012/0292

¹⁵ ANUHCV2018/0500

diagnosed with a partial disability of 15% and was awarded the sum of \$40,000.00EC in general damages.

[57] The obvious difficulty in assessing general damages in a case of fibromyalgia is that the court cannot ignore the very nature of the disease; which is in itself a challenging and controversial diagnosis. This is because the doctors have acknowledged that the actual pain and suffering perceived by the patient is often not commensurate with the usual effect of the actual injury which occurred. The pain may also endure for a much longer period than what is expected from an injury of that nature. Counsel for TDC points out that the claimant in the case of **Sparman**, for example, suffered a much more significant injury than Ms. Archibald. This involved surgery and hospitalization. Even the case of **Faucher v. Donacien** referred to by Ms. Archibald's counsel refers to an injury which involved 7 days of hospitalization, 3 fractures as well as a number of other rather serious injuries resulting in the need for surgical intervention. The question is the extent to which the court can ignore the relatively minor nature of the injury in making the award; as the purpose of the award is to compensate for pain and suffering and not necessarily for the injury itself. However, a focus on the pain and discomfort in isolation to the actual injury may make an award appear to be somewhat disproportionate to awards for injuries in similar cases.

[58] Counsel for Ms. Archibald also referred the court to the English case of **Murphy v. Ministry of Defence**¹⁶ where the sum of £30,000.00 was awarded in a case where the claimant suffered from fibromyalgia. This would amount to \$109,818.09EC. However, there are two difficulties in placing much reliance on this case. Firstly, whilst I appreciate that this is a case involving the diagnosis of fibromyalgia, I am of the view that the jurisprudence in the Eastern Caribbean on damages for pain and suffering has developed sufficiently so as to ensure that the challenges associated with relying on a decision from a jurisdiction with a disparate economy from ours should best be avoided. Secondly, the decision itself does not go into much detail into how the figure was arrived at in the manner in which our jurisprudence would require from this court. What was done was to rely on the Judicial College Guidelines. The judge was of the view that the injuries fell within the "upper end of the lower bracket of "other pain disorders" with minor injuries which would have resolved within 3 months." It seems therefore, that the award in itself was not determined to fall within a higher bracket

¹⁶ [2016] ECWHC 3

of back injuries of that nature within the context of the judicial college guidelines. It appears to me that counsel for the claimant would wish for the court to place reliance on cases from our jurisdiction which do fall within a much higher bracket than what was suffered by Ms. Archibald.

[59] In assessing this case it cannot be doubted that a person who endures surgery and fractures of the nature suffered in **Faucher v. Donacien**, would have had to endure the pain and discomfort of these procedures in a way Ms. Archibald did not. One has to consider the suffering involved in surgery and hospitalization as well as the seriousness of the actual injury. There were no surgeries or fractures in this case, but there is pain to a level which is greater than one would expect for such an injury. Adding to that the loss of amenities she claims to have endured and taking into account the awards in the cases referred to by counsel for both parties, I am of the view that Ms. Archibald's case falls within a bracket which is more in line with the case of **Sparman** referred to by the defendant. In fact, I am of the view that her injuries were perhaps slightly lower than that case. But given the pain she suffers, I would award Ms. Archibald the sum of \$65,000.00EC for the pain, suffering and loss of amenities she has endured.

Loss of Earnings/benefits

[60] In her evidence, Ms. Archibald claims that her monthly salary and allowances was \$8,895.00EC. After statutory deductions her net salary was \$82.10.50. She received this salary up until September, 2017, at which point, due to her injuries and the number of sick days already taken during that period, she was placed on social security benefits in the sum of \$3,093.73EC. These figures are not disputed. Therefore, from September, 2017 she would have seen a net reduction in her monthly income of \$5,116.77. Her evidence is that she was later forced to retire on medical grounds effective 1st September, 2018. She claims therefore that her retirement benefits were affected. Had she retired on 23rd September, 2020, as she was entitled to, her lump sum gratuity payment would have been \$233,818.00EC. Instead she received \$146,051.65EC. In addition to that, she would have received an annual pension of \$46,763.64. Instead she receives an annual pension of \$29,208.35.

[61] As it relates to loss of income, counsel for Ms. Archibald has submitted that the loss of income on account of her placement on social security benefits, should be awarded monthly from 1st October, 2017 until the date of trial. I do not agree with this submission. What the evidence shows is that Ms.

Archibald received the social security benefits until she was retired on 1st September, 2018. From that point she was no longer on social security benefits but was receiving an annual pension and had a lump sum gratuity paid to her. Given that the court will be compensating her for the difference in the gratuity and pension, my view is that the monthly payments of \$5,116.77 ought to be granted up until the point of her formal retirement. I say so as although the calculations may not necessarily be precise, some provision should be made for the fact that she received a lump sum payment somewhat earlier than expected and also that she would no longer have had a duty to contribute to the pension fund once she had been formally retired. In light of this I would award her the sum of \$56,277.21 in lost income under this head.

[62] I would award Ms. Archibald the sum of \$87,776.35 in lost gratuity payments. This would represent the difference between the gratuity she received and that which she would have received had she retired on the anticipated date. When it comes to lost annual pension payments, Ms. Archibald's evidence is that she would have received a difference of \$17,555.69 than that which she had received. I would award her that sum for the years leading up to this judgment from the date of her retirement. This would therefore commence from October, 2018 to February, 2022. This amounts to the sum of \$58,519.06.

[63] It would therefore be left for the court to consider an appropriate award for loss of future earnings. Counsel for Ms. Archibald submits that the multiplicand for this award should be difference in salary on a monthly basis when Ms. Archibald was on social security benefits. I do not agree that this is the appropriate multiplicand to use. She has been compensated for her loss of income up until her retirement and adequate adjustments would have been made for what she would have received in her pension had she retired at the date she was entitled to up until the time of trial. To my mind, it is the difference between the pension she would have received had she retired at the expected time which ought to form the basis of the multiplicand. That sum should be \$17,555.69 on an annual basis. Counsel also submits that a multiplier of 15 ought to be used with a reduction to 11 in order to cater for the normal vicissitudes of life. To my mind this is too high. Given the fact that Ms. Archibald has already come to retirement age that figure ought to take into account the uncertainties which are inherent in an award of future earnings and be reasonable in all of the circumstances. She is also getting a lump sum award here and is a factor to be taken into account.

[64] In examining the decision of the court of appeal in the case of *Alphonso v. Rampnath*¹⁷ I note that the court there examined a number of cases from the region where the loss of future earnings were being considered. In not one of those cases, where persons suffered injury even pre-retirement, was a multiplier of 15 years used. In that case, although the trial judge had initially set a multiplier of 15 for a 45 year old claimant who was expected to work until 65, the court of appeal reduced the multiplier to 12. In the present case, Ms. Archibald had in fact stated that her retirement age was much less than 65. She has in fact already retired, albeit early, on account of her injuries. The court has taken this into account in the awards it has already made. A multiplier of 15 is therefore an inappropriate starting point. To my mind, a multiplier of 5 years appears to me to be more reasonable in the circumstances given all the factors which the court must take into account. I would therefore award the sum of \$87,778.45EC.

Special Damages

[65] Ms. Archibald claims the sum of \$37,926.16 in medical expenses. Counsel for TDC raises 3 objections as it relates to the receipts. Firstly, it is pointed out that there is a duplication of the sum of \$366.00US in the receipt from the Center for Arthritis Rheumatic Disease. However, in the schedule of expenses presented by counsel for Ms. Archibald, this amount is only calculated once in arriving at the figure claimed. Counsel also objects to claims for clothes and shoes in the sum of \$300.40. I do not find these to be unreasonable expenses, given that Ms. Archibald did state that her pants and shoes were damages in the incident. I will award her this amount. Counsel further argues against the sum of \$3,600.00US for the costs of Lumbane women silver made out to Dane Hamilton and not the claimant. The explanation given at trial was that this was an expense which was made by the attorney on Ms. Archibald's behalf. I would accept that evidence as being truthful and include it as an expense incurred as a result of the injury. One further submission relates to the award of getting a helper to assist her at home. I agree that there was insufficient evidence to substantiate this and would therefore not award this amount to her. This however was also not included in Mr. Hamilton's calculations. I would therefore award the sum of \$37,926.16 in special damages for medical expenses to Ms. Archibald.

¹⁷ BVIHCV1996/0001

[66] She also claims the sum of \$26,257.04 in travel expenses associated with her treatment. This, she claims would include the costs of tickets for herself and her companion as well as meals and other associated expenses. Counsel for TDC argues that the claimant should only be awarded the costs of one ticket for her travel expenses. Although she claims that she needed someone to travel with her, the medical evidence does not substantiate this. Counsel therefore requests that the ticket costs for the additional person be excluded from the award. That would amount to \$9,945.15.

[67] I agree with counsel for the defendant where he states that the evidence does not suggest that there was any medical advice that business class travels was more appropriate in the circumstances of Ms. Archibald's case. This was obviously a decision she took on her own. However, given the nature of the injuries she suffered I would agree that it would have been appropriate for someone to accompany her on the trip. As it relates to her meals and other expenses I make the point that had she not traveled she would have naturally spent some money on her own meals and upkeep at the time. In total therefore the expenses she claims are not all reasonable and ought to be discounted. However, it is difficult to do so by sifting through the receipts in this way. I would therefore discount this expense by 25% to cater for the objections which have been sustained as well as the issues raised by the court. I would award the sum of \$19,692.78. I also see no reason to individualize the interest at this point as this will be addressed in the final outcome of the damages awarded.

Conclusion

[68] The court finds that TDC did breach its duty towards Ms. Archibald in that it failed adequately to alert her to an unusual danger which had been present as a result of wet paint spilled in the parking lot. I do not find that there is any evidence of contributory negligence on the part of Ms. Archibald. TDC is therefore liable for all the damages caused to her. I also find that the full extent of her pain and suffering is as a result of the injury sustained on 21st December 2016. This was the cause of her fibromyalgia. I have therefore awarded her the compensation which I think is appropriate in the circumstances of this case.

[69] TDC will pay the following to Ms. Archibald:

- (a) General Damages for pain, suffering and loss of amenities in the sum of \$65,000.00EC.
- (b) Interest on general damages at a rate of 5% from the date of this judgment until paid in full;
- (c) Special Damages in the sum of \$37,926.16EC representing the cost of medical care arising out of the injuries suffered;
- (d) The sum of \$19,692.78EC for travel expenses.
- (e) The sum of \$202,572.62EC in lost earnings inclusive of loss of income, loss of gratuity and loss of pension payments.
- (f) TDC will pay interest on special damages at a rate of 2.5% from the date of the lodging of the claim until the date of this award.
- (g) The sum of \$87,778.45EC in future earnings;
- (h) TDC will pay interest on the special damages and future earnings at a rate of 5% from the date of judgment until the sums are paid in full.
- (i) Costs to be prescribed costs in accordance with part 65 of the CPR.

**Ermin Moise
High Court Judge**

By the Court

Registrar