IN THE SUPREME COURT OF JUDICATURE OF JAMAICA filing Cabinet

IN THE CIVIL DIVISION

CLAIM NO. HCV 000220 OF 2004

BETWEEN	DEBRA SANFARRARO	CLAIMANT
AND	BAY ROC LIMITED	DEFENDANT
	T/A SANDALS MONTEGO BAY	

IN OPEN COURT

Jeromha Crossbourne instructed by Scott Bhoorasingh & Bonnick for the claimant

Charles Piper and Marsha Locke for the defendant

November 29, 30, 2010 and March 24, 2011

OCCUPIER'S LIABILITY - SLIPPING AND FALLING IN BATHROOM - CONTRIBUTORY NEGLIGENCE - STRICT PROOF IN SPECIAL DAMAGES

SYKES J

1. Miss Debra Sanfarro and Mr. Joseph Welser arrived at the world famous Sandals Montego Bay hotel on February 2, 2002 for a five day vacation. This couple was accompanied by another couple, Miss Patricia Kahlche, sister of Miss Sanfarraro, and Mr. Michael Crain.

2. On February 5, Miss Sanfarraro slipped and fell inside the bathing area of the room in which she and Mr. Welser were staying. She injured her wrist

and has now sought compensation from Bay Rock Limited, the company which occupies the property and operates the hotel under the name Sandals Montego Bay. She relies on the tort of negligence as well as occupier's liability. In respect of the occupier's liability, Miss Sanfarraro has alleged that Bay Rock Limited has breached its statutory duty imposed by section 3 (1) of the Occupiers' Liability Act ('the Act'). There can be no double recovery for the alleged injuries. This court has concluded that Bay Roc Limited was in breach of its duty to Miss Sanfarraro under the Act and has awarded damages to her accordingly. These are the reasons for judgment.

3. Miss Sanfarraro and her witness were in the United States of America at the time of trial and so their testimony was received by way of video link.

The evidence

4. Miss Sanfarraro's evidence is that she and her fiancé, Mr. Joseph Welser booked a room at the hotel to spend a vacation. The couple specifically requested a room for persons with disability because Mr. Welser used a wheel chair to move around. It is not that he cannot walk. What he said was that he has 'bad hips' and needs help going up and down steps. In his witness statement he describes himself as disabled and unemployed.

5. The evidence on the type of room specifically requested has not been challenged and the witnesses' testimony on this point and indeed, generally, has not been undermined. The room supplied was room 756. The couple used the room without incident until the fateful evening of February 5.

6. Earlier on February 5 the couple was at the beach, located on the property, between the hours of 11:00am and 3:30pm. During that time, Miss Sanfarraro stated that she consumed two alcoholic drinks but is insistent they had no ill effect on her. They did not impair her motility, mobility or

judgment. The defendant has sought to suggest that Miss Sanfarraro might have been inebriated or at least impaired and made the worse for drink.

7. According to Miss Sanfarraro, at approximately 6:45pm, while getting into the shower, after Mr. Welser had bathed, she slipped and fell, injuring her wrist. She further said that where she fell, the tiles there were slippery and were not non-skid tiles. This evidence about the nature of the tiles has been challenged seriously by the defendant.

8. Paragraphs six and seven raised the two major issues for determination in this trial. First, was Miss Sanfarraro impaired by alcohol to the extent that her fall was the consequence of effects of alcohol? Second, were there non-slip tiles in the shower area at the time of her fall?

9. Mr. Welser also gave evidence. He said that he bathed before Miss Sanfarraro and so the bath area was wet. He also said that when he bathed he used either soap or some kind of gel from a bottle. This raised a possible issue of whether the area was made slipperier by these products but it was not pursued in evidence and so there is no proper evidential basis for the court to make any finding one way or the other on whether the bathing area was made slipperier by the use of soap or gel.

10. Mr. Piper in his written and oral submissions was quite critical of the evidence profferred by the claimant and her witness. He submitted that the evidence was unreliable and did not reveal how it is that Miss Sanfarrraro slipped and fell. Learned counsel highlighted what he said were the following inconsistencies in Miss Sanfarraro's evidence. Counsel submitted that Miss Sanfarraro said:

    a. she slipped and fell whilst getting into the shower (para. 6 of witness statement);

b. she held onto the hand rail whilst stepping into the shower but fell whilst stepping down the steps (para. 10 of witness statement);

c. as she entered the shower she slipped and fell (expanded examination in chief);

d. she fell after coming down the steps and at the time of her fall she had released the hand rail on the left of the bath area and was trying to reach the hand rail in front of her (in answer to the court);

11. It is perhaps convenient to deal with Bay Roc's evidence first. The defendant's case was one of circumstantial evidence. It is asking the court to infer, from the totality of the evidence it presented to say that on February 5, 2002, there were non-skid tiles in room 756 and to further conclude that the falling of Miss Sanfarraro was for some reason other than the defendant's breach of duty to her. The defendant put forward the theory that Miss Sanfarraro was the worse for drink. Nothing is inherently wrong with circumstantial evidence but as is well known the underlying facts on which the inferences rest must be strong enough to support the inferences.

12. Bay Roc led evidence from two witnesses. One of the witnesses was Mr. Bentley Lawrence, an air condition assistant engineer, who said that he had nothing to do with the tiling or the installation of any hand rails in the room in question. He said that he was transferred from the Sandals Montego Bay property in 1999 to another property located in the Turks and Caicos Islands. He returned to the hotel in 2003. The practical result of this testimony is that there is no direct evidence from Mr. Lawrence on the actual tiles in the bathing area of the room on February 5, 2002. He was not even at the property in that year.

13. Mr. Lawrence's testimony, at best, is circumstantial evidence of the type of tiles in the bathing area of the room. Mr. Lawrence went on to say that the

shower stall had a grab bar (also referred to as a grab rail or hand rail) on the left as one enters the shower. There were also two shower grab bars opposite where one enters the shower. According to this witness, the entire floor of the shower stall had tiles which were 'not smooth as were those on the wall. They had something like sand grains on them' (para. 5 of witness statement). He also said that there were tiles on the floor outside of the shower bathing, inside the bathroom, which were 'not smooth either. Their surface was rough' (para. 6 of witness statement). Of course all this related to 1999 when he was last at the property. This testimony, as will be seen, is being relied on to contradict the direct eye-see evidence of Miss Sanfarraro and her witness.

14. Mr. Piper submitted that Mr. Lawrence's evidence shows that the bath area of the room had anti-slip tiles from at least three years before the slipping and falling of Miss Sanfarraro and since there was no evidence that the room had been altered, it meant that the tiles were still in place and therefore the defendant had discharged its duty of making the property reasonably safe for the claimant in using the bath for the 'purpose for which she was invited or permitted by the occupier to be there.'

15. The court is of the view, that Mr. Lawrence's testimony was not as decisive as suggested by Mr. Piper. First, he was not on the property in 2002. Second, the three year time lapse between 1999 and 2003 is too great for the presumption of continuity to apply. Third, there is the direct evidence of Miss Sanfarraro and her witness which has not been discredited or undermined.

16. The other witness for the defendant was Miss Dawn Smith. Her primary function was to adduce records kept by the hotel. These records were relied on to show how the accident might have occurred and, according to the defence theory, if it occurred as suggested by the documents then the defendant is not liable to Miss Sanfarraro. Miss Smith, also said that she has had occasion to enter the room in question and so was able to state categorically that the tiles in the bath area were non-skid tiles. Regrettable,

Miss Smith was not able to say when it was that she entered the room. In other words, at the end of the defendant's evidence, there was no direct evidence from either of the defendant's witnesses that spoke directly to the kind of tiles what were in the bathing area of room 756 on February 5, 2002. The court concludes that neither witness called for the defendant provided evidence sufficiently cogent to displace the assertion of the claimant and her witness that the tiles were not not-slip ones.

17. The court now turns to the documents tendered on behalf of the defendant. It was through these documents that the intoxication theory was developed.

18. The first document relied on was a form known as an incident report form. This form was completed by two persons. One of these two persons was the duty nurse – a Mrs. Mildred Boston-Moore. The second person was the duty manager, Mr. Xavier Roach. Nurse Boston-Moore wrote, 'Fell on bathroom steps and to brace fall, slammed right wrist on tub.' Mr. Roach wrote, 'Miss Sanfarraro clearly had too much to drink. there [in original] was no water or liquid around the shower. I dont [in original] think that there was any other reason or way that this happened.'

19. As can be seen from this form, the nurse had not made any mention of alcohol and so this note by the nurse cannot have the effect contended for by Mr. Piper. In relation to the duty manager's note, it is not clear whether Mr. Roach is stating his opinion based on his actual observations or he was stating a conclusion based on what he was told. At no time did he say in the note that he saw and observed Miss Sanfarraro. Mr. Roach's note is a conclusion and it does not state the reason for the conclusion. The court is of the view, that before it can draw the inference that Miss Sanfarraro was intoxicated, Mr. Roach would have needed to say more. He should have said why he came to the conclusion that Miss Sanfarraro was intoxicated. The court is therefore of the view that Mr. Roach's note cannot establish inebriation of Miss Sanfarraro. Neither Nurse Boston-Moore nor Mr. Roach was present to be cross examined. This form is too equivocal in its contents

on the question of Miss Sanfarraro's lack of sobriety to be conclusive on the point.

20. Another document relied was the duty manager's log for that night. The entry was made by Mr. Xavier Roach. It reads: 'Room 756 – Miss Debbie Sanfarraro fell while entering her shower. Lucky for us nurse was working late so she received attention right away. The doctor was called in at which point she admitted having had too much to drink.' The doctor did not testify. This document does not make it clear whether Mr. Roach is writing what he was told by either the nurse or the doctor. It is not clear whether Mr. Roach was present and heard Miss Sanfarraro admit that she had had too much to drink. The actual words used by Miss Sanfarraro were not recorded. What is stated is a conclusion. In effect, it is at best, Mr. Roach's interpretation (assuming without deciding that he heard Miss Sanfarraro speak) of what Miss Sanfarraro may have said or done. This, in the view of the court, is not sufficient for the court to conclude that Miss Sanfararo was intoxicated on the evening of the fall.

21. The third document relied on by the defendant is called a Nurse's/Doctor's Report. This document is supposed to be the first one written up by a health professional on the property when any guest is in need of medical assistance. The material parts of the form read: 'Guest admitted to having being possibly? [question sign in original] at time of accident. Guest report having drinks from 4pm in the evening.' This document does not advance the case theory of the defendant. The nurse is supposed to have seen Miss Sanfarraro. It is significant to note that the medically trained person, the nurse, who purportedly saw and observed Miss Sanfarraro was unable to take a definitive position on whether Miss Sanfarraro was in fact intoxicated. It is interesting to note also that the nurse made two written entries about Miss Sanfarraro and in none of them was she able to say definitively that in her best clinical judgment Miss Sanfarraro was intoxicated. The closest the evidence comes to the possibility of Miss Sanfarraro being intoxicated is that she had drinks around 4:00 p.m. but

that is an insufficient basis to conclude that she was intoxicated at the time of the fall (approximately 6:45 p.m.) because consumption of alcohol, without more, does not mean that the consumer was intoxicated. The court is unable to conclude that this document either by itself or in conjunction with the others establishes that Miss Sanfarraro was intoxicated at the time of her fall.

22. Miss Sanfarraro testified and so did Mr. Welser. From Mr. Welser's testimony, the court concludes that he did not actually see how Miss Sanfarraro fell. His examination in chief indicated that she fell while getting into the shower. His examination in chief did not give details on the fall. When he was cross examined he did not expand significantly on his examination chief. He said that Miss Sanfarraro helped him out of the shower area. She then went back to the shower and then she fell. He introduced a possibility of shower gel being on the floor of the bath area when he said that he bathed using shower gel. However, this aspect of the case was not explored by the attorneys.

23. The real value of his evidence from the stand point of Miss Sanfarraro is that he testified that the floor of the bath area was slippery. He strongly resisted the suggestion that the tiles on the bath floor were non-slip tiles. What he did accept was that the tiles in the bath room which were outside the shower area were non-slip tiles. Having examined his evidence carefully, the court did not find any logical or evidential inconsistency. He did not attempt to make out that he saw and observed more than the circumstances permitted. The court has no reason to doubt his evidence.

24. Miss Sanfarraro is the only witness who provided direct evidence of her fall. This made her testimony of central importance to the case. The court now embarks on an examination of Miss Sanfarraro's evidence. In her examination in chief, Miss Sanfarraro stated that:

a. I slipped and fell whilst getting into the shower in my room, as a result of which I injured my wrist (para. 6 of witness statement);

b. At about 6:45 p.m., as I was getting into the shower, I slipped and fell. Joseph Wilser [error in original witness statement] had just finished showering and the tiles were still wet (para. 9 of witness statement);

c. The shower area is made of tiles and there are two steps down into the shower. There is a hand rail to the left of the shower. I held onto the hand rail whilst stepping into the shower but fell whilst stepping down the steps (para. 10 of witness statement).

25. So far on this evidence, at paragraphs 6 and 9 she simply said that she fell while getting into the shower. It is only at paragraph 10 that the court was told that she held onto the hand rail on the left and whilst stepping into the shower that she fell. Paragraph 10 adds the detail of holding on to the hand rail. Where precisely she was when she fell is not stated with any clarity at this point in her evidence.

26. In her cross examination by Mr. Piper there is this testimony:

Q And on the left side on the shower enclosure there was a grab bar?

A Yes.

Q Did you use that grab bar on that day?

A To step in the shower in, yes.

Q And notwithstanding using the grab bar you said you fell?

A I fell after I got down the step into the shower area because the tiles were wet. Joseph had just taken his shower and the tiles were wet when I entered the shower.

Q So, when you reached into the shower, were you moving at the time when you fell?

A Yes, I slipped and fell, so I was sliding...

Q So, you had already gotten into the shower when you slipped and fell?

A I had just reached the bottom of the step.

27. In the evidence just stated she gave a more precise location of where she was when she fell. She was now at the bottom of the steps. Then comes this further evidence:

Q When you slipped had you already let go of the grab rail?

A I can't remember.

Q You were in the middle of the shower when you slipped?

A As I stepped down to the final step of the shower, the tiles were wet and my feet went out from under me and I fell back and threw my wrist

behind me and broke my wrist.

28. She now adds more detail by saying that as she had stepped down the final step of the shower, the tiles were wet and she slipped and fell. She also said that she cannot recall if she had already released the hand rail. This would have been the hand rail or grab bar on the left.

29. In answer to the court she said:

Q Now, you said that you were getting into the bath, was it a bath or shower?

A Shower.

Q A shower?

A Yes.

Q And I hear mention of steps?

A Yes.

Q These are steps, stepping up, stepping down could you indicate to me how you were getting in to the shower?

A There was a ledge you need to step up onto the ledge or over the ledge and then there were two steps down to the shower.

Q And those two steps, let us start with the ledge, was the ledge tiled?

A Yes, it was.

Q What kind of tile was it?

A The same tile that was in the shower, white tiles.

Q And the two steps, were they tiled?

A Yes, they were with the same tile.

Q So, if I understand you, then, the same tile was on the ledge on the steps and on the floor of the shower?

A Yes.

Q Okay, and what kind of tiles were these?

A Regular white shower tiles and they were slippery.

Q Now, to go over the ledge, is there a door to this shower?

A No.

Q So, it's an open?

A Yes, it's an open shower.

Q Now, you said that the grab bars were where again, remind me of where you said they were?

A On the left-hand side as you entered down the steps and opposite -- the wall opposite where you get in.

THE WITNESS: Excuse me, m'Lord does she have the picture there that I have taken of the shower can that be admitted into evidence?

HIS LORDSHIP: I don't know if she has them.

MISS SANFARRARO: It would make things clearer.

HIS LORDSHIP: The judge can't indicate to

parties how to present their case. The judge's role is essentially reactive he or she responds to the information presented by the parties so I have no control over how the cases are presented I just have to manage the process as it unfolds in Court but prior to that I have no control really. So, the -- when you are getting into the shower?

A Yes.

Q The grab bar on the left about how far is that from the ledge and the steps.

A It's right along the wall like an angle downward, downward angle so as you getting down the steps the bar is angled downward right as you jump over the ledge onto the step the bar is right there. But the other two were on the wall after you got in to the shower.

Q So, that when you are going down the shower the other bars would be in front of you then?

A Yes, on the opposite wall, yes.

Q Now, with the bar on the left as you are going down the steps is it what -- did you have to bend to hold on to it or you would stand directly and hold on to it?

A I believe you can stand directly.

Q And they are within arms [in original transcript] reach.

A The one on the ledge as you are getting down the step, yes.

Q Now, when you get down to the floor of the bath?

A Yes.

Q Are you still able to hold on to the grab rail that was on the left?

A You're way in the back of the shower it's a very big shower, so what you should do is let go off that one and grab the one on the wall opposite you as you get in.

Q So, from your recollection are you able to -- well, when you get down to the floor of the bath...?

A Yes.

Q Are you able to hold on to the grab bar on the left as you are getting in and the ones in front it -- one or two in front of it?

A Two in front of you.

Q Are you able to hold on to either of them or the one on the left simultaneously?

A Not at the same time, no. They were too far apart.

Q So, when you get down onto the floor of the shower, yes, the controls, that control the faucet, the pipes where are those controls?

A On the opposite wall. Like you get in the shower here the two grab rails were in front of you but the shower

controls were up here. So you needed to get in the shower with that hand on this rail.

Q That's your left-hand?

A Down the step.

Q Right.

A Then crawl to get to the other one and then get the controls.

Q Okay so while you are crossing, to use your words, while you are in the process of crossing?

A Yes.

Q Are you able to hold on to any of the grab rails while you are in the process of crossing?

A After you get in and let go with one hand you have to grab the other one, and then grab the next one to it to get to control. There is a little gap that you don't have anything to hold on to because they were far apart.

Q Okay, and your -- oh, so when you are operating the controls, you are a-- I am not saying that it is so in this case, but this is for the purposes of understanding, if you get across the floor of the shower without a mishap and you get to the grab bars that were in front of you, can you operate the facet the pipes?

A Yes, holding onto the wall, yes.

Q Okay. Now when you fell.

A Yes.

Q I think at one point you had said to Mr. -- well, I wasn't quite sure whether you were agreeing with him or not but from your recollection where did you actually slip and fall. Where were you in terms of the physical location when you actually slipped?

A At the back of the tub after I step down onto floor of the step, onto the floor in the shower, can you hear me?

HIS LORDSHIP: Yes, I can hear you. Had you yet reached to any of the grab bars that were in front of you when you fell?

A I was between the grab bar on side stepping into the shower and attempting to grab the other bar on the opposite wall and slipped and fell.

30. In this part of her testimony she gives the greatest amount of detail. She says that she fell in that 'no-man's land' where one has to be in order to operate the shower. From her testimony, Miss Sanfarraro said that to get to the hand rails at the front of the shower, one must necessarily release the hand rail on the left that one uses to get into the shower. It seems that she had actually come down off the steps and was heading towards the grab bars in front as one faces the shower and in so doing released the bar on the left and while in 'no-man's land', so to speak, she fell. It should be noted that earlier in her testimony she did say that she did not recall if she had

released the bar on the left which she had held onto to assist her in entering the shower.

31. Her testimony prior to answering questions asked by the court gave the impression that she fell while coming off the steps or just at the end of the steps. If this impression is correct, then she would not have been in this area between the hand rail on the left and the hand rails in front as one faces the shower. On the other hand, if she fell while in no-man's land, then she would have come down the steps and on to the floor of the bathing area. From there, she would have been moving towards the grab bars in front and if she had released the bar on the left, she would not have any support and unsurprisingly, she fell. It is this inconsistency that led to Mr. Piper's criticism of her evidence. The court has taken note of the inconsistency but is of the view that the credibility of the witness on the specific issue of whether the tiles were not non-slip tiles has not been adversely affected. She is supported by Mr. Welser. The court is aware that both witnesses are in an intimate relationship and so there is the possibility of misguided loyalties influencing the testimony of both witnesses. On the other hand, these two witnesses are what could be called the 'natural and expected witnesses' in a case of this nature. There is nothing in their testimony that suggests collusion or some attempt to bolster a weak case. I accept both witnesses as being accurate in their description of the tiles that were in the bathing area of room 756.

32. The court concludes that the tiles in the actual shower area were not non-slip tiles. The evidence from the defence on this point is not sufficient to overcome the testimony of both witnesses for the claimant. Neither Mr. Lawrence nor Miss Smith entered the room on February 5, 2002. Mr. Roach's report does not speak to the type of tiles on the floor of the bath. Thus the only two witnesses who were undoubtedly in the room at the time of the incident had stated that the tiles were not the non-slip ones. They have not been discredited on this specific issue even taking into account Miss Sanfarraro's inconsistency on where she actually fell. Since the court has

found that Mr. Welser showered in the bath area of the room 756, it necessarily follows that the court does not accept Mr. Roach's assertion in the Incident Report Form that there was no water or liquid around the shower, if he was referring to the actual bathing area.

33. Having found that the bathing area was wet at the time of the fall and also having concluded that the tiles were not non-slip tiles, the question still remains however, did the defendant breach his duty in relation to Miss Sanfarraro and did that breach result in her injury? There has to be a causal connection between the breach and the injury. A breach of duty, per se, does not mean that the breach was the cause of Miss Sanfarraro's injury.

34. The Court of Appeal of Jamaica in **Rose Hall v Robinson** (1984) 21 J.L.R. 76 accepted the submission of counsel who in turn relied on Charlesworth on Negligence (5th ed). The comments in that text were in relation to the Occupiers Liability Act 1957 (UK) which the court considered as stating the law in Jamaica. Six points were stated in the text. The two that are relevant are these (per Campbell J.A. (Ag)) at 92 H – I):

    a. the duty of care owed to visitors is the 'common duty of care' which is defined as 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 purpose for which he is invited or permitted to be there. The relevant circumstances for the purpose of this duty of care include the degree of care and want of care which would ordinarily be looked for in the visitor.

    b. the duty of care owed to visitors by the occupier is in relation to dangers due to the physical state of the premises or to things done or omitted to be done by

himself and others for whose conduct he is under a common law liability.

35. Harris J.A. in **Victoria Mutual Building Society v Barbara Berry** S.C.C.A. No 54/2007 (delivered July 31, 2008) held, in the context of a customer visiting the appellant's business place, that the 'respondent must demonstrate that her slipping and falling on the step was inconsistent with the appellant exercising due diligence in providing a safe area over which all visitors could have safely traversed its building' (see para. 14).

36. The duty is not an absolute one and the duty is discharged if what the occupier did was reasonable in all the circumstances. The visitor is expected to use ordinary care in using the premises for the purpose for which he or she was invited.

37. The court concludes that while Miss Sanfarraro's evidence is not sufficiently clear on the area where she fell, the court, nevertheless, concludes that she has made good her claim. The court takes into account Mr. Piper's submission that she gave three versions of where she fell. Assuming this to be so, there is no evidence that Miss Sanfarraro was not exercising ordinary care when using the shower area. The direct evidence in the case is that the floor tiles of the shower area were slippery and were not of the non-slip type. The defendant has sought to meet this by circumstantial evidence which, in the view of the court, is not sufficiently cogent to rebut the direct evidence of both the claimant and her witness who were in the room. There is nothing to suggest to the court that Miss Sanfarraro and Mr. Welser are deliberately fabricating evidence to support the claim. The court does not regard either witness as unreliable to the point where the court is unable to accept their evidence. The court concludes that the omission to have non-slip tiles on the floor of the bathing area was a breach of the duty. As is well known, tiles that are not non-slip tend to be slippery when wet. In other words, using the bath area for bathing may result in the user slipping. The purpose of the grab bars was to prevent a fall even if there is a slip. The combination of the

grab bar and non-slip tiles, in the view of this court, is the minimum necessary to meet the required standard.

38. In this particular case the omission to provide the non-slip tiles was an omission to take reasonable care to see that the visitor would be reasonably safe when she was using the property for the purpose for which it was intended. This breach of duty resulted in her slipping. There is no evidence to suggest that she was using the shower area in a manner for which was not intended and neither is there any evidence to suggest that Miss Sanfarraro was not using reasonable care in the circumstances. The closest that the defendant comes to giving evidence of this nature was the allegation of intoxication on the part of Miss Sanfarraro. The court has already dealt with this issue and need not repeat it here.

Nature and extent of injuries sustained

39. The medical report of Dr. Stuart Dubowitch was tendered in evidence on behalf of the claimant. He indicated that on February 8, 2002, Miss Sanfarraro presented to him. The x-rays showed a fractured right distal radius with a dorsal displacement and volar angulation. This was the injury to the right wrist. He said that he performed closed reduction and manipulation of the fracture and casting. The cast was removed on April 2, 2002. On removal there was significant stiffness. Weakness was also noted. After three weeks of therapy, Miss Sanfarraro improved but 'she still exhibited stiffness and weakness in the wrist and hand.' She also 'had limitation of the dorsiflexion and palmer flexion.' Physical therapy was continued until May 10, 2002.

Nature and gravity of resulting physical disability

40. There is no indication of permanent injury.

Pain, suffering and loss of amenities

41. Dr. Dubowitch noted that Miss Sanfarraro was unable to work for three and a half months because of her injury. She also stated that she was unable to work for thirteen weeks. Miss Sanfarraro indicated that the injury was not only painful but very inconvenient.

Quantum of damages

Special damages

42. There is a problem with the claim for special damages. The pleaded case was:

    a. x-rays – US$440 (JA$26,571.60);

    b. doctor bills – US$135 (JA$8,152.65);

    c. loss of income – US$6240.00 (JA$376,833.60);

    d. vacation loss – US$2,176.00 (JA$131,408.64).

43. The evidence placed before the court was:

    a. x-rays – US$349.00;

    b. total medical bills – US$4,090.00;

    c. loss of income and vacation loss were the same as pleaded.

44. The problem is that the sum pleaded for medical treatment is clearly less than that given in evidence. The law in relation to the pleading of special

damages is not in doubt. What is claimed as special damages must be pleaded.

45. The reason for the rule was explained by Bowen L.J. in **Ratcliffe v Evans** [1892] 2 Q.B. 524. Although the expression 'special damages' is used to mean different things in different contexts, it is safe to say, in this case, that special damages are those damages which are over and above what is suffered generally and must be specifically pleaded to give the defendant notice so that he is not taken by surprise at the trial. The defendant who breaches his duty to the claimant will expect that there will be some damage and it is the compensation for this type of damage that is usually called general damages. Special damages are those that are peculiar to the claimant before the court and not to claimants generally, and are beyond the general damages that would be expected to flow naturally from the injury regardless of who the claimant is. For example, a broken leg will result in general damages being awarded for the pain, suffering and loss of amenities regardless of the gender of the person but the actual cost of treatment will not be known to the defendant and it is these costs that are classified as special damages because they are 'special' to the particular claimant because not all claimants will incur the same treatment costs. Another feature of special damages is that they are usually quantifiable before the trial. The special damages are those additional costs incurred which are unique to the claimant which arise from his broken leg. These peculiar damages must not be sprung at trial, without prior notice, on the defendant.

46. In accordance with this position the corollary to the rule was that any special damage not specifically pleaded cannot be secured at trial without an amendment to the pleadings. Special damages must not only be pleaded but proved (Diplock L.J. in **Ilkew v Samuels** [1963] 1 W.L.R. 991, 1006).

47. The total medical bill of US$4,090.00 given in evidence but not pleaded cannot be recovered for the reasons just given. The sum of US$4,090.00 is not recoverable. What is recoverable is the sum of US$135, pleaded under

the head of doctor bills. The amounts claimed for x-ray and loss of income are also recoverable. The loss of vacation claim is not allowed.

48. No supporting documents or oral evidence was tendered in support of any of the special damages claimed. This led Mr. Piper to submit that no award should be made because none of the items claimed was proved according to law, that is to say, strictly proved, which usually means, in Jamaica, tendering supporting documents or other evidence (including oral evidence) consistent with Miss Sanfarraro's evidence.

49. However, the principle is not as absolute as Mr. Piper submits. There are five decisions to be considered in this regard. Three from the Court of Appeal in Jamaica and two from the Court of Appeal of the Republic of Trinidad and Tobago. The effect of these decisions is that the absence of receipts and supporting documentation or any other evidence is not necessarily fatal to a claim for special damages. The three cases from Jamaica are **Walters v Mitchell** (1992) 29 J.L.R. 173, **Attorney General of Jamaica v Tanya Clarke (Née Tyrell)** SCCA No 109/2002 (December 20, 2004) and **Garfield Hawthorne v Richard Downer** SCCA 12/2003 (July 29, 2005). The two cases from the Republic of Trinidad and Tobago are **Grant v Motilal Moonan Ltd** (1988) 43 W.I.R. 372 and **Sookoo v Ramdath** (2001) 61 W.I.R. 400. The Jamaican Court of Appeal in **Hawthorne** expressly approved and applied **Grant v Motilal Moonan Ltd** . In **Grant**, Bernard CJ held at page 377:

> I quite agree that special damage, if sought, must be pleaded and particularised (see Ilkiw v Samuels [1963] 2 All ER 879) and that it must be 'strictly' proved. In regard to the latter requirement the question which necessarily arises, in my view, is what is the degree of this 'strictness' that is required? The nearest answer to this seems to be that which Bowen LJ gave in the leading

case, Ratcliffe v Evans where he said ([1892] 2 QB at pages 532, 533):

> 'In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pendantry.' [emphasis in original]

50. This passage from the learned Chief Justice was stated in circumstances where the claimant was appealing against a dismissal of her claim for special damages. At the assessment the claimant 'confessed in cross-examination that she did not have any receipts verifying the prices that she had paid for these items; nor could she remember the specific year or years in which she had bought them. She also admitted that she had failed to obtain the services of a valuator to value the damages' (page 374). In other words, she had no supporting documentation or other evidence to back up her claim. It was just her say so. The Court of Appeal allowed the appeal and she was able to recover special damages despite the 'weakness' of her claim to such damages. The Court of Appeal of Jamaica did not say that the Bernard C.J. was incorrect in either principle or application of principle to the facts of that case.

51. **Grant**, although distinguished in **Sookoo v Ramdath** (2001) 61 W.I.R. 400 by de la Bastide C.J. (as he was at the time), was reaffirmed as a correct statement of principle. de la Bastide C.J. stated at page 404:

> The sort of evidence which a court should insist on having before venturing to quantify damages will vary according to the nature of the item in respect of which the claim is made and the difficulty or ease with which proper evidence of value might be obtained. It would also, depend in part on the value of the individual item. It may not be reasonable to require expert evidence of the value of used household items, but where one is dealing with a motor vehicle which usually has considerable value and in respect of which there should be no difficulty in securing proper evidence of value, the court is entitled to adopt a more stringent approach.

52. The cases from the Republic of Trinidad and Tobago involved property damage. As the decisions from the Court of Appeal of Jamaica show, there is no logical or policy reason why the same reasoning cannot apply to personal injury cases.

53. The Court of Appeal of Jamaica, in the two cases cited, have, apparently, taken the view that the **Grant** case was one in which the rule of strict proof was relaxed and therefore concluded that there were instances in which the strict rule can be relaxed. It is not readily apparent that either Bernard C.J. or de la Bastide C.J., thought that they were relaxing a strict rule. What this court understands both Chief Justices to be saying is that what amounts to strict proof depends on the circumstances of each case. This is why de la Bastide C.J. said that proof 'will vary according to the nature of the item in respect of which the claim is made and the difficulty or ease with which proper evidence of value might be obtained' (**Sookoo**, page 404).

54. Bernard C.J.'s judgment is important for another reason. His Lordship analysed the case usually cited as the modern fountain head of the strict proof rule. This is the case of **Bonham-Carter v Hyde Park Hotel Ltd** (1948) 64 TLR 177. The learned Chief Justice made the telling point that despite the Lord Chief Justice of England and Wale's criticism of the evidence of the claimant (which was described by the Lord Chief Justice as 'extremely unsatisfactory'), his Lordship still found it possible to award damages to the claimant. From this analysis (which this court agrees and accepts as correct), it is beyond doubt that the absence of what may be called supporting documentation or other evidence does not mean that no award can be made. If this were not the case then the actual decisions in **Bonham-Carter** and **Grant**, as distinct from the statement of principle, must be wrong since the actual results would not be in accordance with the stated principle of strict proof, if strict proof meant that documentation or other evidence **must necessarily** be adduced in every case where special damages are claimed. Bernard C.J.'s analysis of the **Bonham-Carter** case showed that it was quite consistent with another English case commonly cited in relation to this strict proof of special damages principle. This is the case of **Ratcliffe v Evans** [1892] 2 Q.B. 524. In that case Bowen L.J. stated that 'all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done' ([1892] 2 Q.B. 524, 532 - 533).

55. From the analysis of the four decisions the following conclusions can be drawn:

a. whether or not a claimant has met the standard of strict proof of special damages will vary according to what is reasonable having regard to the circumstances of the case;

b. strict proof does not always require production of receipts and supporting documentation.

56. The core principle that seems to be operating in all the cases is that of reasonableness of proof having regard to all the circumstance of the case. This makes the application of the law sufficiently flexible to take account of the many factual circumstances that come before the court. In other words, there is not only one way to meet the strict proof standard in respect of special damages.

57. It is the conclusion of this court that what Wolfe J.A. (Ag) (as he then was) did in the **Walters** case was an obvious application of these principles. In that case the pushcart vendor had not produced documentation or other evidence supporting his special damages claim. Therefore it is perhaps not accurate to say that the **Walters** case (as this court has done in the past) is an exception to the strict proof rule. The more accurate statement, in light of further reflection, is that the nature and circumstances of that case were such that the strict proof standard was met even in the absence of documentation. **Walters** was a personal injury case.

58. This discussion leads to the obvious question: what are the circumstances in which the courts will hold that the strict proof requirements of special damages have been met in the absence of supporting documentation or other evidence? Unfortunately, no single comprehensive test has been formulated but a number of factors have been put forward to be taken into account. One therefore has to look at specific cases to see what these factors are. In **Sookoo**, de la Bastide C.J. took the view that the ease with which the claimant can produce supporting evidence is a factor to be taken into

account. Bernard C.J. in **Grant**, took into account the fact that the claimant had set out her list of losses which were not seriously challenged by the defendant. Cooke J.A. in **Tanya Clarke**, held that the court could rely on its own experience as to what was reasonable. This approach by Cooke J.A. is qualified by the fact that despite the general statement that a court may use its own experience his Lordship nonetheless held in **Tanya Clarke** that the trial judge could not accept figures regarding medical treatment in the United States of America in the absence of supporting evidence other than the bald assertion of the witness. The reason seemed to be that the trial judge did not have experience of the cost of medical care in the United States and so ought to have required more evidence on this point from the claimant. This aspect of Cooke J.A.'s reasoning will be examined further below. However, the broad approach by Cooke J.A. means that de la Bastide C.J.'s ease-of-proof approach is not decisive one way or the other because a particular court may have great experience or expertise in assessing special damages of the kind in dispute in any given case and the court should be able to rely on its experience and expertise to do justice in the case.

59. There is a further point arising from Cooke J.A.'s reasoning in **Tanya Clarke** and it is this. In that case the trial judge was said to have fallen into error when he accepted the witness's assertion of US$375.00 per visit to a gynaecologist in the United States of America. Cooke J.A. reasoned that because the treatment was done in the United States of America, the trial judge had no basis to accept that figure without supporting evidence. To put it another way, the special damages were not strictly proved in the absence of documentary or other supporting evidence. It was also said that the trial judge could not use his experience because he did not have any experience of the cost of medical care in the United States. His Lordship then went on to say that had the matter been a case of treatment in Jamaica then the court may have been better placed to use its experience and local knowledge. His Lordship suggested a figure of US$180.00 per visit. This is a surprising position given that Cooke J.A. expressly held, on this point, that 'there was no strict proof in that there was no documentary support of the cost of

US$375.00 per visit' (see page 12). His Lordship added further that there was 'no evidence from the doctors who were called on behalf of the respondent to in any way support the claim of US$375.00 per visit' (see page 12). Cooke J.A. went as far as saying that '[i]n this case it was not unreasonable to demand more of the plaintiff than her mere assertion' (page 12). Finally, his Lordship said that '[i]t is impossible to imagine any insuperable difficulty which would preclude the plaintiff from obtaining some record of her payment' (see page 12). In light of these strong statements the defendant could hardly be faulted if he had expected the entire award on this head of damages to be set aside; that was not to be. What is sure is that Cooke J.A. did not say that he was using local conditions and circumstance to arrive at the figure his Lordship selected. It was said by the learned Justice of Appeal that the learned trial judge was incorrect to rely on the evidence of the witness which he had accepted as credible and reasonable to make an award. However, it is not quite clear to this court why US$180.00 was a more reasonable figure than US$350.00, given that Cooke J.A. and the trial judge (as far as can be gleaned from the case) were labouring under the same disability, namely, the absence of knowledge of the cost of treatment in the United States of America. There is nothing in the judgment that would indicate that Cooke J.A. was better placed than the trial judge to make an award. It could hardly be said that the evidence in the Court of Appeal was of a better quality than that before the trial judge when, based on the reasons for judgment, the evidence in both courts was identical. In the final analysis even Cooke J.A. himself recognised that he was 'plucking a figure from the air' (see pp. 13 – 14). So there you have it. There is now the position that the trial judge acted on evidence which he found to be 'true credible and reliable' (see page 12) but the Court of Appeal plucked smaller figures from the air. The conclusion of the case was that an award was made even though the Court of Appeal accepted the appellant's point about the absence of strict proof. In looking at the result of these cases, this court is able to make awards for special damages.

60. The court is of the view that the sum claimed for x-rays is not unreasonable. It is well known that in fractures, a number of x-rays will usually be done to see if the bones are properly aligned and that fusion is taking place in a satisfactory manner. This court has gathered this from its own experience in hearing personal injury actions over the past five years. The court therefore accepts the sum stated by Miss Sanfarraro in relation to x-rays.

61. In respect of the income lost for thirteen weeks, the court accepts that she has proved the sum stated. From the totality of the evidence, there is nothing to suggest that Miss Sanfarraro was an unemployed person. Her stated occupation is that of a photographer. Her income does not appear to be outrageously high if there is a conversion to Jamaican currency. It is true that she did not produce any pay slips or letters from her employer but as the cases show, that is not necessarily the end of the matter. It is also true that she could have done more but as the cases have shown beyond all question (**Grant, Bonham-Carter, Tanya Clarke, Walters,** and **Evans**), the failure to do more does not preclude recovery. In evidence she said that she paid taxes but was not aware of the tax rate applicable to her. However, the court will have to do the best it can. The court will use the Jamaican tax rate of twenty five percent (applicable at the time of the accident since special damages are calculated from the date of the accident) and reduce her loss of income accordingly. The sum awarded is US$4680.00.

62. The vacation loss claim of US$2,176.00 is not allowed. The basis of this claim was that her entire vacation was ruined. She had in fact enjoyed the first two days of the vacation. The claim is in respect of the whole vacation and it is not fair to say that the whole vacation was ruined.

General damages

63. Both sides relied on the case of **Annette Christie v Nutrition Products Ltd.** C.L. 1990 C 249, Khan's Vol. 5 pp. 106 - 109. The claimant also relied on **Leroy Robinson v James Bonfield** C.L. 1992 R 116, Khan's vol. 4 p. 99. In the

first case the claimant suffered a broken left wrist when she slipped and fell on a factory floor. She also lost consciousness. She was left with a 9% whole person disability which would have been reduced to 4% had she done the recommended surgery. There is no evidence that Miss Sanfarraro lost consciousness or has been left with any permanent disability. In the second case, Mr. Robinson had multiple abrasions of the left hand, tender swelling to the left elbow, abrasions to the eyebrows and a fracture of the right wrist. He also had a slight deformity of the wrist as well as pain. Miss Sanfarraro did not have multiple abrasions and neither did she have any deformity of her wrist or persistent pain.

64. Miss Sanfarraro did undergo some surgical procedure and was incapacitated for thirteen weeks. It is well known that the assessment of damages in personal injury cases has a subjective as well as an objective component (**H. West & Son Ltd. v. Shephard** [1964] A.C. 326). It is also recognized that loss of good health is a loss of something valuable in and of itself (per Lord Roche in **Rose v Ford** [1937] A.C. 826, 859). It is equally established that there is a distinction between loss of amenity on the one hand and pain and suffering on the other. The cases on personal injury assessment do not always make this clear but the legal position can no longer be in doubt (**H. West & Son Ltd. v. Shephard** [1964] A.C. 326). The point is that incapacity for thirteen weeks necessarily and inevitably reduces one's quality of life, if only for that period because one would have lost one's good health for that period of time. The enjoyment of life must necessarily be reduced even if the impairment to health is slight.

65. Based on the cases cited, taking into account the updated figure using the Consumer Price Index, the court is of the view that an appropriate award is JA$900,000.00.

Conclusion

66. Judgment for the claimant with costs to be agreed or taxed.

67. General damages of JA$900,000.00 at 3% percent interest from the date of the service of the claim to the date of judgment. No award is made for vacation loss.

68. Special damages awarded are:

a. loss of income US$4680.00 at 3% from date of fall to date of judgment;

b. medical treatment US$135.00 at 3% from the date of fall to date of judgment;

c. x-rays US$349.00 at 3% from the date of fall to date of judgment.