

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2022/0003

BETWEEN:

ST. KITTS NEVIS ANGUILLA
TRADING DEVELOPMENT COMPANY LIMITED

and

JENNIFER ARCHIBALD

Appellant

Respondent

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Damian Kelsick, KC with Ms. Hadya Dolphin for the Appellant
Mr. Leon Charles for the Respondent

2024: June 20;
2025: October 1.

Civil appeal – Personal injury – Causal link between fibromyalgia and slip and fall incident – Whether the learned judge erred in finding a causal link between the respondent's fibromyalgia and the slip and fall incident based on the evidence before the lower court - Trial judge's reliance on untested evidence – Whether the learned judge improperly relied on evidence which was not formally tendered into evidence and not tested on cross examination – Proper assessment of damages based on evidence presented - Whether the award of damages for fibromyalgia was justified based on the evidence - Whether the learned judge miscalculated the respondent's loss of future earnings and loss of earnings.

This is an appeal against the decision of the learned judge dated 10th March 2022 wherein the appellant was ordered to pay the respondent (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; and (i) costs to be prescribed costs in accordance with part 65 of the CPR.

By claim form and statement of claim filed on 29th May 2018, Jennifer Archibald (“the respondent”), the claimant in the court below, filed a claim for damages against the Saint Kitts Nevis Anguilla Trading Company Limited (“TDC”/ “the appellant”) on the grounds of negligence and occupier’s liability. The respondent claimed that at approximately 11:45 am on 21st December 2016, she entered the parking lot of TDC Building Home and Depot, a business entity of the appellant, with the intention of entering the store. As she exited her vehicle and began walking to the building, she slipped on some wet paint which was lying on the ground of the parking lot and fell. She attributed this to the appellant’s negligence.

The respondent claimed that she suffered a L5/S1 intersomatic disc posterior annular tear, sacroiliac dysfunction, bursitis and osteoarthritis and was further diagnosed with fibromyalgia as a result of the injury stemming from the slip and fall incident.

The appellant filed its defence on 6th July 2018 wherein it denied liability and contended that the injuries, if any, were suffered solely due to the respondent’s negligence and were as a result of her pre-existing medical condition.

As it relates to the issues in the lower court, there was no dispute that the appellant owed the respondent a duty of care to ensure that the parking lot was reasonably safe. The main issue for consideration was whether there was a breach of that duty. Therefore, counsel for the appellant also urged the court to find that, if the respondent did indeed fall in the paint, the fall resulted from her own negligence rather than any fault of the appellant. Furthermore, if the respondent succeeds on the issue of liability, the court must then assess the extent of her injuries and determine the appropriate amount of damages to which she is entitled.

The learned judge found that the appellant breached its duty towards the respondent in that it failed to adequately alert her to an unusual danger which had been present as a result of wet paint spilled in the parking lot. The learned judge also concluded that there was no evidence of contributory negligence on the part of the respondent and found that the appellant was liable for all of the damages caused to her. It was also a finding that the full extent of the respondent’s pain and suffering was as a result of the injury sustained on 21st December 2016 and this was the cause of her fibromyalgia. Therefore, the learned judge awarded compensation as outlined at paragraph 1 above.

By notice of appeal filed on 12th April 2022, the appellant appealed against the decision of the learned judge dated 10th March 2022. The appellant did not dispute the judge’s

substantive findings as to liability; however, it disputed (a) the learned judge's finding that the respondent's fibromyalgia was caused by her fall; and (b) the part of his assessment which included damages for the fibromyalgia.

The appellant advanced five (5) grounds of appeal being that (i) the learned judge erred in applying the "balance of probabilities" standard to adjudge, as a matter of fact, that the respondent's alleged slip and fall in the appellant's parking lot caused her Fibromyalgia; (ii) the learned judge erred in finding, as a matter of fact, that the appellant did *not* arrange for sawdust to be placed on the paint spill "for 45 minutes"; (iii) the learned judge resultantly erred in finding, as a matter of mixed fact and law, that the appellant breached its duty to the respondent, as an occupier of its premises; (iv) the learned judge erred in finding, as a matter of mixed fact and law, that the appellant was wholly negligent; and (v) the learned judge erred by not taking relevant factors into consideration when adjudging, as a matter of fact, that the appellant actually slipped and fell. At the appeal, the appellant did not dispute liability and therefore did not pursue grounds (ii) to (v) of the grounds of appeal.

The respondent filed a counter notice of appeal on 6th May 2022 seeking that the award of loss of earnings be set aside and substituted for a sum to be determined by the Court of Appeal and that the award for future loss of earnings be set aside and substituted for a sum to be determined by the Court of Appeal. The grounds of appeal in the counter notice are that: (i) "The learned judge erred in law and fact by equating the age of retirement from the civil service with the age of retirement as an employee generally from the civil service and as such fell into error in only awarding loss of earnings from the date of the accident to the date of the respondent's retirement from the civil service; and (ii) "The learned judge erred in law by equating the age of retirement from the civil service with the age of retirement as an employee generally and as such fell into error in determining that the appropriate multiplicand for loss of future earnings should only take into account the difference in pension that she would have received but rather should take into account the difference in pension payable from the Government of Saint Kitts and Nevis and any future earnings she would have made being gainfully employed considering her current salary, experience and education."

At the hearing of the appeal, the issues which arose for determination were: (a) whether the learned judge erred in finding a causal link between the respondent's fibromyalgia and the slip and fall incident based on the evidence before the lower court; (b) whether the learned judge improperly relied on evidence which was not formally tendered into evidence and not tested on cross examination; (c) whether the award of damages for fibromyalgia was justified based on the evidence and; (d) whether the learned judge miscalculated the respondent's loss of future earnings and loss of earnings.

Held: dismissing the appeal, allowing the counter-notice of appeal, remitting the matter for reassessment of damages for loss of earnings before another judge of the High Court, and making no order as to costs, that:

1. When a trial judge's assessment of damages is challenged, appellate courts must begin with the principle of judicial restraint. This is because the assessment of damages is inherently a matter of judicial discretion. However,

restraint does not imply that appellate intervention is never appropriate. An appellate court may intervene if, considering all the circumstances, the award is clearly disproportionate to the loss suffered. Intervention is also justified where the trial judge considered irrelevant factors, ignored relevant ones, applied incorrect legal principles, or used the wrong measure of damage resulting in a fundamentally flawed assessment.

Martin Alphonso and others v Deodat Ramnath (1997) 56 WIR 183 applied.

2. Under the Eastern Caribbean Supreme Court Civil Procedure Rules, only those documents included in the trial bundle and specifically identified as either agreed or unagreed, can be properly used at trial. Central to the appellant's submissions were the medical reports of Dr. Darryl Warner dated 2nd December 2020, and Dr. Daveen Wilkin dated 30th November 2020, as it relates to the causal link between the respondent's slip and fall and fibromyalgia. The appellant emphasized that both doctors were court-appointed experts whose reports were admitted into evidence and subject to cross-examination at trial. However, the appellant submitted that the learned judge utilized the findings of an earlier report by Dr. Wilkin dated 31st January 2018 ("the 2018 report") in his determination of the causal link between the fall and the respondent's fibromyalgia. While the 2018 report formed part of the respondent's disclosed documents, it was not agreed upon by the parties and was not listed among the agreed documents. More importantly, it was never formally tendered into evidence as required by the rules. Merely disclosing a document or attaching it to a pleading or witness statement does not render it admissible. It must be introduced either through a witness or by consent. In this case, the 2018 report was neither introduced during Dr. Wilkin's oral testimony nor referenced in a way that subjected it to cross-examination by the opposing party. This omission is particularly significant since an opposing party must have an opportunity to challenge evidence through cross-examination if it is to be relied upon.

Eastern Caribbean Supreme Court Civil Procedure Rules Part 29.1(c) and **39.1** applied; **section 131** and **141** of the **Evidence Act of St. Christopher and Nevis CAP. 3.12** applied; **Griffiths v TUI UK Ltd** [2023] UKSC 48 applied; **Bergan v Evans** [2019] UKPC 33 applied.

3. Attaching a medical report to pleadings or including it in a trial bundle does not automatically render it admissible. This principle squarely applies here as the 31st January 2018 report, although disclosed, never crossed the threshold into admissible evidence because it was neither agreed nor properly adduced at trial. It remained an untested document, not forming part of the record. The learned judge's reliance on evidence not properly before the court raises significant concerns regarding fairness and adherence to the overriding objective of the CPR. Unlike the expert reports of Dr. Wilkin (30th November 2020) and Dr. Warner (2nd December 2020), which were properly tendered and tested under cross-examination, this report was never formally admitted.

Documents not tendered through a witness or by consent are not in evidence. This constituted an error in law and principle on the part of the learned judge.

Bergan v Evans [2019] UKPC 33 applied; **Lennox Linton v Anthony Astaphan et al** DOMHCV2019/0267 (delivered 20th July 2022, unreported) followed.

4. The appellant contended that the learned trial judge reproduced a line from the 31st January 2018 medical report in paragraph [46] of the judgment. However, the report by Dr. Warner, dated 2nd December 2020, admitted into evidence and tested under cross examination, clearly stated, “fibromyalgia, which is believed to be triggered by a physically or emotionally stressful event, has many symptoms that tend to vary from person to person.” In cross examination, Dr. Warner also acknowledged that the slip and fall incident “could potentially have been the cause”. Applying the civil standard, on a balance of probabilities, it was open to the trial judge to conclude that the injury was more likely than not the cause of the respondent’s condition. The evidence did not exclude causation, and the learned judge was entitled to weigh the expert evidence alongside the relevant circumstances, including the link between the incident and the onset of the respondent’s symptoms. As previously noted, when the assessment of damages by a trial judge is challenged, appellate courts must exercise judicial restraint. In this case, there was sufficient evidentiary basis for the trial judge to find, on a balance of probabilities, that the respondent’s fibromyalgia was caused by the slip and fall incident. Accordingly, the appellant’s challenge to the learned trial judge’s finding that the fibromyalgia was caused by the slip and fall incident, fails.

Martin Alphonso and others v Deodat Ramnath (1997) 56 WIR 183 applied.

5. Courts aim to fairly compensate a claimant for both the income they have already lost and what they are likely to lose in the future due to injury, but there must be clear, specific evidence to do so. When the evidence is unclear, the court may estimate a fair amount instead. The respondent contended that the learned judge erred in his assessment of damages, specifically regarding the calculation of her future loss of pension income. The primary contention relates to the judge’s application of a multiplier of five in calculating the respondent’s future loss of pension income. In calculating the respondent’s future loss of income, the learned judge erred in principle in limiting the multiplier to five years. The period of assessment must correspond with the actual expected duration of the pension payments, not an assumed statutory retirement age, particularly where the injury has prematurely terminated the respondent’s working life. A multiplier of fifteen, as proposed by the respondent appears more reasonable in the circumstances.

Martin Alphonso and others v Deodat Ramnath (1997) 56 WIR 183 applied; **Steadroy Matthews v Garna O’neal** BVIHCVAP2015/0019 (delivered 16th January 2018, unreported) followed; **The Attorney General of Saint Lucia v**

Godfrey Ferdinand et al SLUHCVAP2018/0032 (delivered 25th June 2020, unreported) followed; **Dews v National Coal Board** [1987] 2 All ER 545 considered.

6. The use of the multiplier/multiplicand method to assess future loss of earnings has been reaffirmed by this Court. Under this approach, the multiplicand represents the claimant's net earnings "but for" the injury, while the multiplier corresponds to the duration over which the loss is expected to continue. The respondent's case falls squarely into this. There is nothing to suggest that the respondent would have voluntarily retired earlier than age 55. Therefore, the learned judge erred in his assessment of the respondent's loss of future earnings, which ought to have been calculated using the multiplier/multiplicand method. In this case, that approach would have more accurately reflected the loss incurred by the respondent as a result of her premature retirement.

Pensions Act of Saint Christopher and Nevis and Pension Regulations CAP. 22.06 applied; **Irani v Duchon** [2019] EWCA Civ 1846 applied.

7. With respect to past earnings, the trial judge erred in assessing the respondent's loss of earnings only up to the date of her retirement in September 2018, rather than up to the date of trial in September 2021. The respondent should therefore be compensated for the difference in earnings from October 2018 to August 2021, a 35-month period, amounting to EC\$179,086.95. This sum reflects the difference between the respondent's pre-injury salary and the pension she subsequently recovered, and it is properly recoverable as special damages. This position is consistent with the approach endorsed by this Court which emphasizes that special damages must be specifically pleaded and strictly proved. The respondent has met that threshold.

Steadroy Matthews v Garna O'Neal BVIHCVAP2015/0019 (delivered 16th January 2018, unreported) followed; **Pritchard v J.H. Cobden** [1988] Fam 22 applied.

8. While certain benefits may be deducted (e.g., sick pay or employer-provided insurance), payments arising from separate entitlements, particularly those earned over a career (e.g., pensions), should not be used to reduce damages unless explicitly connected to the injury. Accordingly, the respondent should be entitled to the net difference between her pre-injury salary and her post-retirement income, up to the date of trial. The judge's failure to account for this loss in full was an error of law and of assessment. The trial judge erred in his assessment of both the respondent's past and future loss of earnings. Considering the foregoing, the respondent succeeds on the counter notice and the award of damages in this regard should be set aside and the damages be reassessed by another Judge.

Halsbury's Laws of England, Damages (Volume 29 (2019)), 7. Measure of Damages in Tort, (3) Personal Injury considered.

JUDGMENT

[1] **PRICE FINDLAY JA:** This is an appeal against the decision of the learned judge dated 10th March 2022 wherein the following orders were made:

“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 \$19,692.78 EC for travel expenses.
- (e) The sum of \$202,572.62 EC 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 judgement until the sums are paid in full.
- (i) Costs to be prescribed costs in accordance with part 65 of the CPR¹”.

The claim

[2] By claim form and statement of claim filed on 29th May 2018, Jennifer Archibald (“the respondent”), the claimant in the court below, filed a claim for damages against the Saint Kitts Nevis Anguilla Trading Company Limited (“TDC”/ “the appellant”) on the grounds of negligence and occupier’s liability. The respondent claimed that at approximately 11:45 am on 21st December 2016, she entered the parking lot of TDC Building Home and Depot, a business entity of the respondent, with the intention of entering the store. As she exited her vehicle and began walking to the building, she slipped on some wet paint which was lying on the ground of the parking lot and fell. She attributed this to the appellant’s negligence.

[3] It was the respondent’s claim that she suffered a L5/S1 intersomatic disc posterior annular tear, sacroiliac dysfunction, bursitis and osteoarthritis and was further diagnosed with fibromyalgia as a result of the injury stemming from the slip and fall incident.

¹ Paragraph [69] of the judgment.

- [4] The appellant filed its defence on 6th July 2018. The appellant denied liability and contended that the injuries, if any, were suffered solely due to the respondent's negligence and were as a result of her pre-existing medical condition.
- [5] The trial of the matter was held on 23rd September 2021 and 24th September 2021. As it relates to the issues in the lower court, there was no dispute that the appellant owed the respondent a duty of care to ensure that the parking lot was reasonably safe. The main issue for consideration was whether there was a breach of that duty. Therefore, counsel for the appellant also urged the court to find that, if the respondent did indeed fall in the paint, the fall resulted from her own negligence rather than any fault of the appellant. Furthermore, if the respondent succeeds on the issue of liability, the court must then assess the extent of her injuries and determine the appropriate amount of damages to which she is entitled.
- [6] The learned judge found that the appellant breached its duty towards the respondent in that it failed to adequately alert her to an unusual danger which had been present as a result of wet paint spilled in the parking lot. The learned judge also concluded that there was no evidence of contributory negligence on the part of the respondent and found that the appellant was liable for all of the damages caused to her. It was also a finding that the full extent of the respondent's pain and suffering was as a result of the injury sustained on 21st December 2016 and this was the cause of her fibromyalgia. Therefore, the learned judge awarded compensation as outlined in the paragraph 1 of this judgment.

The appeal

- [7] By notice of appeal filed on 12th April 2022, the appellant appealed against the decision of the learned judge dated 10th March 2022. The appellant does not dispute the judge's substantive findings as to liability; however, it disputes:
- (a) the learned judge's finding that the respondent's fibromyalgia was caused by her fall; and

- (b) the part of his assessment which included damages for the fibromyalgia.

- [8] The appellant has advanced five (5) grounds of appeal which are as follows:
- (i) "The Learned Judge erred in applying the "balance of proof" standard to adjudge, as a matter of fact, that the Respondent's alleged slip and fall in the Appellant's parking lot caused her Fibromyalgia.
 - (ii) The Learned Judge erred in finding, as a matter of fact, that the Appellant did *not* arrange for sawdust to be placed on the paint spill "for 45 minutes".
 - (iii) The Learned Judge resultantly erred in finding, as a matter of mixed fact and law, that the Appellant breached its duty to the Respondent, as an occupier of its premises.
 - (iv) The Learned Judge erred in finding, as a matter of mixed fact and law, that the Appellant was wholly negligent.
 - (v) The Learned Judge erred by not taking relevant factors into consideration when adjudging, as a matter of fact, that the Appellant actually slipped and fell".

- [9] As previously noted in paragraph [7] above, the appellant does not dispute liability and therefore did not pursue grounds II to V of the grounds of appeal.

The counter notice of appeal

- [10] The respondent filed a counter notice of appeal on 6th May 2022 seeking that the award of loss of earnings be set aside and substituted for a sum to be determined by the Court of Appeal and that the award for future loss of earnings be set aside and substituted for a sum to be determined by the Court of Appeal. The grounds of appeal in the counter notice are:

- "(i) The learned judge erred in law and fact by equating the age of retirement from the civil service with the age of retirement as an employee generally from the civil service and as such fell into error in only awarding loss of earnings from the date of the accident to the date of the respondent's retirement from the civil service;

- (i) The learned judge erred in law by equating the age of retirement from the civil service with the age of retirement as an employee generally and as such fell into error in determining that the appropriate multiplicand for loss of future earnings should only take into account the difference in pension that she would have received but rather should take into account the difference in pension payable from the Government of Saint Kitts and Nevis **and** any future earnings she would have made being gainfully employed considering her current salary, experience and education.”

Appellant’s submissions

- [11] Although the grounds of appeal set out in the notice of appeal challenge the factual finding that the respondent slipped and fell, the appellant’s written submissions focus on the trial judge’s finding that the slip and fall caused the respondent’s fibromyalgia. The focus of this appeal is, therefore, the appellant’s challenge to the learned trial judge’s finding that the slip and fall caused the respondent’s fibromyalgia and the assessment of damages based on that finding.
- [12] The appellant submitted that there was no basis upon which the learned judge could have found that the fibromyalgia was caused by the fall sustained by the respondent. The learned judge approached the assessment of damages solely on the basis that the fibromyalgia was caused by the fall and therefore the assessment cannot stand.
- [13] Central to the appellant’s submissions are the medical reports of Dr. Darryl Warner and Dr. Daveen Wilkin, as it relates to the causal link between the respondent’s slip and fall and fibromyalgia. The appellant emphasized that both doctors were court-appointed experts whose reports were admitted into evidence and subject to cross-examination at trial. Specifically, Dr. Warner’s report dated 2nd December 2020² and Dr. Wilkin’s report dated 30th November 2020³ were both tendered into evidence and the experts were cross examined on same. However, an earlier report by Dr. Wilkin dated 31st January 2018⁴, which was included in the respondent’s documents in the

² Pages 67-70 of the Record of Appeal.

³ Pages 75-78 of the Record of Appeal.

⁴ Pages 331-334 Record of the Further Revised Record of Appeal.

court below, was not tendered into evidence and neither was it subject to cross examination.

[14] The appellant submitted that the learned judge utilized the findings in Dr. Wilkin's report of 31st January 2018 in his determination of the causal link between the fall and the respondent's fibromyalgia. The learned judge erred in considering this document as it was not tendered into evidence.

[15] Dr. Darryl Warner, in his expert report dated 2nd December 2020, stated that the respondent was in his care for over a year having visited his office complaining of back pain after a fall. He related that the respondent complained of persistent pain in the neck, arms, shoulders, back, hips, buttocks, and legs; discomfort that travels the length of her entire body, along with numbness, weakness, tingling and pins-and-needles sensations in her associated limbs. He further reported his observations of swelling, tenderness, and severe muscle spasm. He also stated that MRI findings revealed a disc bulge at L5/S1 consistent with an intersomatic disc posterior annular tear, bilateral nerve root canal narrowing, and contact on the exiting right L5 nerve root with evidence of some nerve compression. Dr. Warner noted that the generalized pain, swelling, tenderness and spasm were evidence of additional medical issues. He further noted that the respondent was later diagnosed with fibromyalgia after extensive testing. He described fibromyalgia as 'a condition referring to pain in the fibrous tissues of the body, such as muscles, tendons and ligaments...which is believed to be triggered by a physically or emotionally stressful event.'

[16] Upon cross examination, Dr. Warner was asked whether fibromyalgia is a disease where the cause is scientifically unknown. He answered, 'we haven't been able to directly decide what exactly would cause it, but we look at various possibilities.'⁵ Upon further cross examination, Dr. Warner stated that it 'could potentially be the cause' and also admitted that he had treated the respondent prior to seeing her in December 2016.⁶

⁵ Page 250 of the Record of Appeal.

⁶ Ibid.

- [17] Dr. Daveen Wilkin, in her expert report dated 30th November 2020, records that the respondent was referred to her for pain management and that the respondent had a past medical history of thyroid disease. After referring to the results of the MRIs, Dr. Wilkin made an assessment of “Fibromyalgia Type II Complex Regional Pain Syndrome” and then noted that the diagnosis was confirmed by Baptist Health Hospital where “nerve conduction studies as well as several other diagnostic tests had been performed”.
- [18] Upon cross examination, Dr. Wilkin confirmed that there is no direct scientific cause of fibromyalgia.⁷ Dr. Wilkin admitted that she was not informed by the respondent that she had previously been diagnosed with fibrocystic breast disease and that it would have been something to take note in making her diagnosis of fibromyalgia.⁸
- [19] The learned judge accepted the respondent’s evidence that her symptoms began after the slip and fall and concluded on a balance of probabilities that the fall was the cause of the respondent’s fibromyalgia. The learned judge relied on medical evidence suggesting that fibromyalgia can be triggered by physical trauma, emotionally stressful events, or significant psychological stress. The appellant submitted that the judge misstated the medical evidence. Both Dr. Warner and Dr. Wilkin confirmed that the cause of fibromyalgia is scientifically unknown. At most, the evidence indicated that trauma could *possibly* trigger fibromyalgia, but no direct link was established.
- [20] The appellant further submitted that the learned judge reversed the burden of proof by requiring the appellant to disprove alternative causes. It was for the respondent to prove, on a balance of probabilities, that the fall caused her fibromyalgia, something the medical evidence did not support. The judge’s conclusion that the respondent’s earlier medical conditions had been successfully treated was not grounded in any evidence and was speculative. Overall, the finding that the fibromyalgia was caused by the fall lacks evidential support. While symptoms may have emerged post-incident,

⁷ Page 301 of the Record of Appeal.

⁸ Page 308 of the Record of Appeal.

the judge's reasoning does not meet the required standard of proof, and the medical evidence fell short of establishing causation.

- [21] The appellant relied on the case of **Sienkiewicz v Greif (UK) Ltd.**⁹ wherein the House of Lords explained that, where medical science cannot identify a precise biological mechanism, causation may still be inferred though epidemiological or statistical evidence showing a consistent association between an event and the onset of a condition. The appellant submitted that in the present case, no such epidemiological evidence was presented. Both medical experts confirmed that the cause of the fibromyalgia remains scientifically unknown, and Dr. Warner's evidence went no further than suggesting trauma as a possible trigger, without expressing an opinion that the fall probably caused the condition. That evidential burden was not discharged. Consequently, there was no adequate basis upon which the judge could properly conclude that the fibromyalgia was caused by the fall.

Respondent's submissions

- [22] The respondent contended that the appellant has not discharged the burden that the trial judge was plainly wrong in his finding that the respondent's fibromyalgia was caused by her fall on the appellant's premises.
- [23] The respondent also contended that the learned judge was correct in his findings of fact that the fibromyalgia was caused on a balance of probabilities after the traumatic experience of the fall in the appellant's parking lot as outlined in paragraph 46 of the judgment.¹⁰ The learned judge's findings were grounded and informed by the overwhelming medical evidence given at the trial on the respondent's behalf and evidence of the respondent herself.
- [24] With respect to the medical report of Dr. Wilkin dated 31st January 2018, the respondent submitted that this document was not an agreed document between the

⁹ [2010] UKSC 10.

¹⁰ SKBHCV2020/0102 *formerly* SKBHCV2018/0168 (delivered 10th March 2022, unreported) at paragraph 46.

parties, however, it formed part of the respondent's bundle of documents and automatically formed part of the record. Further, the respondent advanced that 11 medical reports and 2 neurosurgeons' reports were filed on behalf of the respondent, and all were admitted into evidence by agreement.

[25] The respondent submitted that the learned judge also had two written expert reports of Dr. Darryl Warner dated 2nd December 2020 and Dr. Daveen Wilkin dated 30th November 2020. The medical evidence presented by the respondent was not challenged by the appellant, who neither submitted contrary medical reports nor significantly cross-examined the respondent's medical experts.

[26] The learned judge's findings were also grounded on the respondent's account of her symptoms and suffering which was provided through both a written witness statement and oral testimony during the trial.¹¹

[27] The respondent further argued that the evidence of Dr. Darryl Warner at the trial of the matter undoubtedly informed the learned judge's findings. The respondent highlighted the following:

“(a) He saw the respondent 2 days after the fall at the Appellant's parking lot complaining of persistent pain in the shoulder, neck, feet and hands and swelling. **The respondent was referred to 2 neurosurgeons who advised that the respondent suffered multiple injuries during her slip and fall incident.** (emphasis mine). In addition, to the L5/S1 intersomatic disc posterior annular tear, the Respondent suffered sacroiliac dysfunction, bursitis and osteoarthritis, which are all associated with sudden trauma such as injury or incident.¹² Dr. Warner suspected damages to the sciatic nerve.

(b) Dr. Warner reports a few months later¹³ that based on the respondent's worsening condition she was referred to treatment overseas. The respondent attended 2 medical facilities in the United States of America and based on the tests performed she was diagnosed with FM. Dr. Warner explains FM as a condition referring to pain of the tissues including muscles tendons and ligament and that FM is triggered by a physically or emotionally stressful event”.

¹¹ Pages 29-88 of the Transcript of Proceedings dated 23rd September 2021.

¹² Medical report dated 21st September 2017 at page 8.

¹³ Medical report dated 9th January 2018.

- [28] With respect to the evidence of Dr. Wilkin, the respondent highlighted the following:
- “(a) Dr. Wilkin’s evidence is that the respondent’s reported that her symptoms started after the slip and fall incident. While Dr. Wilkin acknowledged the annular tear, Dr. Wilkin stated that the annular tear did not explain the degree of pain the respondent was in and that a presumptive diagnosis of FM was made.¹⁴
 - (c) Dr. Wilkin details that symptoms of FM normally begin after a physically trauma such as an injury or emotionally stressful event or significant psychological stress.¹⁵
 - (d) She describes the respondent as a text book case of FM displaying almost all of the symptoms in a severe manner”.
- [29] Based on the foregoing, the respondent submitted that the judge had sufficient medical evidence to support his findings. The slip and fall incident in the appellant’s parking lot was clearly traumatic. The appellant did not claim that the respondent had symptoms of fibromyalgia before the incident, and her symptoms only began afterwards. Thus, the respondent’s account of when symptoms started went unchallenged. The respondent’s fibromyalgia diagnosis aligns with the ongoing pain and symptoms she has experienced since the fall.
- [30] As it relates to the respondent’s prior medical history of hyperthyroidism and fibrocystic disease, the respondent submitted that the judge had unchallenged medical evidence before him that these prior conditions were unrelated to her diagnosis of fibromyalgia. In this regard, the respondent relied on the medical report of Dr. Carol Lawrence dated 5th March 2018 which states that the respondent was diagnosed in 2010 with hyperthyroidism and treated with medication for 2 years and was completely resolved in 2012. Further, having seen the respondent after 2012 for other complaints her thyroid had been dormant.¹⁶

¹⁴ Medical report dated 31st January 20218 at page 17.

¹⁵ Ibid at page 18.

¹⁶ Trial bundle 3 at page 23.

[31] The legal principles on causation were drawn from **Rawle Hannibal v The BVI Health Services Authority**¹⁷, where the Court emphasized the “but for” test requiring proof on a balance of probabilities, that but for the defendant’s actions, the injury would not have occurred. It was confirmed that in circumstances where there is no issue of multiple causes contributing to the injury or illness there is no need to depart from the but for test.

[32] The respondent submitted, in this case, there was ample, unchallenged medical evidence supporting the trial judge’s conclusion that the respondent’s fibromyalgia was caused by the slip and fall. The progression of symptoms from the fall of the diagnosis formed a clear, medically supported causal link. As in **Murphy v Ministry of Defence**¹⁸, the time and continuity of symptoms provided a logical connection between the incident and the condition, justifying the judge’s finding and the award of general damages. Therefore, the judge’s findings and consequential award of damages should stand.

Submissions in support of the counter notice of appeal
Respondent’s submissions in support of counter notice of appeal

[33] The respondent’s counter notice of appeal challenges a) the award for future loss of earnings and b) the award for loss of earnings. The respondent seeks an increase in award under both heads of damages. The respondent’s loss of future earnings relates to the future loss of pension payments and future loss of earnings (future salary payments).

[34] Regarding future earnings, the respondent argues that the judge misapplied a multiplier of 5 based on a misunderstanding of her retirement age and pension entitlement. The respondent contends that the pension was payable for life, not merely until standard retirement age, and thus the multiplier should reflect her life expectancy.

¹⁷ BVIHCVAP2017/0002 (delivered 13th December 2019, unreported).

¹⁸ 2016 EWHC 3 (QB).

In support of this, the respondent relied on the **Pensions Act**¹⁹ and the Regulations to the Pensions Act.

[35] The respondent was entitled to a government pension for life and not up to the normal retirement age for employees within the Federation which is 62 years. That is to say, once she became entitled to receive a pension from the government it would continue from the date of her retirement until the date of her death. Therefore, the appropriate period under consideration would be the number of years between the date of her retirement up to her life expectancy which for a woman in the Federation is 79 years.²⁰ Therefore, the appropriate period under consideration for loss of years of future pension payments was a period of approximately 29 years.

[36] The respondent relied on the decision in **Martin Alphonso et al v Deodath Ramanath**²¹ and submitted that a multiplier of 15 is appropriate, increasing her future loss of pension award from EC\$87,778.45 to EC\$263,335.35.

[37] It was submitted that in addition to the loss of future pension, the respondent is also entitled to future loss of earnings (future salary payment) from age 50 (date of trial) to at least age 55 which is the age of retirement from government. The loss is calculated as EC\$5,116.17 multiplied by 60 months (5 years) = EC\$307,006.20. The respondent asserts that her entitlement to compensation should not be reduced due to her early, injury-induced retirement.

[38] As to loss of earnings, the respondent was paid her loss of income up to the date of her retirement and not up to the date of the trial. After the respondent's retirement on 1st September 2018 up to the date of trial in September 2021 some three years later, the only income the respondent received was her social security benefits of EC\$3,093.73 monthly prior to her retirement and after retirement her pension sums which were a lower amount. The respondent should not be deprived of the loss of

¹⁹ Cap 22.06 of the Revised Laws of St. Christopher and Nevis.

²⁰ Social Security Actuarial Report for St. Kitts and Nevis, 2021.

²¹ BVIHCVAP1996/0001 (delivered 21st July 1997, unreported).

income during this period because her early retirement was due to the appellant's negligent conduct which left her in a position where her earnings were significantly reduced.

[39] Further, it was submitted that the judge improperly factored the respondent's early gratuity payment into the assessment. The learned judge erred in that he had before him documentary proof of loss of income of EC\$5111.73 monthly from October 2017 to the date of the trial and he refused to make an award in favour of the respondent in those circumstances.

[40] The respondent relied on the case of **Pritchard v J.H Cobden Ltd**²², which states that loss of earnings for a living claimant should be calculated as special damages for earnings lost between injury and trial, with future losses calculated separately from the trial onward. Therefore, the respondent argued that the appropriate period for loss of earnings is up to trial and not an earlier date randomly selected by the trial judge.

[41] In terms of the pension payments, those payments should be considered the same way the social security payments prior to 1st September 2018 were treated and as such, the respondent is entitled to the difference in her earnings up to the date of trial in the amount of EC\$179,086.95 (35 months from October 2018 to August 2021 x EC\$5116.77. 27). This additional sum of EC\$179,086.95 ought to have been paid to the respondent to cover the remaining period not covered by the judge's order.

Appellant's submissions in response to the counter notice of appeal

[42] Counsel for the appellant made oral submissions in response to the counter notice of appeal.

[43] With respect to loss of earnings, counsel submitted that the learned judge dealt with this at paragraph 61 of the judgment.²³ Paragraph 61 of the judgment states:

“...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

²² [1988] FAM 22.

²³ Page 156 of the Record of Appeal.

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.”

[44] Counsel submitted on behalf of the appellant that the respondent would have argued that the matter is one of special damages up to the date of trial, not liquidated damages. It is not a matter of simply multiplying salary by a set figure, rather it requires consideration of a range of factors, true loss, any benefits from other sources and the like and it is only your true loss that is recoverable. The appellant submitted that the judge appropriately addressed this at paragraph 61 of the judgment. Further, the appellant contended that the judge made the best assessment possible based on the evidence available, arriving at a figure he considered fair in the circumstances. While it was not the most precise exercise, it was the most reasonable approach available. This also addresses the respondent's attempt to distinguish between pension and retirement, as the period from injury to trial constitutes a single, continuous timeframe. It is artificial to divide it into sub-periods such as pre- and post-retirement. Thus, paragraph 61 of the learned judge's judgment encompasses the full period from injury to trial.

[45] With respect to loss of future earnings and the multiplicand, the appellant submitted that the judge's choice of 5 years was based on the evidence before him, including the respondent's medical condition. It cannot be said that this decision was irrational. The mere fact that another judge might have selected a longer period is not enough to undermine the decision, as this was a matter of judicial discretion exercised considering the circumstances. Accordingly, the appellant contended that the judge acted within a reasonable range of discretion in adopting a multiplicand of 5 years.

Issues

[46] Based on the foregoing, the issues to be determined are:

- (a) Whether the learned judge erred in finding a causal link between the respondent's fibromyalgia and the slip and fall incident based on the evidence before the lower court.
- (b) Whether the learned judge improperly relied on evidence which was not formally tendered into evidence and not tested on cross examination.
- (c) Whether the award of damages for fibromyalgia was justified based on the evidence.
- (d) Whether the learned judge miscalculated the respondent's loss of future earnings and loss of earnings.

Law

Standard of proof in civil proceedings: Balance of probabilities

[47] Generally, the standard of proof required in civil cases is expressed as proof on the balance of probabilities. If the evidence is such that the tribunal can say "we think it more probable that not," the burden is discharged, but if the probabilities are equal, it is not.²⁴

[48] Section 141 of the **Evidence Act of St. Christopher and Nevis**²⁵ outlines the standard of proof in civil proceedings as follows:

- "141(1) In a civil proceeding, a court shall find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- 141(2) In determining whether it is satisfied as specified in subsection (1), the matters that the court shall take into account include the nature of the cause of action or defence, the nature of the subject-matter of the proceeding and the gravity of the matters alleged."

When are documents in a civil matter deemed to be tendered in evidence at trial?

²⁴ Per Denning J. in **Miller v Minister of Pensions** [1947] 2 All E.R. 372, 373-374.

²⁵ Cap. 3.12 of the Revised Laws of St. Christopher and Nevis 2017.

- [49] Many of the rules regulating the course of evidence in civil trials are contained in the Eastern Caribbean Supreme Court **Civil Procedure Rules 2000** (“CPR”)²⁶.
- [50] **CPR 8.7(3)** indicates that the claimant must identify in or annex to the claim form or statement of claim any document which is considered to be necessary to the claimant’s case.
- [51] Under **CPR 29.1**, the court has a general power to control evidence and to give directions as to: (a) the issues on which it requires evidence; (b) the nature of the evidence which it requires for each issue; and (c) the way in which evidence is to be placed before it.
- [52] **CPR 39** governs the conduct of trials in civil proceedings. It ensures that trials are conducted in a fair, orderly and efficient manner consistent with the overriding objective to deal with cases justly.
- [53] **CPR 39.1** sets out documents for use at trial:
- (1) At least 21 days before the date fixed for the trial, all parties must inform the claimant of the documents that they wish to have included in the bundle of documents to be used at the trial.
 - (2) The claimant must prepare a bundle including all the documents which any party wishes to make use of at the trial.
 - (3) The bundle of documents should separate those which are agreed and those which are not agreed.
 - (4) The claimant must paginate and index the bundle of documents.

²⁶ CPR 2000 is used considering that the trial was held in 2021, prior to the introduction of CPR (Revised Edition) 2023.

- (5) At least 10 days before the date fixed for the trial the claimant must file at the court office – (a) a bundle comprising copies of – (i) all statements of case; (ii) any document which the parties were ordered to file under rule 38.6(2)(b); (iii) any requests for information and the replies; (iv) the claim form; and (v) the pre-trial memorandum or memoranda; (b) a second bundle comprising copies of – (i) all expert reports; (ii) all witness statements; and (iii) any agreed statements under rule 38.6(2) (c) (ii)-(iv).

[54] **Section 131 of the Evidence Act** of St. Christopher and Nevis provides that:

- “(1) A party may adduce evidence of the contents of a document in question-
- (a) **by tendering the document in question;**
 - (b) by adducing evidence of an admission made by some other party to the proceedings as to the contents of the document in question;
 - (c) **by tendering a document that-**
 - (i) is or purports to be a copy of the document in question; and
 - (ii) has been produced, or purports to have been produced, by a device that reproduces the contents of documents;
 - (d) if the document in question is an article or thing by which words are recorded electronically or in such a way as to be capable of being reproduced as sound, or by which words are recorded in a code, including shorthand writing, **by tendering a document that is or purports to be a transcript of the words;**
 - (e) if the document in question is an article or thing on or in which information is stored in such a manner that it cannot be used by the court unless a device is used to retrieve, produce or collate it, and a document is tendered that was or purports to have been produced by use of the device;
 - (f) **by tendering a document that-**
 - (i) forms part of the records of or is or was kept by a business whether or not the business is still in existence; and
 - (ii) purports to be a copy of, or an extract from or a summary of, the document in question, or is or purports to be a copy of such a document;
 - (g) ...
 - (h) ...
- (2) ...

- (3) A party may adduce evidence of the contents of a document in question that is unavailable—
- (a) by **tendering a document** that is a copy of, or a faithful extract from or summary of, the document in question; or
 - (b) by adducing oral evidence of the contents of the document in question”.
(emphasis mine)

[55] **Bergan v Evans**²⁷ concerned the procedure for the deployment of medical expert evidence in personal injury litigation in St. Kitts and Nevis. Specifically, the issue was whether the special provisions about the attaching of medical reports to a statement of claim for personal injuries in the Civil Procedure Rules 2000, and the special provision for admissibility in evidence of written medical reports in section 163 of the Evidence Act 2011, displace what, read on its own, appears to be a general rule, applicable to all expert evidence, that it may not be deployed without the court’s permission, in rule 32.6 of the CPR.

[56] The appeal in **Bergan v Evans** stemmed from a claim wherein Evans claimed that she suffered neck injuries in a 2006 road accident caused by Bergan. The respondent filed her claim in 2012, attaching four medical reports from her doctor as required by CPR 8.9(3). Bergan’s defence neither admitted nor denied the injuries, which was non-compliant with CPR 10.6. Evans later applied for permission to use Dr. Laws’ reports under Rule 32.6, but the application was refused due to a procedural defect (omission of the doctor’s CV). Believing court permission was no longer needed, her legal team made no further application and subsequently submitted another report from Dr. Hendrickson, again without permission, relying instead on section 163 of the **Evidence Act** 2011. At trial, Bergan objected to both reports, but the trial judge ruled in Evans’ favour, holding that Bergan’s inadequate defence allowed Dr. Laws’ evidence and section 163 permitted the use of Dr. Hendrickson’s report without Rule 32.6 compliance, a view upheld by this Court.

[57] The Board reviewed the relevant law pertinent to the case that is, section 163 of the **Evidence Act** in paragraphs 21 and 22 which set out, notwithstanding any enactment

²⁷ [2019] UKPC 33.

or law, and subject to the conditions specified in subsection (2) of section 163 that the certificate or report of a registered medical practitioner in respect of (i) the medical condition of a person; (ii) the nature and extent of any injuries to that person, including the probable effects of the injuries, are admissible in evidence before a court in civil and criminal proceedings. Section 163 also provides that before the hearing at which the document is to **be tendered in evidence** a copy of the document(s) should be served by or on behalf of the party proposing to tender it on the other parties to the proceedings; and (ii) none of the other parties to the proceedings have, within seven days from the service of the document, served on the party serving the document, a notice objecting to the document being tendered in evidence.

[58] The Board further noted at paragraph 22 that the **Evidence Act 2011** replaced an evidence regime, in force at the time of the inauguration of the CPR in 2002.¹ Lord Briggs then further stated at paragraph 40 that:

“40. Starting with section 163, it is important to note that its operation in rendering admissible a documentary medical report or certificate under subsection (1) is entirely mechanical and admits of no discretionary intervention by the court. The document is admissible if it is of a type identified in subsection (1) but only if the conditions in subsection (2) are satisfied, and those conditions include non-objection by any other party to the proceedings within seven days from the service of the document: see subsection (2)(c)(ii). If there is objection, then the document is simply not admissible pursuant to the Act. If there is no objection, it is admissible. **The exercise of the court’s statutory power under section 163(4) to require a person tendering such a document in evidence to attend and give evidence does not render the document inadmissible.**” (emphasis mine)

[59] Further at paragraphs 35 and 36, the Board noted that:

“35. ...More generally, rule 8.9(3) does not limit the claimant to attaching only a single medical report to her claim form, or reports from a single medical expert. In the present case the claimant attached four of them. **It would be an extraordinary restriction upon the court’s duty and power to limit expert evidence to that which is reasonably required to resolve the proceedings justly if the claimant could secure the right to deploy any number of experts of her choice, merely by attaching their reports to her claim form.** (emphasis mine)

“36. The Board can see no good reason why the CPR should be interpreted as conferring that disproportionate right upon a claimant merely because the defendant’s defence failed to comply with rule 10.6. On the contrary, in such a case, where the defendant had failed to identify the ambit of any dispute about the claimant’s injuries, it would be likely that less, rather than more, expert evidence would be required to be deployed at any trial.”

[60] Consequently, documents attached to a statement of claim or witness statement do not constitute evidence merely by being filed, they become evidence only when formally adduced at trial or as otherwise permitted under the CPR or the Evidence Act. A witness statement does not attain the status of evidence until the witness is called to give oral testimony in court; until that point, it merely outlines the evidence the witness is expected to provide.

Evidential value of documents exhibited to statement of claim or defence

[61] A statement of case serves three purposes (as summarised by Cockerill J in **King and others v Stiefel and others**):²⁸

- (a) It enables the other side to know the case it has to meet.
- (b) It ensures that the parties can properly prepare for trial – and that unnecessary costs are not expended, and court time required chasing points which are not in issue or which lead nowhere.
- (c) The process of preparing the statement of case operates (or should operate) as a critical audit for the claimant or defendant and its legal team that it has a complete cause of action or defence.²⁹

[62] Pariagsingh M (as he then was) in **Lennox Linton v Anthony Astaphan et al**³⁰ at paragraph 38 of the judgment stated:

“[38] A document is relevant if it goes to a fact in issue in the case. Disclosure of a document however, does not mean it is part of the evidence in a

²⁸ [2021] EWHC 1045 (Comm): see paragraphs 145 and 146.

²⁹ The Civil Court Practice (The Green Book), Chapter 4 Statements of case and service (Part 7) The purpose of statements of case.

³⁰ DOMHCV2019/0267 (delivered 20th July 2022, unreported).

case, without more. In civil proceedings all evidence is given by witness statements (or summaries) and if the documents referred are not referenced in the witness statements, barring agreement from the other side they may not be admitted into evidence.”

[63] The master went on at paragraph 42 to express that:

“[42] The witness putting in the document can be cross examined on the document. The opposing party can also even apply to strike it out as a hearsay document or for being irrelevant if it is sought to be introduced into evidence. Disclosing a document alone does not permit a party to rely on it as part of his case. The document must be put in evidence either through a witness or by consent. Failing this, the document simply is not in evidence. Documents disclosed are not evidence. Evidence is what is contained in witness statement (including documents annexed or referred to which were disclosed).”

Cross examination

[64] **CPR 32.10** states that ‘if an expert appointed by the court under rule 32.9(5) gives oral evidence, the expert may be cross-examined by any party.’

[65] In almost every civil case, an expert witness is required to submit a written report before the trial which must be disclosed to other parties pursuant to the court’s direction. This report should have been pre-read by the judge and examination in chief is relatively brief consisting of the advocate highlighting the important sections of the report and asking the expert to amplify or clarify ambiguities in the report, and sometimes issues raised by the other side’s report. Just as a party must, in cross examination, challenge evidence of fact given in chief by a lay witness which is not accepted, so too the opinions of an expert must be challenged if they are to be disputed.³¹

[66] In **Griffiths v TUI UK Ltd**³², the Supreme Court reinstated a claim dismissed by the County Court and restored by the Court of Appeal, ruling on the proper treatment of *uncontroverted* expert evidence. Mr. Griffiths had submitted a CPR-compliant expert

³¹ Expert Evidence (5th edn, Sweet & Maxwell 2017).

³² [2023] UKSC 48.

report attributing his illness to contaminated food at a TUI hotel. TUI neither submitted its own expert evidence nor cross-examined Griffiths' expert, instead criticizing the report only in closing submissions. The County Court accepted TUI's criticisms and dismissed the claim. The High Court reversed this and held that an unchallenged expert report could not be disregarded. The Court of Appeal reinstated the County Court's decision, but the Supreme Court allowed Griffiths' appeal, emphasizing the rule in ***Browne v Dunn***³³ **that a party must cross-examine a witness on material points it intends to dispute.** (emphasis mine)

[67] The court relied on **Phipson on Evidence (20th ed., 2022, para 12-12)**, which states:

"In general, a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases. In general, the CPR does not alter that position. This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected."

[68] The Supreme Court affirmed that this rule applies to both factual and expert witnesses, and its underlying rationale is ensuring trial fairness to the opposing party, the witness (who may have reputational interests at stake), and the integrity of the judicial process. Cross-examination offers a witness the opportunity to clarify or explain evidence and is especially vital if their credibility or competence is being challenged. However, the Court stressed that the rule is not rigid, it must be applied with regard to the overall fairness of the trial, and exceptions may arise (e.g., time constraints or other proportionality concerns). Still, where no cross-examination occurs on a key point, it is generally impermissible to reject that evidence.

Discussion

[69] For the purposes of this discussion, issues (a), (b) and (c) are interrelated and will therefore be addressed collectively.

³³ (1893) 6 R 67.

- [70] When a trial judge's assessment of damages is challenged, appellate courts must begin with the principle of judicial restraint. This is because the assessment of damages is inherently a matter of judicial discretion. However, restraint does not imply that appellate intervention is never appropriate. An appellate court may intervene if, considering all the circumstances, the award is clearly disproportionate to the loss suffered. Intervention is also justified where the trial judge considered irrelevant factors, ignored relevant ones, applied incorrect legal principles, or used the wrong measure of damage resulting in a fundamentally flawed assessment: **Martin Alphonso and others v Deodat Ramnath**.³⁴
- [71] In the lower court, there were 11 medical records as it related to the respondent's medical condition, her pain and suffering. The appellant and the respondent agreed on one document which was the Report to Michelle Lake, Manager TDC Home & Building Depot dated 4th January 2017³⁵. Therefore, all other documents were not agreed.
- [72] There were two court appointed experts who provided expert witness reports pursuant to Part 32 of the **CPR**. These experts were Dr. Daveen Wilkin and Dr. Darryl Warner. For the purposes of this analysis, it is important to emphasize the conclusions in their reports concerning the causal relationship between the respondent's fibromyalgia and the fall as well as what document was elicited by them upon cross examination.
- [73] The expert witness report of Dr. Daveen Wilkin dated 30th November 2020 stated the following:
- “...Ms. Archibald was next seen by me on December 18, 2017, after having seen a neurologist at Baptist Health Hospital where nerve conduction studies as well as several other diagnostic tests had been performed. The patient still complained of severe pain. The initial diagnosis of Fibromyalgia was confirmed, and the patient was asked to continue taking the medication that had been previously prescribed. She was also advised on the benefits of hydrotherapy.
- ...

³⁴ (1997) 56 WIR 183.

³⁵ Agreed list of documents filed on 14th August 2020 at page 419 of the Record of Appeal.

As of the last time Ms. Archibald visited me in 2018, her symptoms had remained unchanged and are consistent with a severe case of Fibromyalgia.”³⁶

[74] At page 6 of the transcript of proceedings dated 24th September 2021³⁷, the examination in chief of Dr. Wilkin was conducted by counsel for the respondent in the court below and the expert report of Dr. Wilkin dated 30th November 2020 was tendered into evidence.

[75] Upon cross examination by counsel for the appellant, the following questions were put to Dr. Wilkin, and his answers were as follows:

“Q. You have determined from your analysis of your patient, Ms. Archibald, that she has a severe case of fibromyalgia, correct?

A. Yes. That is correct.

Q. Is it safe to say that there is no scientifically proven cause of fibromyalgia?

A. To date, there is no direct scientific cause of fibromyalgia.”³⁸

[76] As previously noted, there were 11 medical reports in the court below, one of them being the report of Dr. Wilkin dated 31st January 2018³⁹ which formed part of the respondent’s documents. However, this document was never formally tendered into evidence as it can be gleaned from the aforementioned, and neither was it subject to cross examination.

[77] The medical report of Dr. Wilkin dated 31st January 2018 stated:

“Researchers believe that FM, also called Fibromyalgia Syndrome (FMS) is a condition that amplifies painful sensations by affecting the way the central nervous system (brain, spinal cord and nerves) processes pain messages carried around the body.

Symptoms normally begin after a physical trauma such as injury, emotionally stressful event or significant psychological stress.”⁴⁰
(emphasis mine)

³⁶ Pages 75-78 of the Record of Appeal.

³⁷ Page 298 of the Record of Appeal.

³⁸ Page 301 of the Record of Appeal.

³⁹ Page 331 of the Further Revised Record of Appeal.

⁴⁰ Page 332 of the Further Revised Record of Appeal.

[78] The expert witness report of Dr. Darryl Warner dated 2nd December 2020 stated the following:

“Fibromyalgia is a condition referring to pain in the fibrous tissues of the body, such as muscles, tendons, and ligaments. Fibromyalgia, which is believed to be triggered by a physically or emotionally stressful event has many symptoms that tend to vary from person to person. The chronic pain, fatigue and other symptoms associated with fibromyalgia often make normal day to day activities extremely difficult.”⁴¹

[79] In direct examination, the medical report of Dr. Warner dated 2nd December 2020 was tendered into evidence. Dr. Warner was submitted for cross examination. The following questions were put to him, and he answered accordingly:

“Q. And correct me if I’m wrong, isn’t fibromyalgia a disease where the cause is scientifically unknown?

A. Well, what happened is not direct—it hasn’t been able – we haven’t been able to directly decide what would cause it, but we look at various possibilities. Okay?

Q. So—so, scientifically, there is no proven way to determine the cause, but you all look at different factors which could potentially be the cause?

A. **Could potentially be the cause**⁴².” (emphasis mine)

[80] In paragraph [46] of the learned judge’s reasons, it appears that he relied upon or reproduced the contents of Dr. Wilkin’s medical report dated January 31st, 2018. Paragraph 46 states:

“...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.... 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.”⁴³

[81] As previously noted, the medical report of Dr. Wilkin dated 31st January 2018, which appears to have influenced the trial judge’s finding, was not tendered into evidence.

⁴¹ Page 68 of the Record of Appeal.

⁴² Page 250 of the Record of Appeal.

⁴³ SKBHCV2020/0102 *formerly* SKBHCV2018/0168 at paragraph 46.

- [82] Under **CPR 39.1**, only those documents included in the trial bundle and specifically identified as either agreed or unagreed, can be properly used at trial. While the 31st January 2018 report formed part of the respondent's disclosed documents, it was not agreed upon by the parties and was not listed among the agreed documents. More importantly, it was never formally tendered into evidence, as required by **CPR 29.1(c)** and section 131 of the **Evidence Act of St. Kitts and Nevis**.
- [83] Section 131(1)(a) of the **Evidence Act** clearly stipulates that a document must be tendered to be admissible. Furthermore, as noted in paragraphs 54 to 57 above, merely disclosing a document or attaching it to a pleading or witness statement does not render it admissible. It must be introduced either through a witness or by consent. In this case, Dr. Wilkin's report dated 31st January 2018 was neither introduced by her during her oral testimony nor referenced in a way that subjected it to cross-examination by the opposing party.
- [84] This omission is particularly significant in light of the guidance in **Griffiths v TUI UK Ltd.**, which affirms that the opposing party must have an opportunity to challenge evidence through cross-examination if it is to be relied upon. In the present case, the appellant was denied that opportunity in relation to the 31st January 2018 report. The document was never tendered by Dr. Wilkin during her testimony on 24th September 2021, and there is no record of any cross-examination on its contents.
- [85] Additionally, the Board in **Bergan** clarified that attaching a medical report to pleadings or including it in a trial bundle does not automatically render it admissible. That principle squarely applies here: the 31st of January 2018 report, although disclosed, never crossed the threshold into admissible evidence because it was neither agreed nor properly adduced at trial. It remained an untested document, not forming part of the record.
- [86] The learned judge's reliance on evidence not properly before the court raises significant concerns regarding fairness and adherence to the overriding objective of

the CPR. Unlike the expert reports of Dr. Wilkin (30th November 2020) and Dr. Warner (2nd December 2020), which were properly tendered and tested under cross-examination, this report was never formally admitted. As noted in **Lennox Linton v Anthony Astaphan et al**, documents not tendered through a witness or by consent are not in evidence. This constituted an error in law and principle on the part of the learned judge.

[87] Having established that the 31st January 2018 medical report was not tendered into evidence and did not form part of the evidence at trial, the learned judge ought not to have relied on it. This was an error in principle and in law of the learned judge. I will now consider whether there was sufficient evidentiary basis for the learned judge to conclude that the respondent's fibromyalgia was caused by the slip and fall incident.

[88] The appellant contended that the learned trial judge reproduced a line from the 31st January 2018 medical report in paragraph [46] of the judgment. However, the report by Dr. Warner, dated 2nd December 2020, admitted into evidence and tested under cross examination, clearly stated, "fibromyalgia, which is believed to be triggered by a physically or emotionally stressful event, has many symptoms that tend to vary from person to person." In cross examination, Dr. Warner also acknowledged that the slip and fall incident "could potentially have been the cause". Applying the civil standard, on a balance of probabilities, it was open to the trial judge to conclude that the injury was more likely than not the cause of the respondent's condition. The evidence did not exclude causation, and the learned judge was entitled to weigh the expert evidence alongside the relevant circumstances, including the link between the incident and the onset of the respondent's symptoms.

[89] As previously noted in Martin **Alphonso and others v Deodat Ramnath**, when the assessment of damages by a trial judge is challenged, appellate courts must exercise judicial restraint. In this case, there was sufficient evidentiary basis for the trial judge to find, on a balance of probabilities, that the respondent's fibromyalgia was caused by the slip and fall incident. Accordingly, the appellant's challenge to the learned trial judge's finding that the fibromyalgia was caused by the slip and fall incident, fails.

Loss of earnings and loss of future earnings

[90] According to **Halsbury's Laws of England**⁴⁴

"Pre-trial loss of earnings is assessed as the net sum which the claimant would have received after necessary deductions, for example, of income tax and national insurance; his loss is the disposable amount which he would have left after those deductions which his employer is compelled by law to make or which the claimant, as a self-employed person, would be required to pay. Where the claimant's contract of employment provides for other deductions (for example, in respect of contributions to a pension scheme) these will be taken into account in assessing his net loss. Any expenses normally incurred by the claimant in order to perform his job and not now incurred may be deducted from the award of damages....

Where an employee continues to receive his wages from his employer as of right, this will fall to be deducted from his damages for loss of earnings; any payments payable under a term of an employee's contract by the defendant to the employee a partial substitute for earnings must be deducted. Where the claimant is entitled to payments under an insurance policy taken out and paid for not by him, but by his employers, the defendants, these payments (or equivalent) will be deducted from the award of damages since they are classified as sick pay. The claimant will in all cases be entitled to damages representing his loss of earnings up to the date of trial, no matter how long has elapsed since the date of the accident. This is so notwithstanding the fact that the result may be, when combined with the operation of the multiplier and the multiplicand, to increase substantially the total sum awarded."

[91] Where the claimant's injury has resulted in the loss of his pension rights or in his entitlement to a lower pension than would otherwise have been the case, he is entitled to compensation for that loss.⁴⁵ In **Dews v National Coal Board**⁴⁶, the House of Lords held that if the claimant has lost some entitlement to pension this reduction should be assessed separately and should form the subject award of damages.

⁴⁴ Halsbury's Laws of England, Damages (Volume 29 (2019)), 7. Measure of Damages in Tort, (3) Personal Injury.

⁴⁵ **Lim Poh Choo v Camden and Islington Health Authority** [1980] AC 174.

⁴⁶ [1987] 2 All ER 545.

[92] The general method of assessment of future loss of earnings is to use a multiplier/multiplicand methodology. This Court in **The Attorney General of Saint Lucia v Godfrey Ferdinand et al**⁴⁷ held that:

“When assessing loss of earning capacity, the starting point is to determine whether the injury suffered is likely to cause loss of earnings. It is only if and when the court determines that the injury is likely to cause a loss of earning that the issue as to the correct multiplicand becomes relevant.”

[93] In **Irani v Duchon**⁴⁸ the court noted that the multiplicand is the net loss of earnings, being the amount the claimant would have earned had it not been for the injury ("but for earnings") less the amount the claimant is likely to earn given the fact of the injury ("residual earnings"). The multiplier is the number of years the loss of earning capacity will last, discounted for various factors such as accelerated receipt. The Court further stated that:

[20] This method is to be preferred to the broad-brush approach of awarding an overall lump-sum figure after consideration of all the circumstances as in *Blamire v South Cumbria Health Authority* [1993] PI QR 1 – a *Blamire* award. It should be adopted unless the court is driven to conclude that there is no real alternative to a *Blamire* award – see *Ward v Allies and Morrison Architects* [2012] EWCA Civ 1287 at [20] per Aikens LJ (with whom the other judges agreed), citing *Bullock v Atlas Ward Structures Ltd* [2008] EWCA Civ 194 at [17] and [21].

...

[22] There will be no real alternative to a *Blamire* award if, for example, there is insufficient evidence or there are too many imponderables for the judge to be able to make the findings necessary to support the multiplicand/multiplier approach.

[23] In order to calculate the multiplicand it is necessary for the claimant to establish on the balance of probabilities (i) the but for earnings and (ii) the residual earnings. This will include consideration of both the type of work and the level of remuneration over time.”

[94] In **Martin Alphonso et al v Deodat Ramnath** the Court of Appeal upheld the award of \$10,000.00 for loss of earning capacity and reduced the damages for future loss of earnings. In relation to loss of earning capacity, the Court, citing the cases of

⁴⁷ SLUHCVP2018/0032 (delivered 25th June 2020, unreported).

⁴⁸ [2019] EWCA Civ 1846.

Moeliker v. A Reyrolle and Co. Ltd⁴⁹ and **Fairley v John Thompson (Design and Contracting Division Ltd)**⁵⁰ stated:

“The learning from the aforementioned two cases is that this head of damage would arise where a plaintiff is, at the time of trial, in employment but there is a risk that he may lose this employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. The cases show that it is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial. As Denning MR put it in the **Fairley** case. “It is important to realize that there is a difference between award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages.”

[95] **Halsbury’s Laws of England** further states that:

“Where a future pecuniary loss, such as loss of earnings or the need for medical care, is likely to last for a number of years, or extend for the rest of the claimant’s life, that loss has conventionally been capitalised and awarded as a lump sum. In order to calculate that lump sum, the net annual loss is calculated; the computation commences with what would have been the net earnings of the claimant at the time of the trial, not at the time of the tort. Earnings include not only wages and salary, but also fees, profit sharing and benefits in kind. Account must be taken of any deductions which fall to be made and, in the case of lost earnings, any lost promotion prospects.

...Where medical evidence indicates that the need for care will increase or decrease over time, it may be necessary to take different multiplicands for the different periods covered by the award.”

[96] Further in **Steadroy Matthews v Garna O’neal**⁵¹ Michel JA stated at paragraph 30 ‘In terms of the special damages award for loss of earnings, it is now trite that special damages must be specifically pleaded and strictly proved.’ Further at paragraphs 38, 40 and 41 Lordship expressed that:

38. “The multiplicand is the net annual amount which the injured party would have been earning but for her injuries, less any amount which she is capable of earning in the future. Where the injured party is in salaried employment and is rendered completely incapable of working by the injury, the calculation of a multiplicand is fairly easy. Where, however, as in the

⁴⁹ (1977) 1 All ER 9.

⁵⁰ (1973) 2 Lloyd’s Rep. 40.

⁵¹ BVIHCVAP2015/0019 (delivered 16th January 2018, unreported).

present case, the injured party was self-employed and is capable of doing some amount of income-earning, the calculation of the multiplicand is fairly difficult. The calculation, however, is a factual determination to be made by the finder of fact, which in this case is the master who undertook the assessment of damages.

40. The multiplier is the amount by which the net annual income should be multiplied in order to arrive at the quantum of the award for loss of future earnings. This is determined by ascertaining the number of years which the injured party would have been earning that income but for her injuries. According to McGregor on Damages, “[t]he starting point in the calculation of the multiplier is the number of years that it is anticipated that the claimant’s disability will last; the calculation falls to be made from the date of trial”.

[41] In the case of **Pritchard v J. H. Cobden**⁵², the English Court of Appeal held that damages for loss of earnings for a living claimant should be assessed as special damages for the earnings lost between injury and trial, with a calculation of the future loss of earnings from trial by selecting a multiplier from the date of trial to compensate the claimant for the likely loss of earnings for his future working life.”

[97] With respect to the *Blamire* award Michel JA further stated at paragraph 49 of the **Steadroy Matthews v Garna O’neal** judgment that:

“In the case of **Blamire v South Cumbria Health Authority**, the English Court of Appeal held that the trial judge was entitled to reject the multiplier-multiplicand approach in assessing the injured party’s future loss of earnings, given the number of uncertainties in that case as to the amount the injured party would have earned if she had not been injured, as well as the likely future pattern of her earnings. The judge accordingly decided, and the Court of Appeal upheld his decision, to award a global sum for loss of future earnings.”

[98] Consequently, the court held that ‘in the case of a *Blamire* award, the judge is entitled to reject the multiplier-multiplicand approach because of uncertainties as to the amount the injured party would have earned as well as the future pattern of earnings. The court is of the view that there was sufficient certainty in that case as to the income which the respondent would have earned to make the multiplier multiplicand approach appropriate.’

⁵² [1988] Fam 22.

Discussion

[99] In relation to issue (d), courts aim to fairly compensate a claimant for both the income they have already lost and what they are likely to lose in the future due to injury, but there must be clear, specific evidence to do so. When the evidence is unclear, the court may estimate a fair amount instead.

[100] The respondent challenged the awards made under the heads of (a) loss of earnings and (b) loss of future earnings inclusive of her pension entitlement.

Loss of future earnings (pension and loss of future salary payments)

[101] The respondent contended that the learned judge erred in his assessment of damages, specifically regarding the calculation of her future loss of pension income. The primary contention relates to the judge's application of a multiplier of five in calculating the respondent's future loss of pension income. The respondent argues that the multiplier was inappropriately tethered to the statutory retirement age of 62 years, rather than her actual entitlement to a government pension for life. It is undisputed that the respondent retired at age 50 due to injuries sustained in the incident for which the appellant was found liable. The respondent has submitted that her life expectancy extends to age 79 as per the life expectancy for women in the Federation, and therefore the appropriate period for calculation of pension loss ought to span this full 29-year period and not merely the 12 year period between age 50 and 62.

[102] I am persuaded that the judge erred in principle in limiting the multiplier to five years. The period of assessment must correspond with the actual expected duration of the pension payments, not an assumed statutory retirement age, particularly where the injury has prematurely terminated the respondent's working life. A multiplier of fifteen, as proposed by the respondent and supported by the decision in **Martin Alphonso et al v Deodat Ramnath**, appears more reasonable in the circumstances.

[103] In terms of loss of future earnings, the respondent submitted that her loss of earnings from age 50 to at least age 55 which is the age of retirement from Government, represented the period in which she would have continued to be in salaried employment with the government. This loss is calculated as EC\$5,116.17 per month for 60 months, yielding a total of EC\$307,006.20.

[104] In **Irani v Duchon**, the court reaffirmed the use of the multiplier/multiplicand method to assess future loss of earnings. Under this approach, the multiplicand represented the claimant's net earnings "but for" the injury, while the multiplier corresponds to the duration over which the loss is expected to continue. In my view, the respondent's case falls squarely into this. There is nothing to suggest that she would have voluntarily retired earlier than age 55. Therefore, the learned judge erred in his assessment of the respondent's loss of future earnings, which ought to have been calculated using the multiplier/multiplicand method. In this case, that approach would have more accurately reflected the loss incurred by the respondent as a result of her premature retirement.

Loss of past earnings (up to trial)

[105] With respect to past earnings, the respondent argues that the trial judge erred in assessing her loss of earnings only up to the date of her retirement in September 2018, rather than up to the date of trial in September 2021. The respondent maintains that following her early retirement, her only income was a reduced pension and that she should be compensated for the shortfall in income between what she earned pre-retirement and what she received thereafter.

[106] The case of **Pritchard v J.H. Cobden** is instructive. There, the Court of Appeal held that damages for loss of earnings in respect of a living claimant should be calculated as special damages up to the date of trial, with a separate calculation thereafter. The respondent in this case adduced documentary evidence of her monthly income of EC\$5,116.77 from October 2017, and there appears to have been no legitimate basis for limiting the award to September 2018. The trial judge further erred by factoring into

account a gratuity payment as a substitute for earnings, without accounting for the significant shortfall in her actual income.

[107] The respondent seeks compensation for the difference in earnings from October 2018 to August 2021, a 35-month period, amounting to EC\$179,086.95. This sum reflects the difference between the respondent's pre-injury salary and the pension she subsequently recovered, and I am satisfied that it is properly recoverable as special damages. This position is consistent with the approach endorsed in **Steadroy Matthews v Garna O'Neal**, which emphasizes that special damages must be specifically pleaded and strictly proved. The respondent has met that threshold.

[108] The respondent further asserts that pension and social security payments should be treated as partial mitigation of income loss, rather than as complete substitutes. This aligns with the reasoning in **Halsbury's**, which states that while certain benefits may be deducted (e.g., sick pay or employer-provided insurance), payments arising from separate entitlements, particularly those earned over a career (e.g., pensions), should not be used to reduce damages unless explicitly connected to the injury.

[109] Accordingly, the respondent should be entitled to the net difference between her pre-injury salary and her post-retirement income, up to the date of trial. The judge's failure to account for this loss in full was an error of law and of assessment.

[110] The trial judge erred in his assessment of both the respondent's past and future loss of earnings. Considering the foregoing, the respondent succeeds on the counter notice and the award of damages in this regard should be reassessed.

Disposition

[111] In light of the foregoing, I would make the following orders:

- (1) The appeal against the decision of the learned judge's finding that the slip and fall incident caused the respondent's fibromyalgia is dismissed.
- (2) The counter-notice of appeal filed by the respondent is allowed.

(3) The matter is remitted for reassessment of damages for loss of earnings before another judge of the High Court; and

(4) There be no order as to costs.

I concur
Vicki Ann Ellis
Justice of Appeal

I concur
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar