BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

NO. CV 0571 OF 2018

BETWEEN

WENDY POPO **CLAIMANT**

AND

THE ATTORNEY GENERAL OF BARBADOS **DEFENDANT**

Before: **The Honourable Mr. Justice Barry L. Carrington, Judge of the High Court.**

Dates of Hearing: **May 11 & 12, 2021**

Date of Decision: **February , 2022**

Appearances:

Mrs. Shontelle N. Murrell-Hinkson, Attorney-at-Law for the Claimant.

Ms. Ann-Marie A. Coombs and Mr. Wilfred Estwick, Attorneys-at-Law for the Defendant.

DECISION

Introduction

[1] The Claimant visited the Bridgetown Fisheries Complex and had occasion to use the bathroom facilities. While at a sink to wash her hands, a bar of soap fell to the ground and in her attempt to retrieve it, she placed her hand on to the sink for support. The sink collapsed to the floor and shattered causing her immediate injury. It was later discovered that there was a 'shaky' bracket supporting the sink that was allegedly tightened but not replaced. The Claimant commenced proceedings alleging a breach of the common duty of care owed while the Defendant claimed that the Claimant was contributorily negligent.

Issues

[2] The issues which arise for determination Court are as follows:

i. whether the Defendant is in breach of the common duty of care owed to the Claimant by virtue of ***section 4*** of the **Occupiers Liability Act, Cap 208 ("Occupiers Liability Act")** and at common law by failing to replace the 'rusty' brackets on the sink in the washing facility.

ii. If the Defendant is in breach of the common duty of care, whether the Claimant was contributorily negligent pursuant to **section 3** of the **Contributory Negligence Act, Cap. 195 ("Contributory Negligence Act").**

Background

[3] Wendy Popo ("the Claimant") of No. 2 Sealy Land, Bank Hall in the parish of St. Michael was a lawful visitor to the premises of the Bridgetown Fisheries Complex. The Attorney General of Barbados ("the Defendant") is a party to these proceedings by virtue of **section 14(2)** of the **Crown Proceedings Act, Cap 197** as the Bridgetown Fisheries Complex is owned and operated by the Government of Barbados.

[4] On August 16, 2016, one of the sinks in a lavatory at the Bridgetown Fisheries Complex was reported to the maintenance artisan as being 'shaky' and coming off the wall. Later that day, he proceeded to tighten the brackets to secure the sink to the wall and reported that the sink was left in a sturdy condition.

[5] However, on August 18, 2016, the Claimant, being a lawful visitor to the precincts of the Bridgetown Fisheries Complex, entered the said lavatory to utilise its washroom facilities. While at the sink to wash her hands, the Claimant dropped the bar of soap and in the process of retrieving the bar of soap, held onto the sink for support. It collapsed to the floor and shattered and in the process, the Claimant fell and suffered injury, loss, damage. She sought medical attention at the Queen Elizabeth Hospital and later from Dr. Shakilah Patel and was unable to work for a period of twelve (12) weeks.

[6] The Claimant has since instituted proceedings against the Defendant seeking damages for the injuries and losses sustained in accordance with the breach of ***section 4*** of the **Occupiers Liability Act** and by reason of negligence.

The Evidence

[7] Evidence was provided by witness statements and augmented by evidence on oath. Ms. Popo was the sole witness for the Claimant, and she said that she was using the lavatory's washing facility and it collapsed causing her to fall to the ground. Under cross examination, Ms. Popo was adamant that she merely touched the sink and was not holding on to it. She said that while touching the sink, she did not put any pressure on it.

[8] Ms. Denise Coward a general worker at the Complex said in her witness statement that while cleaning the bathroom the day before the incident, she noticed that one of the sinks was tilting slightly since the supporting brackets were slackening from the wall. She reported the matter to Mr. Winsley Brathwaite, the maintenance artisan, who in his statement indicated that he removed the sink, changed dowels that were needed and replaced the sink. Ms. Coward admitted not placing any warning tape or signs alerting visitors to the danger of the faulty sink. Mr. Brathwaite said that after he replaced the sink, he shook it, and it was sturdy. Mr. Brathwaite also indicated that he did not replace the rusty brackets since

they were still sturdy. Under cross examination, he reiterated that the sink was repaired and sturdy when he finished. Mr. Gregory Payne, Senior Superintendent of Markets gave a witness statement in which he indicated that Ms. Coward notified him that the sink was a little shaky and coming off the wall. He indicated that Ms. Coward notified Mr. Brathwaite and not the maintenance supervisor or the senior maintenance supervisor, both of whom had the authority to order repairs to be carried out. Mr. Payne said, "I therefore concluded that the sink was not fixed." Under cross examination, Mr. Payne said that Mr. Brathwaite was neither of the two (2) persons with the authority to order repairs to be carried out. He added that if the proper protocol was adhered to and the work completed, that either the maintenance supervisor or the senior maintenance supervisor would ensure that the work was done to his satisfaction. Mr. Payne stood by his statement that he concluded that the sink was not fixed.

Injuries Sustained

[9] Attached to the Claimant's witness statement are medical reports from the Queen Elizabeth Hospital and Dr. Shakilah Patel. The hospital's report indicated that the Claimant, a forty-eight (48) year old female, presented at the hospital with multiple lacerations and abrasions to her right upper limb. She was examined and the significant findings were isolated to her musculoskeletal system and included the following:

- approximate 8 cm laceration to the posterior lateral aspect of the right forearm, extending down to the muscle with small incomplete laceration of muscle bed, with breach of fascial compartment contaminated with dirt and debris;

- 4 cm laceration to the ulnar border of right hand;

- 2 cm laceration just proximal to the metacarpophalangeal joint of right little finger;

- 1 cm laceration to 4th interdigital space; and multiple abrasions to the dorsum of forearm mainly along radial half of forearm.

[10] She was sent for x-rays which revealed no fractures, and the wounds were cleaned and sutured. She was also seen for follow up treatment by Dr. Patel on September 7 and 26, 2016 and December 12, 2017.

Law & Discussion

The statutory duty of care & its breach

[11] The **Occupiers Liability Act** was designed to protect lawful visitors to any premise or property from imminent dangers which may be found on an occupier's premises/property due to lack of care or negligence. In its Long Title, it is stated that it is an Act to amend the law relating to the liability of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or other property from dangers due to the state of the property or to things done or omitted to be done there.

[12] **Section 4(1)-(9)** proclaims the extent of the occupier's ordinary duty to a lawful visitor as follows:

> "4. (1) An occupier of premises owes the same duty (in this Act referred to as "the common duty of care ") to all his visitors, except so far as he is free to and does extend, restrict, modify, or exclude his duty to any visitor or visitors by agreement or otherwise.
>
> (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
>
> (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor.
>
> (4) In determining whether the occupier of premises had discharged the common duty of care to a visitor, regard is to be had to all the circumstances.
>
> (5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.
>
> (6) Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, reconstruction, demolition, maintenance, repair or other like operation by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he

reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(7) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor.

(8) Where the occupier fails or neglects to discharge the common duty of care to a visitor and the visitor suffers damage as the result partly of that fault and partly of his own fault, the Contributory Negligence Act, Cap. 195 shall apply.

(9) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

[13] Counsel for the Claimant in pursuing the Claimant's claim in Negligence relied upon the decision of **Donoghue v Stevenson [1932] A.C. 562** and urged the court to find the existence in law of a duty of care situation and that the Defendant breached its duty of care by failing and/or refusing to replace the 'rusty' supporting brackets of the sink and to that extent, Counsel noted that regard should be placed on the often cited words of Baron Alderson in his definition of negligence in **Blyth v. Birmingham Waterworks Co. 3 (1856) 11 Exch. 781 ; 156 E.R. 1047** , namely

> "…the omission to. do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do".

[14] Counsel submits that there was a causal connection between the Defendant's careless conduct and the damage and, finally, that the kind of damage to the Claimant is not so unforeseeable as to be too remote.

[15] Conversely, Counsel for the Defence posited the view that the common duty of care under the **Occupiers Liability Act** is not absolute, but what is necessary is for the occupier to do all that a reasonable occupier in similar circumstances would do. Based on this, Counsel stated that the Defendant discharged the common duty of care by taking such care to ensure that the restroom sink in the market was reasonably safe by repairing the sink as soon as the fault was reported. It is Counsel's submission that the Defendants' actions were reasonable.

[16] The Defendant further submitted that it did not owe the common duty of care to the Claimant for the particular circumstances outlined in this case because the Claimant was using the sink in an unauthorized way. Counsel argued that the sink was not designed to accommodate weight bearing such as it was exposed to by the Claimant.

[17] The term 'occupier' was defined by Lord Denning in **Wheat v. E. Lacon & Co. Ltd. (H.L) [1966] 1 ALL E.R. 582** *at p. 593* where his Lordship stated:

> "In the Occupiers Liability Act 1957 the word 'Occupier' is, used in the same sense that it was used in the common law cases on Occupiers' Liability for

> dangerous premises. It was simply a convenient word to dente a person who had a sufficient degree of control over premises to put him under a duty of care towards those who came lawfully unto his premises. Those persons were divided into two categories, invitees and licencees… The duty of the occupier had become simply a duty to take a reasonable care to see that the premises were reasonably safe for people coming lawfully on to them".

[18] The term 'visitor' was defined by **Professor Kodilinye** in his text entitled **Commonwealth Caribbean Tort Law**, 4th edition at *page 127* as:

> "The common duty of care is owed to all visitors to the premises, and visitors are those persons who would, at common law, have been treated as invitees or licensees. Thus, in effect, any person who enters lawfully, that is, not as a trespasser, will be a visitor for the purposes of the statutes".

[19] In the case of **Carrington v Accra Beach Hotel Ltd. BB 2016 HC 23**, **Cornelius J.** was required to determine whether the Defendant owed a duty of care to the Claimant; whether in the circumstances the Defendant took reasonable steps to ensure that the Claimant was reasonably safe in using the premises and whether the Claimant knew that there was a danger in the room. The learned judge while discussing the statutory duty of care, said at *para. 49:*

> "The court must consider therefore, based on the evidence before it, whether the state of the premises or whether things done or omitted to be done on the premises at the time of the claimant's fall gave rise to a breach of the defendant's duty of care to the claimant as his 'visitor'".

[20] Although the Claimant's claim under Occupier's Liability failed, the Court provided a comprehensive discussion on the essence of the occupier's responsibility and the learned trial judge stated at **paras.51-52:**

> "What then is the nature of the occupier's responsibility? The defendant was under a duty to take reasonable steps to protect the claimant and case law has long determined that the visitor should be protected not only from dangers created by the occupier itself, but reasonable steps must also be taken to protect a visitor from dangers which the occupier did not itself create (refer Cunningham v. Reading Football Club [1992] PIQR P141; Allison v. Rank City Wall Canada Ltd (1984) 6 DLR (4th) 144 not quoted in argument)".
>
> "The court, therefore, must examine all the circumstances and decide whether in the circumstances, the defendant took reasonable steps to ensure that the claimant was reasonably safe in using the premises. The court takes regard to how obvious the danger was, the purpose of the visit, the conduct to be expected of the claimant and the state of knowledge of the defendant".

[21] In the High Court decision of **Gittens v Bourne Holdings Ltd BB 2010 HC 2,** the Plaintiff claimed damages for personal injuries, loss and damage suffered when she fell on the Defendant's premises. The Defendant failed to explain the accident in a manner that was consistent with the absence of negligence on its part and the High Court in applying the Occupiers Liability Act, found that there was no effective system in place at the Defendant's business for dealing with spillages and other dangers.

[22] In **Atkins v Mika Inc. BB 2014 HC 62, Cornelius J.** was required to determine whether a fall sustained by a Plaintiff on a wet stairway in a

boutique store was sufficient to be deemed a breach of the statutory duty owed to all visitors and whether it warranted an award of damages. In finding that the Defendant had breached its statutory duty, the learned trial judge said at *para. 90*:

> "It is now trite law that a duty of care is owed to a person who would be likely to be affected by the actions of another. (refer Donoghue v. Stevenson[1932] A.C. 562. The failure of the defendant to bring the nature of the wet staircase to the claimant's attention was in breach of this duty. In addition, I consider the construction of the stairs to be a significant factor and not up to industry standards for a commercial building. I accept the evidence of Mr. Ashby that the stairs were inherently dangerous. Based on the evidence before me, it was these breaches of duty that was a causative factor in the claimant's falling down the stairs. I reject therefore the defendant's contention that the claimant's fall occurred as a result of her not taking care for her own safety".

[23] The High Court of Barbados in **Morris v Airline Freight Services Ltd et Al BB 1997 HC 38** per **King J.** held that the Defendants were liable in negligence when the Plaintiff was injured when she tripped and fell on BRC wire which was laid out flat on a ramp in front of her premises occupied by the First Defendant and on which premises the Second Defendant was carrying out work for the First Defendant. The Plaintiff alleged that her injuries were caused by the negligence and/or breach of the common duty of care by the First Defendant under **Section 4** of

the **Occupiers Liability Act** and/or the negligence of the Second Defendant as servant and/or agent of the First Defendant.

[24] By contrast, in the case of **Weekes v the Attorney General of Barbados BB 1986 HC 62,** which although there is a factual variance, substantial guidance can be gleaned from the reasoning adopted by the High Court. Here, the Plaintiff sought to recover damages for personal injuries which she sustained by falling on a wet floor while visiting the Grantley Adams International Airport. The Court had to determine whether the occupier was in breach of his duty under **Section 4 of the Occupier's Liability Act.**

[25] The Court found that the occupier had discharged the duty imposed by the Act and had done all that a reasonable occupier could be expected to do by giving adequate warning notices around the area in question which the Plaintiff ought to have seen. Before dismissing the Plaintiffs' claim, **Rocheford J.** adamantly posited:

> "The warning given by the defendant to the plaintiff was enough, in all the circumstances, to enable the plaintiff to be reasonably safe. The defendant had done all that a reasonable occupier could be expected to do. He had thereby discharged the duty imposed on him by section 4 of the Act. The sole cause of the accident was a failure on the part of the plaintiff to do what was reasonable to safeguard herself. Her injury was not due to any negligence or breach of statutory duty on the part of the defendant its servants or agents…"

[26] Based **section 4*(2)*** of **the Act** and the foregoing authorities**,** it is quite clear that the Defendant owed a common duty of care to the Claimant to ensure that the bathroom facilities were reasonably safe for use by lawful visitors to the premises. The Claimant qualifies as a visitor to the premises and was owed a duty of care by the Defendant while she was there. However, the Defendant breached this common duty of care where it failed to take proper action when the sink was reported to be 'shaky and coming off the wall' as a result of rusty brackets. Instead of replacing the said rusty brackets, the maintenance artisan merely tightened the screws to the wall in the hope that it was secured but the Defendant's case was weakened by the evidence of Mr. Alleyne, the Senior Superintendent of Markets who was of the opinion that the repairs were not done. It is my view that since the rusty brackets were not replaced with new ones, there should have been at least some warning signs placed in the washroom to caution users of the weakened state of the sink. I am not persuaded that the Defendant did all that it could in the circumstances to ensure the safety of its visitors who used the washroom facilities, including the Claimant. Therefore, the Defendant by virtue of **section *4 (2),*** owed the common duty of care to all visitors but in the case of the Claimant, that duty was breached.

The Duty of Care at Common Law & its breach (Negligence)

[27] **Professor Kodilinye** at *page 62* has defined the tort of negligence as the breach of a legal duty to take care which results in damage, undesired by the Defendant, to the Plaintiff. The Learned Professor further postulates that there are three (3) elements to the tort:

> *(*a) a duty of care owed by the Defendant to the Plaintiff;
>
> (b) breach of that duty by the Defendant; and
>
> (c) damage to the Plaintiff resulting from the breach.

[28] Consequently, at *pages 61-62*, the Learned Professor discusses the renowned ***'neighbour principle'*** as enunciated by **Lord Atkin** in the locus classicus decision of **Donoghue v Stevenson [1932] AC *562*, p.579** and states:

> "The first question to be determined in any action for negligence is whether the defendant owed a duty of care to the plaintiff. In general, a duty of care will be owed wherever in the circumstances it is foreseeable that, if the defendant does not exercise due care, the plaintiff will be harmed. This foreseeability test was laid down by **Lord Atkin** in the celebrated case of **Donoghue v Stevenson 2** and is known as the ***'neighbour principle'***: The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when

> I am directing my mind to the acts or omissions which are called in question".

[29] **Professor Kodilinye** quoted **Lord Wilberforce** in the case of **Anns v Merton LBC [1977] 2 All ER *492, pp.498-99*** who laid down a two (2) stage test for the existence of a duty of care. Kodilinye notes that this decision was applied in the Barbadian case of **Austin v AG [1986] 21 Barb LR 259**.:

> "In order to establish that a duty of care arises in a particular situation, the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit, the scope of the duty or the class of person to whom it is owed, or the damages to which a breach of it may give rise".

[30] Moreover, at *page 67*, the Professor reveals the formula for considering breach of duty of care and likens the standard to that of a reasonable thinking man:

> "Having decided that a duty of care was owed to the plaintiff in the particular circumstances, the court's next task is to determine whether the defendant was in breach of that duty. In the Caribbean, this question is the one which, in practice, is likely to occupy most of the court's time. **In deciding the question, the court considers whether or not a reasonable man, placed in the defendant's position, would have acted as the**

> **defendant did**…In deciding what a reasonable man would have done in the circumstances, and in assessing the standard of care expected of the defendant, the court may take into account what may be called the 'risk factor'. This has four elements: (a) the likelihood of harm; (b) the seriousness of the injury that is risked; (c) the importance or utility of the defendant's conduct; (d) the cost and practicability of measures to avoid the harm".

[31] The Learned Professor then adds at *page 100* the imperativeness of the doctrine of causation:

> "Having established that the Defendant owed a duty of care to him and that the defendant was in breach of that duty, the plaintiff must then prove that he has suffered damage for which the defendant is liable in law. There are two aspects to this requirement: (a) causation in fact; and (b) remoteness of damage in law."
>
> "The first question to be answered is: did the defendant's breach of duty in fact cause the damage? It is only where this question can be answered in the affirmative that the defendant may be liable to the plaintiff. A useful test which is often employed is the 'but for' test; that is to say, if the damage would not have happened but for the defendant's negligent act, then that act will have caused the damage. The operation of the 'but for' test is well illustrated by Barnett v Chelsea and Kensington Hospital Management Committee [1968] 1 All ER 1068".

[32] In the case at bar, the Defendant is a person having sufficient control over the premises of the Bridgetown Fisheries Complex and as such qualifies as an 'occupier'. Likewise, the Claimant, being a person lawfully permitted to utilize the bathroom facilities located in the Bridgetown Fisheries Complex being a fish vendor, for the purposes of the **Occupiers Liability**

Act qualifies as a '*visitor'*. That point was conceded by the Defendant in its submissions.

[33] In applying the facts of this case to the law to determine whether there was a breach of the common duty of care and/or negligence, a number of things stand out. It is established that there was a problem with the bathroom sink before the incident occurred and it was reported to the maintenance artisan, Mr. Brathwaite who said he reinforced the brackets but did not replace them even though they were rusty since they were sturdy. The Defendant's case became unnecessarily complicated by the contradictory evidence of Mr. Brathwaite who said he fixed the sink and Mr. Payne who said he doubted that it was fixed. His doubt was premised on the fact that the report should have been made to the maintenance supervisor and the senior maintenance supervisor who after the work was completed, would ensure that it was done to his satisfaction. There being no report as is the established practice and approval of the work done was enough to foment in Mr. Payne's mind a doubt that it was done.

[34] However, the court accepts Mr. Brathwaite's version of events of having fixed the slightly tilting sink, but the effectiveness of the repair job remains doubtful. The Claimant was resolute in the face of cross-examination that she lightly touched the sink in her effort to retrieve the bar of soap and there was no contradictory evidence.

[35] In applying the judgment of **Cornelius J**. in **Carrington, supra,** the Court has considered that based on the evidence before it, the state of the premises or the things done or omitted to be done on the premises at the time of the Claimant's fall gave rise to a breach of the Defendant's duty of care to the Claimant as its 'visitor'.

[36] Therefore, the Court holds that it is evident that the Claimant's fall resulted in her injuries which are directly linked to the Defendant's negligence.

Contributory Negligence

[37] In accordance with the **Contributory Negligence Act Cap. 195**, **("the Contributory Negligence Act"),** contributory negligence is defined in **section 3** as:

> "Subject to this section, where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the persons suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage".

[38] Counsel for the Claimant cited numerous authorities including **Caswell v Powell Duffryn Associated Collieries Ltd. [1940] A.C. 152** and submitted that the Claimant was not informed of the state of the lavatory prior to her entry, neither were there affixed any signs or warnings alerting the Claimant to the state of the sink and/or the need for special care to be

taken in the use thereof. Counsel further added that the Claimant could not have reasonably foreseen that her actions would result in her hurting herself and therefore the Defendant has failed to establish the defence of contributory negligence.

[39] However, Counsel for the Defence contended that the Claimants' injuries and losses were wholly caused by her own negligent actions in using the sink in a manner that it was not intended to be used, as a prop to bear her weight while she retrieved the soap from the ground, thus failing to take proper care for her own safety. In addition, in relying on *section 3* of the **Contributory Negligence Act**, Counsel recommends that liability ought to be attributed at the ratio 80% to the Claimant and 20% to the Defendant.

[40] **Lord Denning, L.J.** (as he then was) in **Jones v. Livox Quarries Ltd. [1952] 2 Q.B. 608** at *para. 625*, aptly pointed out the similarity between negligence and contributory negligence as it relates to the foreseeability of harm:

> "Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought to have reasonably foreseen that, if he did not act as a reasonable prudent man, he might hurt himself; and in his reckonings he must take into account the possibility of others being careless". (My emphasis).

[41] In the decision of **Froom and others v. Butcher [1976] Q.B. 286,** the Plaintiff, who was not wearing a seat belt, suffered head and chest injuries and a broken finger when the car he was driving was in collision with a car driven by the Defendant. He was not wearing a seat belt because he did not like them as he had seen accidents where the driver would have been trapped in the vehicle had he been wearing a seat belt. The accident was caused solely by the Defendant's negligent driving, but the Plaintiff would not have suffered the head and chest injuries had he been wearing a seat belt. He brought an action for damages against the Defendant, who claimed that the Plaintiff's failure to wear a seat belt amounted to contributory negligence. **Meld J.** held that, in the absence of any statutory compulsion to wear a seat belt, the Plaintiff was not negligent but, if he had been guilty of contributory negligence, the damages would have been reduced by 20 per cent.

[42] On appeal, the Court per their **Lord Denning M.R., Lawton** and **Scarman L.JJ.** found that there was evidence of contributory negligence and reduced the award by 20%. The court made the following remarks:

> "In determining whether the plaintiff had been guilty of contributory negligence**, the question was not what was the cause of the accident but what was the cause of the damage;** that since the plaintiff's injuries, except for the broken finger, had been caused by his failure to wear a seat belt he had been guilty of contributory negligence and, the judge's assessment having been

> accepted by the parties, the overall reduction in the damages would be 20 per cent". [Emphasis mine].

[43] The Court also applied and quoted from the case of **Jones, supra**, and stated at *page 291* that contributory negligence is a man's carelessness in looking after his own safety. **Chandler J**. in **Layne v the Attorney General BB 2010 HC 9** was called upon to determine whether the Defendant was negligent in circumstances where the Plaintiff slipped and fell during the course of her duties at the Queen Elizabeth Hospital. In finding that the Defendant had breached its duty to ensure protection of its employees from unnecessary risks, the Court awarded damages to the Plaintiff.

[44] In arriving at this decision, his Lordship succinctly adumbrated at *para. 133* of the judgment that:

> "Knowledge of an existing danger is an important element determining whether a person has been contributory negligent. A person must therefore act reasonably with regard to the dangers, which he knew or ought to have known, existed. Thus, a person's duty to take reasonable care for himself is enhanced by his knowledge of the risks involved".

[45] His Lordship further emphasized at *para. 140* his reason for not allowing the defence of Contributory Negligence to succeed and compendiously stated:

> "Consequently, it is my opinion that the plaintiff, based on her own evidence, would have had knowledge of the

> state of the floor when she arrived at work on Tuesday 10 March 1998. Nevertheless, there is no evidence that the plaintiff did anything that could have been classified as negligent before or during her fall to contribute to her damages. Instead, it can be said that she took precautions to protect herself from possible injuries within the lab by wearing her lab coat and safety shoes. She further gave evidence that she survived by walking very gingerly and sometimes holding onto the wall. This reinforces the fact that she took reasonable precautions for her own safety. Consequently, the defence of contributory negligence fail".

[46] In **Bico Ltd v Qual-Tec Services Ltd BB 2016 HC 43, Cornelius J**. examined the extent of the Plaintiff's contributory negligence re. a fire that destroyed portions of the ice manufacturing plant. The learned trial judge analyzed the relevant legislative provisions and in determining the degree BICO was responsible, applied the reasoning of **Denning, L.J.** as in **Jones v. Livox Quarries Ltd.**, **supra**.

[47] The Court found at *para. 105* that accordingly, BICO should have foreseen that a loss of this nature was possible and at *para. 107* it was adamantly asserted that:

> "Not only should they have indemnified themselves against such a loss (and there is no evidence that they did) but the Court finds that these failures contributed to the extent of the blaze and thus the loss. I assess that contribution at 20% liability. In keeping with that finding, the Defendant, whose actions were the primary cause of the fire, must be seen to be 80% liable for its cause".

[48] In the case at bar, it is the opinion of this Court that there was no imminent threat or visible harm while using the washing facility as the Claimant clearly did not notice the rusty brackets on the sink and would have been of the opinion that the sink was sturdy enough to bear her weight.

[49] I am satisfied that the Claimant has discharged the foreseeability of harm test as laid down by **Denning L.J.** There is no way, in the absence of advanced warning of the faulty sink or if she had noticed that the sink was not well positioned or the brackets were rusty, that Claimant ought to have reasonably foreseen that, if she did not act as a reasonable prudent woman, she might hurt herself. Put differently, there is no way that the Claimant could have reasonably foreseen that if she placed her hand on the sink, there was the possibility that it would collapse causing her injury. It is a matter of public knowledge that most persons while bending to pick up something on the ground would place their hand or hold on to a nearby object like a sink. Usually, they do not transfer their full body weight or a substantial amount of it on the object. There is no evidence that the Claimant was negligent, and the reasonable conclusion is that she did not contribute to her injuries.

[50] **Lord Denning M.R.** in **Froom, supra,** said that the question is not what the cause of the accident was, but rather, what is the cause of the damage.

The evidence clearly shows that the cause of the accident was the faulty sink which collapsed and caused injury to the Claimant.

[51] In the circumstances therefore, I therefore hold that the Claimant has not contributed to her injuries, and consequently is not contributorily negligent.

Measure of Damages

Pain, Suffering & Loss of Amenities ("PSLA")

[52] Under this head, Counsel for the Claimant quoted the case of **Cornilliac v St. Louis [1965] 7 W.I.R 491** and urged the Court to consider the approach adopted in this judgment. Counsel also cited **Wells v Wells [1998] 3 ALL ER 481** and recited the judgment of Lord Hope of Craighead therein.

[53] Counsel for the Claimant submitted that an award in the sum of BDS$75,000.00 would be appropriate in this case for pain, suffering and loss of amenities in reliance on the authorities.

[54] Conversely, Counsel for the Defendant relied on the decision *of* ***Ashton v Royal Hotel 2010 unreported*** stating that the facts were similar to the current matter. There the Claimant was awarded the sum of €11,000.00 as general damages for pain, suffering and loss of amenities.

[55] Counsel for the Defendant in relying on **Ashton, supra,** submitted that the sum of $35,000.00 appears apt to compensate the Claimant for pain, suffering and loss of amenities.

[56] In **Wilkinson-Routledge v Bedfordshire CC [2001]**, the Court awarded the Plaintiff a total of €4,000.00 for Pain, suffering and loss of amenities where she suffered soft tissue injury to right, dominant, forearm, and a suspected fracture of the radius. The Plaintiff was 55 years old and tripped on a defective pavement and sustained a soft tissue injury to her right, dominant, forearm. The Plaintiff was off work six (6) to seven (7) weeks and it was three (3) months before the Plaintiff started to recover during which time she needed assistance with domestic chores, personal care, dressing and gardening. (**Kemp & Kemp: The Quantum of Damages, Volume 4).**

[57] Comparatively, in **Heslop v Roadchef Ltd. [2005]** the Claimant who was aged 73 at the time of the injury, was awarded €7,750.00 where she sustained a deep laceration to the palm of her left, non-dominant hand with damage to tendons which was sutured. The prognosis showed permanent 30% loss of hand function and 50% loss of grip strength, inter alia. The Claimant had tripped on the raised edge of a mat and sustained a deep laceration to the palm of the left hand. In the case of **Blanchard v Lancashire CC [2006]** the Claimant received lacerations to his dorsum of

right dominant hand which required suturing and was away from work for approximately 6 weeks. The Court awarded the Claimant the total sum of €3,250. (**Kemp & Kemp: The Quantum of Damages, Volume 4).**

[58] The Claimant in the current case who was 48 years old at the date of the incident received an 8cm laceration to her right forearm; 4cm laceration to the border of her right hand; 2cm laceration of right little finger; 1cm laceration to 4th interdigital space and multiple abrasions along the radial half of forearm. The wounds were sutured, and the Claimant was away from work for approximately twelve (12) weeks. The Medical Report of Dr. Patel revealed that the injuries took about four (4) months to fully heal and there was no debilitating prognosis. However, evidence on Affidavit shows that the major after-effect on the Claimant is the significant scarring as a result of the laceration which causes the Claimant to feel self-conscious at times. Occasionally, the Claimant also suffers from flashbacks of the incident.

[59] In consideration of the above facts and the cited authorities, it is this Court's opinion that the Claimant should be awarded the sum of $40,000.00 representing General Damages for Pain, Suffering and Loss of amenities.

Past Domestic Assistance

[60] Counsel for the Claimant referred the Court to **Cunningham v Harrison [1973] 3 All E.R 463** and **Housecroft v Burnette [1986] 1 All E.R. 332** as authorities for awarding damages for the lost ability to carry out household services. Ultimately, Counsel asserted that an award in the sum of BDS$2,160.00 would be appropriate applying a rate of $45.00 per day based on assistance four (4) days per week for the twelve (12) week period.

[61] Counsel for the Defendant submitted that the Claimant be awarded for domestic assistance in the sum of $990.00 having applied the decisions of **Edwards v George GD 2013 HC 10; Ellis v Reid BB 2014 HC 81 and Allan Francis v Andy Brathwaite No. 1847 of 2014**.

[62] This Court in the case of **Lorraine Luke v Charmain Poyer CV 473 of 2017 (unreported, December 7, 2020*)*** examined what would be an appropriate daily rate for domestic services. At paragraph [80], I said:

> "The issue of what is an appropriate daily rate was dealt with by Scott J (ag) in **Allan Francis,** who, after reviewing the authorities made an award of $45.00 per day. Justice Scott reasoned that six (6) years after the decision in **Barker v Boyce (High Court Suit No. 2534 of 2000) (unreported) (6th January 2006)**, the daily rate of $40.00 'did not accord with reality.' I agree with his assessment and shall make my assessment on the basis of $45 per day".

[63] I shall respectfully adopt the reasoning of **Scott J (ag**) and award the Claimant the sum of $45.00 per day for past domestic assistance. The total

under this head is as follows: $45.00 ×4 (four days per week) =$180.00. Twelve (12) weeks × $180.00 = $2,160.00.

Past Loss of Earnings

[64] Counsel for the Claimant submitted that the sum of BDS$42,000.00 under this head is appropriate given the Claimant's average daily earnings of $500.00 for the twelve (12) weeks' leave.

[65] In applying **Leonce v Green BB 1994 HC 41** and **Johnson v Cave Shepherd & Co. Ltd. BB 1996 HC 28**; it was submitted by Counsel for the Defendant that while it is believed that some loss of earnings occurred, the Claimant has failed to properly substantiate her claim for loss of earnings, relying only on self-penned records of sale.

[66] Counsel for the Defendant postulated that given the nature of the Claimant's employment coupled with the failure to pay income taxes and national insurance; an award of $12,000.00 seems reasonable to compensate the Claimant for loss of earnings for twelve (12) weeks.

[67] This Court again cites the decision of **Stephen, supra** where **Beckles J.** stated that from the evidence, the Court is satisfied that the Claimant was employed as both a jockey/trainer and a truck driver. However, the Court expressed concern that there was a total lack of documentary evidence to substantiate it apart from the word of the Claimant himself.

[68] The learned trial judge said at *para. 62* the Court's rationale for its award under the head: Past Loss of Earnings where there was no evidence to substantiate:

> "A nominal sum of $200.00 per week for a period of 12 weeks = $2,400.00 is considered an appropriate award for the trucking services which the claimant provided no evidence to substantiate but which the Court believes that he did occasionally and not as frequently as has been suggest by him".

[69] Unlike the Claimant in **Stephen, supra**, who occasionally worked as a truck driver and was awarded $200.00 per week for Past Loss of Earnings; the Claimant in this case worked as a full-time fish vendor. Although the Court is cognizant that there was no real proof of earnings submitted by the Claimant as there were no payments of N.I.S or Income Tax; this Court posits that the sum of $200.00 per week is not an adequate form of compensation for a Claimant who worked on a full-time basis. However, as a result, I believe that the sum of $12,000.00 recommended by the Defendant which equates to $1,000.00 per week for twelve (12) weeks, is a fair and reasonable amount in the circumstances. This would therefore bring the total under this head to the sum of $1,000.00 ×12= $12,000.00.

Special Damages

[70] Under this head, Counsel for the Claimant submitted a total of BDS$1,410.00 for Medical Expenses broken down as follows:

- Medical Report (QEH)-$375.00;
- Medical Report (Dr. Patel)-$800.00;
- Medical Services-$120.00, and
- Transportation-$115.00.

[71] Counsel for the Defendant has accepted the above expenses as being connected to the incident, save and except for car services from 'Ocean C Fish' sales totaling $630.00 which Counsel submits has not been proven to have been incurred because of the incident.

[72] This Court hereby accepts that the Claimant is entitled to special damages totaling the sum of $1,410.00.

Disposal

[73] In the circumstances, the court hereby makes the following Orders:

i. The Defendant is in breach of **section 4** of the **Occupiers Liability Act, and** its duty of care to the Claimant at common law;

iii. based on the circumstances of this case, the Claimant did not contribute to her injuries and therefore is not contributorily negligent.

iv. The final award of damages is assessed at $50,154.00, as follows:

PSLA	$ 40,000.00
Past Domestic Services	$ 2,160.00
Past Loss of Earnings	$ 12,000.00
Special Damages	$ 1,410.00
GRAND TOTAL	**$55,570.00**

vi. **Award of Interest**

I award interest on the above amounts, as follows:

(a) interest to accrue on the special damages in the sum of $1,410.00 at the rate of 3% per cent per annum from the date of the incident to the date of judgment;

(b) interest to accrue on the award for PSLA of $40,000.00 at the rate of 2% per annum from the date of filing the Claim Form to the date of judgment;

(c) interest to accrue on the award for Past Domestic Services ($2,160.00) and Past Loss of Earnings ($12,000.00 at the rate of 2% per annum from the date of filing the Claim Form to the date of judgment, and

(d) interest to accrue on the sum of $55,570.00 at the rate of 6% per annum from the date of judgment to the date of payment.

[74] The Defendant to pay the Claimant's costs to be assessed if not agreed.

BARRY L. CARRINGTON
Judge of the High Court