REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2014-04881

BETWEEN

NEKEISHA CANDICE MOE Claimant

AND

CARIBBEAN AIRLINES
AIRPORT AUTHORITY OF TRINIDAD AND TOBAGO Defendants

AIRPORT AUTHORITY OF TRINIDAD AND TOBAGO Ancillary Claimant

AND

T&T CARPET INSTALLATION AND CLEANING LIMITED Ancillary Defendant

Before the Honourable Madam Justice Margaret Y Mohammed

Dated the 19th January 2018

APPEARANCES
Mr. Gilbert Peterson SC instructed by Ms. Stacy Benjamin-Roach Attorneys at law for the Claimant.
Ms. Vanessa Gopaul instructed by Ms. Kenniesha Wilson Attorneys at law for the First Defendant.
Mr. Robin Otway instructed by Ms. Phillip Attorneys at law for the Second Defendant/Ancillary Claimant.
Mr. Brent Hallpike Attorney at law for the Ancillary Defendant.

JUDGMENT

The Claimant's case

1. On the 31st December 2010 the Claimant was employed by the First Defendant ("CAL") as a flight attendant. At around 8:30 pm on the said day the Claimant completed a flight from Kingston, Jamaica. While she was exiting the main terminal at the Piarco International Airport ("the Airport") in the Customs Hall ("the Customs Hall") she fell in a puddle of water in the area behind the Customs Officer's desk. Three days later while on duty and during a flight the Claimant experienced pains and she asked to be replaced. She visited CAL's medical unit where she was referred to another doctor and was given sick leave. Her doctor's visits and physiotherapy sessions were paid for by CAL. She was treated by various medical personnel and she was assessed as having a 35% permanent partial disability. She continued to stay away from work and she was eventually taken off the payroll by CAL at the end of October, 2014. She has instituted the instant proceedings against CAL and the Second Defendant ("the AATT") for damages for personal injuries suffered by her, loss of past and of future earning, interest and costs.

2. The Claimant's case against CAL was that she was injured during the course of her duties and that CAL had a duty to provide and maintain a safe place of work and that when she fell in the Customs Hall, CAL breached its duty of care to her. The Claimant contended that the route which she adopted upon exiting the aircraft was provided for and authorized by CAL and it was the only route which was routinely used by the Claimant for entry and exit of the aircraft. The Claimant also averred that when she fell she was still in the course of her duty even though she had completed the flight and she was leaving the Airport since the sole purpose of her presence in the Airport was to fulfill her duties as agreed with CAL. Also, part of her case was that she intended to switch from cabin crew to flight crew. She had aspirations of becoming a pilot. She applied for and received her Student Pilot Authorisation Card and a medical certificate effective 22nd November 2010 which were issued by the Trinidad and Tobago Civil Aviation Authority.

3. The Claimant's case against the AATT was that it was the owner of the Airport and the

Customs hall and therefore it had a duty to provide a safe environment to the users of the said areas. She also pleaded that she did not unreasonably delay in reporting the alleged incident to the AATT.

CAL's Defence

4. CAL's position was that firstly the Claimant was not in the course of her duties with CAL at the time of the incident since she had completed her duties having ended her tour and exited the aircraft. Secondly it denied liability on the basis that it had no control over the Customs Hall which is where the Claimant fell and that it was in the care and control of the AATT as the owner and/or manager of the Customs Hall. It denied that it was aware that the floor of the Customs Hall was in an unsafe condition and it posed an unusual danger to the Claimant or that it was responsible for the drying of the floor in the Customs Hall or that it was obligated to warn the user, in particular the Claimant of the condition of the floor. It also averred that the Claimant's fall did not occur on any part of the Airport which was leased to it by the AATT.

5. Alternatively, CAL averred that if the Claimant fell as alleged, it was caused either wholly or in part by her own negligence. Therefore CAL called upon the Claimant to prove that all the injuries she claimed to have suffered was as a result of the fall since CAL maintained that the only injury the Claimant suffered as a result of the alleged incident were soft tissue injuries which would have been resolved by the time the instant action was instituted. In this regard CAL averred that the Claimant failed to mitigate her loss. CAL admitted that that the Claimant was removed from the payroll in October 2014 when she failed to submit a medical certificate, or to provide any other reason in support of her failure to return to work. It also admitted that the Claimant's monthly salary as at 2010 was $6996.00 but it denied that the Claimant will suffer loss of earnings in the amount of $83,952.00 per annum as the annual salary of a flight attendant was based on rostering and was variable and that the Claimant is not entitled to interest on the part of the general damages in respect of future loss. It did not admit that the Claimant was eligible to work as a pilot.

The AATT Defence

6. The AATT admitted that it was responsible to ensure the provision of an efficient, secure and safe aviation service and it managed the Airport. The AATT denied that it was responsible for the Claimant's injury and loss and it called upon her to prove that she was at the Customs Hall on the date and time which she alleged; that the surface of the floor was wet and/or slippery and if it was that the AATT caused it to be wet. It averred that the Customs and Excise Division of the Ministry of Finance ("the Customs Division") had exclusive and complete control over the Customs Hall in the Airport when the Claimant allegedly fell and that no one including any of its servants and/or agents was permitted to enter the Customs Hall without the permission of a Customs Officer. Further, there was no report of any liquid spillage on the floor on the date of the incident and there was no report of any permission granted to clean up the said spillage.

7. The AATT also averred that it was not liable to the Claimant for any loss since at all material times it had contracted an independent contractor namely the Ancillary Defendant ("T&T Carpet"), to carry out all janitorial services at the Airport. This contract was in effect at the time of the incident and it required T&T Carpet to have and maintain a 24 hour system at the Airport which involved "spot mopping" for dealing with any spillage and wet portions of the granite floor of the Customs Hall. The said areas are identified with very bright and visible signs marked "caution wet floor" or other appropriate words in order to warn anyone walking in such areas. Therefore, the AATT averred that if the Claimant did slip on the floor in the Customs Hall as she alleged it was not due to its negligence but due to the failure of the employees of T&T Carpet to maintain the said floor and/or set out the appropriate warning signs.

8. The AATT averred that the Claimant wrongfully and unreasonably delayed in making a report of the alleged incident within a reasonable time after the date it occurred since the first time it became aware of it was on the 7th December 2011, nearly 1 year after the incident.

9. The AATT also pleaded contributory negligence on the part of the Claimant on the basis that given the nature of the Claimant's employment she was a frequent user of the Airport. In particular it averred that she stepped on the wet floor exposing herself to the risk of injury; she failed to have proper regard to her own safety and she failed to avoid visible danger and/or obstacles. With respect to the claim for damages the AATT called upon the Claimant to prove her loss and it challenged certain aspects of the medical reports which the Claimant sought to rely on.

The AATT's Ancillary Claim

10. The AATT issued an ancillary claim during the course of the proceedings against T&T Carpet. In it the AATT sought to be indemnified against the Claimant's claim for damages and costs in the main action. The AATT averred that any negligence as alleged by the Claimant would have been committed by a servant or agent of T&T Carpet, who failed or neglected to put in place any proper or adequate precaution to ensure that the Claimant was not endangered. The basis for the AATT's ancillary claim was the letter dated the 4th May 2009 where the AATT awarded T&T Carpet a contract to provide custodial maintenance and janitorial services at the Airport and the terms of the Contract as set out in the document dated February 2010 ("the Contract"). In particular AATT relied on Clauses 6 (e) (i) & (ii) and g(ii) of the Contract.

11. The AATT averred that the Contract specified that all mopped areas shall be clearly marked with 'wet floors' sign and all mopped floors will have an appropriate drying time; that T &T Carpet had 13 janitors on duty at all material times and that any negligence, such as alleged by the Claimant, would have been committed by the agents of T &T Carpet who failed to put adequate precautions in place to ensure that the Claimant was not endangered. It also had no duty to notify and inform T &T Carpet of any spillage of water in the Customs Hall.

T &T Carpet's Ancillary Defence

12. T&T Carpet denied that it was negligent or in breach of a statutory duty and or caused damage to the Claimant by a wilful act of its employees, servants or agents or at all. It averred that any negligence if at all was contributed by or wholly by AATT.

13. It also challenged the interpretation and applicability of the provisions of Clause 6(e) (i) and (ii) and (g) (ii) of the Contract. It averred that it was awarded a contract to provide custodial maintenance and janitorial services at the airport by a letter dated the 4th May 2009 from the AATT and that the indemnification clause of the Contract only arises when the T &T Carpet is proven to be negligent or has breached a statutory duty or where the injuries, death or damage is caused by the wilful act of its employees, servants or agents.

14. Alternatively, T&T Carpet averred that in the event it is proven that there was substance on the floor at the material time, the claim in negligence cannot be maintained because AATT: (i) failed to notify or advise it of the presence of a puddle of water and the requirement for a "spot mop"; (ii) failed to advise it of the requirement to place any warning signs in the vicinity of the puddle of water; (iii) failed to inform or alert the persons in the area of any slippery or dangerous condition of the floor and (iv) failed to inform it to ensure that the floor area where the Claimant allegedly fell was dry.

The Issues

15. The issues to be determined are as follows:
    (a) Did CAL admit liability by its conduct?
    (b) Was the Claimant injured in the course of her employment at the time of the incident?
    (c) Did CAL owe the Claimant a duty of care to ensure that the area where she fell was a safe environment and if so was the duty breached ?
    (d) Did the AATT owe the Claimant a duty of care to ensure that the area where she fell was a safe environment and if so was the duty breached?
    (e) Is the AATT entitled to be indemnified by T&T Carpet?

(f) Did the Claimant suffer loss and if so what is the measure of the loss?

16. At the trial, the Claimant gave evidence on her behalf and she called Tracey Fernandez, Dr Ian Pierre, Dr David Santana and Dr Marlon Mencia as her witnesses. Mr Ronald Sukbir was CAL's sole witness. AATT's witnesses were Mr Kenneth Campbell, Ms Julia Williams and Ms Phyllis Hercules and T&T Carpet's sole witness was Mr Lennox Osbourne.

Did CAL admit liability by its conduct?

17. In the closing submissions, the Claimant argued that CAL by its conduct had admitted liability for her personal injuries, damage and loss by providing for and facilitating her medical care and attention after the fall. The Claimant referred the Court to the evidence of CAL's sole witness Mr Ronald Sukbir who admitted that it paid all of the Claimant's medical expense and that it also made an offer of full and final settlement to the Claimant for her injuries arising from the incident.

18. CAL's position was that the Claimant did not plead estoppel by conduct and therefore it was manifestly unfair for the Court to permit the Claimant to alter its case to raise this new issue when it was not given notice of the Claimant's intention to assert estoppel.

19. According to **Bullen & Leake Precedents of Pleading**[1] a party cannot assert a plea of estoppel if it did not plead it. At page 1056 it was stated that:

> "Pleading. Every estoppel must be specifically pleaded, not only because it is a material fact, but also because it raises matters which might take the opposite party by surprise, and usually raises issues of fact not arising out of the preceding pleading (see Ord 18 r8(1). It is not, however, necessary to plead estoppels in any special form so long as the matter constituting the estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer (Houstoun v Sligo (1885) 29 Ch. D.

[1] 12thed

448; and see Sanders (orse Saunders) v Sanders (orse Saunders) [1952] 2 All E.R. 767, per Lord Merriman P. at 769) ..... The plea of estoppel cannot of course appear in a Statement of Claim; it can only be raised in a subsequent pleading. It usually contains the allegation, either before or after stating with full particularity the facts, matters and circumstances relied on, that the opposite party is 'estopped from saying' or 'ought not to be admitted to say' (General Steam Navigation Co v Guillon (1843) 11 M.&W. 877 at 894). If the facts necessary to create the estoppel appear upon the pleading of the opposite party, the point can be raised by an objection in point of law, e.g. 'the defendant will object that the plaintiff is estopped from claiming any of the money which he seeks to recover in this action by reason of the facts which he alleges in paragraphs 4, 5 and 8 of the Statement of Claim." (Emphasis added)

20. The Claimant did not plead estoppel by conduct in the Amended Statement of Case nor in its Reply to CALs Defence. The only issue which arose from the pleadings between the Claimant and CAL was whether CAL was liable for the Claimant's injuries and loss as a result of the fall. Therefore the issue of estoppel by conduct by CAL did not arise from the pleadings. For this reason I agree with CAL's contention that it is unfair after the trial to permit the Claimant to widen the scope of her pleadings by raising the issue of estoppel by conduct.

Was the Claimant injured in the course of her employment at the time of the incident?

21. It was submitted on behalf of the Claimant that when she fell in the Customs Hall she was still on duty since the 30 minute stipulated period after her flight had not expired and that she had to pass through the Customs Hall before she could take the transportation provided by CAL to the Claimant.

22. CAL argued that when the Claimant fell she had already completed her post flight duties and she was leaving the Airport to access CAL's transportation to go home. Even though

the Claimant and Mr. Sukhbir were of the view that the Claimant was on duty at the time of the incident, her terms and conditions of employment as contained in the "Cabin Crew Safety and Emergency Procedure Manual" ("the Manual") do not support that view. The Manual expressly linked duty with the performance of any task associated with the business of CAL and the Claimant did not produce any evidence that she performed any task associated with the business of CAL at the time that she was passing through the Customs Hall. Further, the obligation to pass through the Customs Area was imposed by the Government of Trinidad and Tobago and not CAL.

23. Lord Dunedin in the case of **Charles R. Davidson and Co. v M'Robb**[2]**,** stated that ***"****In the course of the employment"* does not mean during the currency of the engagement but means in the course of the work which the workman is employed to do and what is incidental to it; and absence on leave for the workman's own purposes is an interruption of the employment.

24. The Claimant testified that after returning from a Kingston flight on the 31st December 2010, she along with her crew disembarked the aircraft. The Claimant and Ms Fernandez headed to the Customs Hall while the other flight attendants stopped off in the Duty Free area. She stated that normally they would stay on the plane for a longer period but they disembarked early enough so that they were within the 30 minute time period and therefore she was still on duty by the time they approached the Customs Officer in the Customs Hall according to the Manual.

25. In cross-examination, the Claimant said that she was familiar with the Manual which provides that 30 minutes is allowed for post flight duties for international flights and 15 minutes for domestic flights. She noted that during her time as a flight attendant post flight duties have never finished before 30 minutes on international flights.

26. The Claimant was asked what her post flight duties entailed. She stated that it involved thanking and greeting passengers for the flight. During cross-examination, the Claimant

[2] [1918] A.C. 304

accepted that while exiting the Airport through Immigration, the Duty Free Area and the Customs Hall, she was not engaged in any post flight duties. She nevertheless insisted that she was on duty at the time of the incident because the 30 minute period (stipulated for post flight duties) had not yet expired. When pressed during cross-examination to identify any duty which she was performing at the time that she was in the Customs Hall, the Claimant was unable to do so. She claimed that she was there for the benefit of CAL but she was unable to explain what benefit CAL derived from her exiting the Customs Hall. She eventually said that she was required to clear Customs as part of her duties in order to access the transportation provided by CAL to take her home. She agreed that after disembarking the aircraft she would be leaving her job to go home.

27. The Claimant's witness, Tracy Fernandez, also accepted during cross-examination that the Customs Division at the Airport required her, also an employee of CAL, to pass through Customs.

28. According to the evidence of CAL's witness Ronald Sukbhir the Claimant's duties and duty period, as a Flight Attendant were governed by the Manual. In paragraph 2.7 of the Manual "*Duty*" is defined as "*any continuous period during which a crewmember is required to carry out any task associated with the business of the Company*". The flight duty period of all flight crew started when the crew member was required by CAL to report for a flight and finished at the end of the flight time on the final sector and travelling time does not count as duty time. Under paragraph 2.9(b)(i) the flight crew may be required to conduct post flight duties and the standard time for same on international flights was 30 minutes. Mr Sukbhir also stated that the Claimant's last flight was from Barbados to Trinidad and landed at 8:13 pm local time. Her flight duty period therefore ended at that time. Any duties which she performed by her subsequent to that time would fall into the category of post flight duties, for which there was a 30 minute limit.

29. During cross-examination Mr. Sukhbir, agreed that being on duty reasonably extended to when CAL transported the employee to his/her home. He stated, however, that the requirement to pass through the Customs Hall was a requirement of the Customs Division.

30. In my opinion, the totality of the evidence was the Claimant had completed her duties after she had disembarked the aircraft. She was not performing any task or duty when she was existing the Custom Hall even if it was within the 30 minute limit of the flight. The obligation by the Claimant to pass through the Customs Hall before she could access CAL's transportation was not imposed by CAL but by the Government of Trinidad and Tobago.

31. Therefore, the weight of the evidence does not support the Claimant's contention that she was acting in the course of her employment when she fell in the Customs Hall.

Did CAL owe the Claimant a duty of care to ensure that the area where she fell was a safe environment and if so was this duty breached?

32. A finding of negligence requires proof that the Defendant owes a duty of care to the Claimant; that the Defendant has breached that duty; and that the damage to the Claimant attributable to the breach of the duty by the Defendant[3]. There must be a causal connection between conduct and the damage and the kind of damage suffered by the Claimant must not be so unforeseeable as to be too remote[4].

33. It was submitted on behalf of the Claimant that CAL in its capacity as the tenant of the AATT was in joint possession and/or occupation of the Airport and the Customs Hall with the AATT and therefore it is jointly liable for the Claimant's injuries. The Claimant also argued that CAL owed a duty of care to her to ensure she had a safe exit out of the Airport.

34. In the closing submissions CAL objected to the joint occupation contention made by the Claimant on the basis that it was not pleaded.

35. The Claimant did not plead in the Amended Statement of Case that CAL was a joint occupier of the Customs Hall by virtue of a lease of the Customs Hall to CAL. It was CAL

[3] Charlesworth & Percy on Negligence 12th Edition, Chap 1 para 1-19.
[4] Clerk & Lindsell on Tort 19th Edition, Chap 8 para 8-16

which pleaded at paragraph 7 of its Defence that the Customs Hall where the Claimant fell was not part of the premises leased to CAL by the AATT and it did not have control over it. In the Reply to CAL's Defence the Claimant did not raise the issue of joint occupation in the lease.

36. Therefore I understood that the Claimant's pleaded case against CAL was in negligence in its capacity as the Claimant's employer. I did not understand that the Claimant's pleaded case against CAL was that in occupier's liability or in joint occupier's liability. As such there was no issue of occupier's liability to be determined between the Claimant and CAL. In my opinion to permit the Claimant to widen the scope of her case beyond her pleading with respect to her claim against CAL would be unfair to CAL since it was deprived of any opportunity to cross-examine the Claimant and her witnesses in relation to this issue. Further, at the trial in the cross-examination of CAL's sole witness, Mr Sukbhir, Counsel for the Claimant did not put any case of occupier's liability to him.

37. In any event, according to the lease agreement between the AATT and CAL (formerly BWIA International Airways Ltd)[5] the premises which were leased to CAL was the Hanger (covered space); Land /Kiosk; Land /Kiosk; Land / Warehouse and an uncovered space. Therefore, there was no landlord and tenant relationship between AATT and CAL for the Customs Hall.

38. I now turn to CAL's duty to the Claimant in ensuring that she had a safe exit out of the Airport. It was argued on behalf of CAL that the Customs Hall was not within its control but it was within the control of the AATT; it could not reasonably exercise control over the Customs Hall so as to take measures to ensure the Claimant's safety; and since it was not within its control it did not know of the risks which the Claimant was exposed to.

39. According to **Halsbury's Laws of England, Volume 52 (2014), paragraph 376:**

> "At common law an employer owes to each of his employees a duty to take reasonable care for his safety in all the circumstances of the case. The duty is often expressed as

[5] Dated the 1st December 2003 Tab 20 Trial Bundle

a duty to provide safe plant and premises, a safe system of work, safe and suitable equipment, and safe fellow-employees; but the duty is nonetheless one overall duty. The duty is a personal duty and is non-delegable. All the circumstances relevant to the particular employee must be taken into consideration, including any particular susceptibilities he may have. Subject to the requirement of reasonableness, the duty extends to employees working away from the employer's premises, which may include employees working abroad. (Emphasis added)

40. Where the employee is on the premises of a third party, the Court is required to examine the degree of control the employer can reasonably exercise in the circumstances and the employer's own knowledge of the defective state of the premises.

41. In **Ciliav H.M. James & Sons**[6] the plaintiff's son was employed as a plumber's mate by the defendants to install hand basins on the ground floor of a house which was at the time unoccupied. The water storage tank in the loft of the house began to overflow and the plaintiff's son went to attend to it. The floor of the loft was covered with steel plates by the owner of the house as protection against fire bombs. Under one plate was a defective conduit which resulted in a circuit when the plaintiff's son stepped on it and touched the ball valve of the tank, resulting in his electrocution. The plaintiff sued her son's employer for damages for negligence.

42. The trial judge held that in the circumstances of that case which the employer was under no duty to take all reasonable steps to see that the premises were reasonably safe since the workman was not working on the employer's premises. The Court found that the risk to the employee was not foreseeable and that a reasonable employer would know, or ought to have known, of any such danger or that it was the duty of the employer to carry out a complete inspection of the premises in order to ensure that all was absolutely safe before his workmen began to work.

[6] [1954] 2 All ER 9

43. In **Cook v Square D Ltd and ors**[7] the claimant was an electronics engineer, who was employed by a company based in the United Kingdom. He was sent on assignment to Saudi Arabia to complete the commissioning of a computer control system. The premises at which he was to carry out his duties was occupied by a third party. The area had a specially constructed floor consisting of large tiles which could be lifted individually with a special tool to obtain access to the floor underneath. The claimant had from time to time complained about too many tiles being lifted at once since it impaired the balance of the floor. On the day in question, the claimant had almost completed his work and was instructing others on the use of the system when he fell as a result of a raised tile. He sued his employer for damages for negligence. The trial judge held that the state of the floor created a hazard for which the employer was liable, being a breach of their duty of care to provide for the safety of the employee at this place of work.

44. On appeal, the trial judge's decision was overturned. The Court of Appeal found that on the facts of that case to hold the employer responsible for the daily events on a site in Saudi Arabia, owned and managed by reliable companies, lacked reality. The Court of Appeal stated in its reasoning that:

> "It is clear that in determining an employer's responsibility one has to look at all the circumstances of the case, including the place where the work is to be done, the nature of the building on the site concerned (if there is a building), the experience of the employee who is so despatched to work at such a site, the nature of the work he is required to carry out, the degree of control that the employer can reasonably exercise in the circumstances, and the employer's own knowledge of the defective state of the premises.....There is no doubt that it is an employer's duty to take all reasonable steps to ensure the safety of his employees in the course of their employment.....There is also no doubt that the duty cannot be delegated, but the authorities show that the considerations which I have just summarised must be taken into account when the employee is

[7] [1992] ICR 262

injured on premises in the occupation of a third party.....it depends on what is reasonable in all the circumstances."[8](Emphasis added)

45. In **Firth v Carib Holdings Limited[9]** the claimant was employed by the third defendant. In the course of his employment, the claimant was seconded to the first defendant's hotel in Antigua. While residing at the hotel, although not in the course of his employment, the claimant suffered serious personal injury while diving into the sea. He sued *inter alia* his employer for damages for negligence. The employer applied to strike out the claim and/or for summary judgment. The Court struck out the claim against the employer on the basis that the claimant's employer had a duty to take reasonable care for the safety of the Claimant in the course of his employment and it did not owe a duty of care to the employee in respect of risks, even known risks of serious injury, in the locality of the employment which are outside the course of the employee's employment.

46. The Court also found that in determining an employer's responsibility one has to look at all the circumstances of the case, including the place where the work is to be done, the nature of the building on the site concerned (if there is a building), the experience of the employee who is so dispatched to work at such a site, the nature of the work he is required to carry out, the degree of control that the employer can reasonably exercise in the circumstances, and the employer's own knowledge of the defective state of the premises.

47. The Claimant's evidence was that she fell after her luggage was checked she walked passed the Customs Officer's desk in the Custom Hall. In support of her contention that CAL was liable for her injuries which occurred in the Customs Hall which were the premises of a third party, the Claimant referred the Court to the local High Court judgment of **Daron Andrew Williams v RBP Lifts Limited and anor[10].**

48. In that case the claimant was employed by the first defendant and along with two other persons he was assigned to maintain and service elevators on the premises owned by a

[8] Supra at page 268 G ,H and 269 A-B
[9] [2003] All ER (D) 69
[10] CV 2014-01088

third party. While ascending a ladder to the elevator machine room, the claimant slipped and fell thereby injuring himself. The Court found that the employer was liable since (a) complaints had been made by employees to the employer in respect of the premises and, (b) it was against that background that the Court held that the duty of the employer could only be fulfilled by a proper and comprehensive examination of the premises to determine whether there were any dangers apparent. Therefore, in **Daron Williams** the duty was imposed since the employer had been put on notice that the premises were unsafe.

49. Was CAL aware of the unsafe state of the Customs Hall? At common law if an employer is aware of the defective or unsafe state of the premises of a third party on which his employees are working, the employer is under a duty to inspect the premises in order to determine and assess the dangers to which his employees are thereby exposed and to take reasonable measures in respect of same.

50. In the instant case, there was no evidence that the Claimant or any other employee or person notified CAL of the occurrence or risk of spillages on the floor of the Customs Hall or that such occurrence was so regular and/or common that CAL must have known of same. Therefore there was no evidence to support the position that CAL had knowledge of the unsafe state of the Customs Hall and should have therefore inspected it or taken any steps for the Claimant's safety while she was there.

51. There was also no evidence from the Claimant and/or her witness Tracey Fernandez that CAL had received complaints that the Customs Hall was unsafe. Therefore there was no reasons for CAL to conduct a comprehensive examination of the Custom Hall to determine whether there were any apparent dangers. In light of the evidence CAL could not have been reasonably expected to know that the Customs Hall was unsafe.

52. Did CAL reasonably exercise control over the Customs Hall? In any event, the evidence from the witnesses for the AATT was that CAL did not exercise control over the Customs Hall. Julia Williams was employed with the T &T Carpet from 2009 to 2014 as Custodian and later Supervisor and who was at the time of the trial employed by the AATT as an

Attendant. According to Ms Williams's evidence, the janitors of T&T Carpet who worked at the Airport were instructed if a flight had landed and there were passengers or flight crew present in the Customs Hall, workers were not allowed to be there. During this time they would wait in the Utility Room in the Customs Hall until these persons had cleared. In cross-examination her evidence on the restriction in movement in the Custom Hall remained unchallenged.

53. Mr Kenneth Campbell was employed as the Duty Manager at the AATT and he has been employed with the AATT since 1992. At paragraph 3 of his witness statement he too stated that access to the Custom Hall was restricted when passengers and flight crew were present. In cross-examination he confirmed that the Customs Hall was under the sole and exclusive control of the Customs and Excise Division. This aspect of his evidence was unchallenged in cross-examination.

54. Ms Phyllis Hercules was a duty Manager of the AATT at the time of the incident. Her evidence in chief was that there were no AATT employees or T&T Carpet employees stationed inside the Customs Hall as that area was under the sole and exclusive jurisdiction of the Customs Division and in order for any of the employees to respond to an incident in the Customs Hall, outside of their scheduled cleaning times, they must first be informed of the incident and allowed entry by a Customs Officer. She confirmed in cross-examination to Counsel for CAL that the Customs Hall was a restricted area.

55. Mr Lennox Osborne was employed with T&T Carpet as the Operations Manager at the time of the incident. According to Mr Osbourne all employees of the T&T Carpet were required to undergo specified training in order to be given a security access pass to carry out their duties at the Airport and that custodial staff were required to vacate the Customs Hall when passengers and/or flight crew were in the area to avoid interactions with them. In cross-examination he stated that the Customs Hall was a secured area.

56. In my opinion CAL could not have reasonably exercised any degree of control over the Customs Hall which the Claimant fell since it was a restricted area of the Airport and CAL was not one of the parties which had unrestricted access.

57. Therefore the Claimant has failed to establish that CAL owed a duty of care to her to take reasonable steps for her safety in the Customs Hall over which it had no control and/or which it could not reasonably have exercised any degree of control and/or in respect of which CAL had no knowledge of any danger or risk posed to the Claimant.

Did the AATT owe the Claimant a duty of care to ensure that the area where she fell was a safe environment and if so was this duty breached?

58. Before I get into dealing with this issue it is apt at this juncture that I address the issue raised by the AATT defence that it had denied that the incident had occurred since the first time it was notified of it was almost 1 year after it took place. In my opinion, the unchallenged evidence of the Claimant and her witness, Ms Tracy Fernandez, that she fell in the Customs Hall on the day of the incident supports the Claimant's position that she fell and injured herself and there was no evidence to challenge the Claimant's assertion. I now turn to the AATT's duty of care.

59. The Claimant argued that the AATT, as the owner of the Airport, had control over it including the Customs Hall and therefore it had a duty to ensure that it provided a safe environment to its visitors. It was also argued on behalf of the Claimant that even if the Customs Division generally gave permission to the T&T Carpet staff to clean the Customs Hall when passengers and flight crew were there this did not absolve the AATT's overall duty of care.

60. The AATT denied being responsible for the Claimant's injuries. It submitted that it was the owner of the Customs Hall and the Airport. However it argued that the Customs Division exercised control over the Customs Hall and that it had limited and occasional access to it. As such any liability to the Claimant rest with the Customs Division and by

extension the State. Notably, while this was the AATT's defence, it did not bring any witness to support its case neither did it seek to add the Customs Division as a party to the proceedings whom it said was responsible for the Customs Hall.

61. The AATT's Defence was not that it was a joint occupier of the Customs Hall with the Customs Division. Its Defence was that it did not have sufficient degree and control of the Customs Hall at the time of the incident and therefore it owed no duty of care to the Claimant since the risks to her were not reasonably foreseeable by the AATT.

62. According to **Halsbury's Laws of England, Volume 78 (2010)** in order to be an occupier, exclusive occupation is not required and the test is whether a person has some degree of control associated with and arising from his presence in and use of or activity in the premises. Two or more persons may be occupiers of the same kind each under a duty to use such care as is reasonable in relation to his degree of control[11].

63. The duty owed by an occupier of premises to his visitors is the common duty of care. This duty, except in so far as it is extended, restricted, modified or excluded by agreement or otherwise, is 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. The relevant circumstances include the degree of care, and of want of care, which would ordinarily be looked for in the visitor[12].

64. **Charlesworth & Percy on Negligence[13]** describes the responsibility of an occupier as:

> "Liability for dangerous or defective premises is primarily on the occupier, whether he is the owner or not, and is based on the fact that he has control of the place in or on to which he has invited his lawful visitor….The answer to the question who is an occupier "…in each case depends on the particular facts of the case and

[11] Paragraph 30
[12] Paragraph 32
[13] Thirteenth Edition, Chapter 8, paragraph 8-15

especially upon the nature and extent of the occupation or control in fact enjoyed in fact enjoyed or exercised by the defendants over the premises."

65. **Charlesworth & Percy on Negligence** also notes that occupation can be by more than one person, in which event each is under a duty of care to a visitor, dependent upon the degree of control exercisable by him.[14] Further where a claimant's damage has resulted from the act of another person independent of the defendant, the mere fact that the defendant's breach of duty has given, as it were, the third party the opportunity to intervene does not make the defendant responsible for the consequences of the intervention. Those consequences must be within the scope of the risk created by the defendant's conduct.[15]

66. Did the AATT exercise the requisite degree and control over the Customs Hall at the time of the incident? The Claimant's evidence was that when she fell she immediately noticed a pool of water on the ground directly behind the Customs Officer desk in the area .The Officer apologized and told her that he had just begun his shift and that he did not even notice the water. This was supported by the contemporaneous document which was the Staff Accident/Incident Report dated 7th February 2011[16] the Claimant stated: *"WHEN I SLIPPED AND FELL A PUDDLE OF WATER AS ON THE GROUND BEHIND THE OFFICER'S CUBICLE WHICH NEITHER MYSELF NOR THE OFFICER SAW PRIOR TO MY ACCIDENT. HENCE, NO SIGNAGE WAS DISPLAYED."*

67. However under cross-examination the Claimant stated that: "*I fell in front of the Customs Officer"* and she said this was caused by a 3 foot by 3 foot puddle of water which was about 6 feet away from the Customs Officer who sat at the desk "*on the far right"* by the sign directing flight diplomats and flight crew to that desk. In my opinion the information in the contemporaneous document is accurate since it was closer to the date of the incident.

[14] Paragraph 8-18
[15] Paragraph 6-77
[16] Page 293 of the Trial Bundle

68. Ms. Tracy Fernandez evidence was that a Customs Officer was positioned about 6 feet or thereabout from where the Claimant fell. She did not testify that she saw any employee of the AATT or T&T Carpet's at or before the time of the Claimant's fall.

69. Ronald Sukhbir described the area where the Claimant reported that she fell as being "*just after the Customs check area which is the final checkpoint of all passengers and crew after they collect their baggage and before they exit the Airport building".*

70. In order to demonstrate that it did not have sufficient degree of control over the Customs Hall at the time of the incident, the AATT sought to demonstrate that it did not have access to the Customs Hall as it wished; the Customs Officers were in control of the Customs Hall and the T&T Carpet janitors were responsible for the cleaning up of spills in the Customs Hall. To do so the AATT relied on the evidence of Phyllis Hercules, Julia Williams and Kenneth Campbell.

71. According to Julia Williams witness statement she was employed with T&T Carpet from 2009 to 2014 as Custodian and later Supervisor. Her duties included cleaning offices and washrooms, replenishing washroom supplies and disposing the garbage in the North Terminal of the Airport which included the Departure Gates, Immigration Hall, Duty Free Hall and the Customs Hall. As Supervisor she had overall responsibility for ensuring those areas were properly cleaned. She stated that the mopping of all the areas usually took place at night, but workers were trained to spot mop any area if required 24 hours a day. They were instructed if a flight had landed and there were passengers or flight crew present in the Customs Hall, workers were not allowed to be there. During this time they would wait in the Utility Room in the Customs Hall until these persons had cleared. If there was an incident such as spillage while passengers were in the Customs Hall, the normal procedure was that a Customs Officer on duty there would telephone the AATT Technical Help Desk, which would then telephone the AATT's Supervisor, who would inform the T&T Carpet's Supervisor on duty. He/she would in turn instruct his/her team to immediately clean the required area. Any serious spill incidents occurring during a shift were recorded in a notebook used by T&T Carpet.

72. Ms Williams also stated that if there were no passengers in the Customs Hall and the T&T Carpet employees were on duty during the scheduled cleaning times and there was a spill or other matter requiring clean up, they would take instructions from the Customs Officer on duty as to the areas to be cleaned. Ms Williams could not recall any incident of spillage in the Customs Hall during her time as a Custodian or Supervisor, nor on the 31st December 2010. She stated that such an incident would have been recorded in T&T Carpet's notebook. However, no such incident was recorded.

73. In cross-examination Ms Williams admitted that she did not work on the night of the incident and that the Supervisor on that night was Ms. Shirley Bascombe. She indicated that she first learnt of the incident when she went to give her witness statement on the 10th November 2016 and at that time she was no longer working with T&T Carpet so she did not have access to its records.

74. Ms Williams confirmed in cross-examination that the janitors generally cleaned behind the Customs Officers desk and that mopping of all places in the Airport usually took place at night after the last flight when passengers were not around. She stated when passengers were not around, if there is a spill, the janitors would be called via cell phone but if the janitor was outside and the Customs Officer saw the spill, he would alert the worker of the spill and instruct him/her to clean it.

75. Ms Williams explained in cross-examination that the female janitors stayed in the female washroom where a chair was provided, while the male janitor sat in the utility room near to the male washroom which is approximately 30 feet from the first Customs desk with the red line. She said that if a spill occurred at the Customs Hall someone would call her to have it cleaned. Unlike in her witness statement, in cross-examination she did not draw a distinction on the procedure when there were passengers in the Customs Hall and when there were no passengers in the Customs Hall. She confirmed that spills had previously occurred and the janitors of T&T Carpet were called upon to clean up the Customs Hall. According to Ms Williams, the procedure was that the AATT Supervisor would call the T&T Carpet Supervisor who would call the worker in that area to indicate that there was a

spill. She stated that in a "one off" incident, it would be the Customs Officer who would call the janitor.

76. Ms Williams was asked about the T&T Carpet notebook, she stated that she did not know where it was located but she was of the opinion that it would have been located in the T&T Carpet office in the Duty Free Hall on the desk for all Supervisors. She also stated that she did not know what became of the relevant notebook yet she searched the notebook but there was nothing in it about the incident.

77. In my opinion Ms Williams appeared to be knowledgeable on the procedure implemented by the AATT for the cleaning of the Customs Hall by the employees of T&T Carpet. Her evidence was in a large part consistent. However she could not speak directly about the night of the incident since she was not on duty.

78. Ms Phyllis Hercules was a Duty Manager with the AATT and who worked the shift from 2:00pm to 10:00pm on the day of the incident. Her responsibility was to supervise all systems and facilities in both the North and South Terminals of the Airport to ensure that they run smoothly. She also supervised and oversaw the operations of T&T Carpet. According to Ms Hercules, if a spillage occurred inside the Customs Hall when passengers were present, the standard procedure was that a Customs Officer would contact the AATT Technical Help Desk using a courtesy phone located at the Customs Officers' desk or in the Customs Office located next to the "Red Line" in the Customs Hall. The staff at the Technical Help Desk would immediately deploy janitors to the affected areas in order to clean and set up "Wet Floor" signs if required. The Technical Help Desk or Attendant Supervisor would also call the Duty Manager to inform him or her of the spillage and/or incident. In the event of a spillage alone, the Attendant Supervisor would typically inspect the area within a few minutes of being informed to ensure it has been cleaned in the event of a passenger falling. The Duty Manager would respond together with security and Red Cross personnel.

79. According to Ms Hercules, there were no AATT Employees or T&T Carpet employees stationed inside the Customs Hall as that area was under the sole and exclusive jurisdiction of the Customs Division and in order for any of the employees to respond to an incident in the Customs Hall, outside of their scheduled cleaning times they must first be informed of the incident and allowed entry by a Customs Officer.

80. Ms Hercules also stated that she was not informed of any incident of spillage or of any passenger or flight crew having fallen in the Customs Hall on the 31st December 2010 during her shift as Duty Manager from 2:00pm to 10:00pm. She stated that if an incident had occurred during her shift, she would have recorded it in the Duty Manager's Log Book and taken appropriate action, including photographs of the scene and direct the Red Cross to refer to the passenger to seek further medical attention at the Arima Health Facility. She stated that she would have also requested the CCTV Footage of the incident to be flagged and stored for investigation. She stated that there was no record of any spillage incident or of any passenger having fallen in the Customs Hall that day. Furthermore, the incident was not reported at the time as such the CCTV video footage for the 31st December 2010 would have been automatically overwritten after forty five days.

81. In cross-examination Ms Hercules testified that she had a pass to access the Customs Hall. She visited the Customs Hall when making rounds and that she usually took about 2 hours to do rounds. She did not indicate if she did her rounds when there were passengers in the Customs Hall or when there were no passengers in the said Hall. She stated that while doing her rounds it was not usual to see puddles of water on the floor. She said she was not aware of any water on the floor at the Customs Hall and she first learnt of the incident in November 2016 when she was preparing her witness statement. She stated that she did not recall anyone reporting to her on the night of the incident that someone fell nor did she see anything in the records which indicated this. She said such an incident would have been reported to her by anyone who saw it.

82. Ms Hercules confirmed in cross-examination that any reports of spillage in the Customs Hall went to the Technical Help Desk which would then be reported to the Duty Managers.

She said she depended on anyone to report it to the Technical Help Desk so that she would be aware of it. She said her log book would only have a report if it came to her and that she made the necessary entries in her log book when she was on duty and that her entry log book did not indicate that an incident occurred. She confirmed that Ms. Julia Williams was the Supervisor of the janitors at the time and that the janitors were stationed in an office in the Duty Free Area where they assembled and were assigned.

83. More importantly, Ms Hercules stated in cross-examination that there was no need for the AATT to record when persons were allowed to enter a restricted area. She said that the Customs Hall was a restricted area and if someone was called upon to mop up water on the ground in the Customs Hall that would not be put in the log book. She said that AATT staff would not have been called upon to supervise janitors as they mopped up a spot and that cleaning up a spill would not necessarily find its way into her log book. When asked what she meant by "Ops Normal" in her log book on the 31st December, 2010, she responded that it meant operations were normal at the airport that night. She said the log books are available for more than 2 years. She said if she was in the Customs Hall and the incident was reported, she would have fetched the janitors and given those instructions. She said no one reported the incident to her, if they did she would have viewed the CCTV footage to see what transpired. She said that the AATT Supervisor also supervised the janitors as well.

84. Like Ms Williams, Ms Hercules was knowledgeable on the procedure the AATT had implemented in the Customs Hall for the cleaning up of any spillage. It was clear from her evidence that as an employee in a supervisory position at the AATT , since she had a pass, she had access to the Customs Hall at any time even when there were passengers and flight crew in the Customs Hall and that the system which the AATT had of recording spills and clean up in the Customs Hall was not consistent since she admitted in cross-examination that if someone was called upon to mop up water on the ground in the Customs Hall that would not be put in the log book.

85. Mr. Kenneth Campbell was employed as a Duty Manager with the AATT on the night of the incident and he was on shift from 10:00 pm to 6:00am on 1st January 2011, having taken

over from Ms. Phyllis Hercules. According to Mr Campbell, the contract between AATT and T&T Carpet required that the Customs Hall to be swept and mopped twice daily and as otherwise required, for example when there is a spillage. T&T Carpet Workers were not permitted to be in the Customs Hall when passengers were present. During this time the workers waited in their designated office which is located in the Duty Free area next to the washrooms or in the utility room in the Customs area until all passengers have exited the Customs Hall.

86. Mr Campbell stated that if there was a spillage in the Customs Hall when passengers were present, the normal procedure was that a Customs Officer would contact the AATT Technical Help Desk situated in the Terminal, using a courtesy phone located at the Customs Officers' desk or in the Customs Office located next to the 'Red Line' in the Customs Hall. The Technical Help Desk would then be required to immediately contact the AATT Supervisor, informing him or her of the spill and instructing him/her to arrange immediately to clean up the area. The T&T Carpet Supervisor would then instruct his/her crew to clean the required area and set up a 'Wet Floor' sign if needed. The Technical Help Desk would also be required to call the Duty Manager on shift to inform him/her of the incident. The Duty Manager would follow up the call by doing a walk around the area within 15 minutes or by telephoning the Technical Help Desk to check up on whether the area was cleaned and to ensure that the issue had been resolved. In the event of a fall, the Duty Manager would take photographs of the scene, direct the Red Cross personnel to refer the passenger to seek further medical attention at the Arima Health Facility and note the incident in the Duty Manager's Log Book.

87. Mr Campbell stated that if the T&T Carpet workers were cleaning the Customs Hall during their scheduled time when the area was clear of passengers, the workers would on occasion take instructions directly from Customs Officers on duty about any area that needed to be cleaned or mopped, if a spillage had occurred. He said he witnessed this a few times over his 24 year career at the AATT. He also stated that there was no T&T Carpet employee stationed inside the Customs Hall, as that area was under the sole an exclusive control of the Customs Division.

88. Mr Campbell did not recall being informed of any incident of spillage in the Customs Hall on the night of the incident during his shift. If an incident had occurred during Ms Hercules' shift from 2:00 pm to 10:00 pm, it would have been recorded in the Duty Manager's Log Book. However there was no record of any incident of spillage or of any passenger having fallen in the Customs Hall on that day.

89. In cross-examination, Mr. Campbell testified that he went to the Customs Hall immediately following the start of his duties around 10:45pm on the 31st December 2010. He said this was a routine visit and he usually walked around the Customs Hall first. He did not indicate if there were passengers in the Customs Hall at that time. He said his routine would have been different if something had happened which would take his attention away. He did not recall where the janitors were when he got there and that he did not speak to any Customs Officers, janitors of T&T Carpet Supervisor that night so he did not know if the Claimant fell or if there was a spill. He also said he did not recall inspecting the area. He said he first learnt of the incident in November 2016 and he had no specific information as of what transpired on the night of the incident.

90. Mr Campbell also stated in cross-examination that during his career at AATT he noticed spillage about five times and that he had seen spillage in the Customs Hall. He said that depending on the nature of the spill he would write it in his log book and that he would record if someone fell. He said he had nothing to write while on duty on the night of the incident and there was no report in the log book by Ms. Hercules and that if there were no T&T Carpet workers during his shift that would have been recorded.

91. In my opinion Mr Campbell was also knowledgeable on the procedures implemented by the AATT with T&T Carpet to deal with the cleanup of spills. He confirmed that the janitors of T&T Carpet had limited access to the Customs Hall when there were passengers and flight crew there. More importantly Mr Campbell's evidence confirmed that his access to the Customs Hall was not restricted to when there were or were not any passengers in the said Hall.

92. Mr. Lennox Osbourne was the sole witness for T&T Carpet. He was employed with T&T Carpet as the Operations Manager at the time of the incident. He said he was unaware of the incident involving the Claimant because it was never reported to him then or subsequently. According to Mr Osbourne all employees of the T&T Carpet at the Airport were required to undergo specified training in order to be given a security access pass to carry out their duties at the Airport.

93. Mr Osbourne also stated that the employees of T&T Carpet were required to vacate the Customs Hall when passengers and/or flight crew were in the area to avoid interactions with them. He said in the event of a spill of any liquid on the floor in the Customs Hall, the practice was that a Customs Officer would contact the AATT's Supervisors or the Customs Officer would go to the Utility Room within the Public Bathroom, where the employees of T&T Carpet were stationed during flight clearance, to inform them.

94. Mr Osbourne stated that T&T Carpet's employees were stationed there 24 hours a day however there was a shift system to ensure that there are always personnel on duty to ensure any need for cleanup. He stated that no report was made to him of the incident by the AATT or anyone.

95. In cross-examination, Mr. Osbourne testified that he learnt of the incident sometime in 2016. He said he was not on duty on the night of the incident so he would not have been at the Airport on that night. He said he looked at the records the next day and he recalled that nothing was recorded and he did not speak to the Supervisor about the incident.

96. With respect to the procedure to clean up a spill in the Customs Hall, Mr Osbourne stated that Customs Officers had the option to go to the utility room and ask someone to clean up the spill. He said that in his experience this happened many times. He said when cleaning spills, the staff of T&T Carpet would take instructions at the beginning of the shift and they would be assigned to a particular area by their supervisor. He said if they observed a spill there was no need to get instructions and the janitors have caution signs.

97. While Mr Osbourne was not at the Airport on the night of the incident, his evidence corroborated the evidence of Ms Williams, Ms Hercules and Mr Campbell on the procedures for the cleaning up of a spill in the Customs Hall and the restrictions which were placed on the employees of T&T Carpet in cleaning up of spills in the Customs Hall when passengers and flight crew were present.

98. Based on the totality of the evidence of Ms Williams, Ms Hercules, Mr Campbell and Mr Osbourne:

(a) The employees of the AATT were aware that spills in the Customs Hall took place.

(b) The AATT Supervisors had access to all areas of the Airport including the Customs Hall at all times.

(c) The Customs Hall was off limits to the employees of T&T Carpet when there were passengers and flight crew in the said Hall.

(d) The T&T Carpet employees usually mopped the Customs Hall after all flights usually after midnight.

(e) There were two different procedures used when there was a spill in the Customs Hall.

(f) The procedure used when there were passengers and flight crew was that the Customs Officer would call the Technical Help Desk which would contact the AATT Supervisor who would contact the T&T Carpet supervisor to instruct janitors to clean up the spill.

(g) When the Customs Hall did not have flight crew and passengers, the Customs Officer called the T&T Carpet's employees directly to clean up the spill.

99. Should the AATT have reasonably foreseen the risks to the Claimant? In **Hosie v Arbroath Football Club Ltd**[17] a plaintiff raised an action against the Defendant for reparation for injuries sustained by him at the Defendant's football ground. He sustained severe injuries when knocked down and trampled upon by a crowd at the football ground. The crowd had made a deliberate and concerted attack on the security of a gate which eventually gave way. The crowd then surged through, carrying the plaintiff in with them. There was no suggestion of contributory fault by the plaintiff. The occupiers of the football ground were blamed on the grounds that they knew or ought to have known that the gate

[17] (1978) S.L.T. 122

could be lifted off its runners by the pressure of a crowd and that someone could thereby be injured. It was established that no one had inspected the part of the gate that gave way prior to the accident and that no one had applied his mind to problems of crowd safety resulting from the gate being broken down either accidentally or deliberately.

100. The Court held that it was reasonably foreseeable by the occupiers that there might be an attempt by an unruly crowd to force the gate, that the behaviour of the crowd did not amount to a novus actus interveniens breaking the causal link, and that accordingly the occupiers were liable since they had failed reasonably to maintain the gate.

101. In my opinion, the AATT should have foreseen the risk to the Claimant since based on Mr Campbell's evidence it was aware of the occurrence of spillage in the Airport and the Customs Hall. The AATT retained control of the Customs Hall even when passengers and flight crew were present since the evidence of Ms Hercules and Mr Campbell were that they had access to the Customs Hall at any time. The purpose for the Supervisors of the AATT having unrestricted access to the Customs Hall was to ensure that all areas in the Airport including the Customs Hall was safe for its users. The AATT retained the responsibility for the cleaning of the Customs Hall since it contracted T&T Carpet to do so and it implemented an elaborate system to deal with the clean up of spillage. In my opinion, even if the Customs Officer knew or did not know about the spillage it still made the Customs Hall unsafe and any failure by the Customs Officer did not make the AATT less liable. In other words, it was not the Customs Officer who placed the liquid on the floor which caused the Claimant to fall. It was not the Custom's Officer responsibility to check the floor before passengers and flight crew passed in the Customs Hall was safe. In my opinion this was the responsibility of the AATT and this must have been one of the reasons it retained control for its Supervisors to have access to the Customs Hall, hence the reasons for them "making rounds". It was to check on the safety of the Custom Hall.

102. I have concluded that based on the circumstances of this case that the AATT owed a duty of care to the Claimant and it breached the said duty of care.

103. Did the Claimant contribute to her fall? The particulars which the AATT had averred in asserting that the Claimant contributed to her fall were:

PARTICULARS OF NEGLIGENCE

a. Placing her feet, or either of them, or walking into or standing in or stepping upon and/or into an area where she knew or ought reasonably to have known that in so doing she could suffer and/or expose herself to the risk of suffering injury.

b. Walking and/or stepping into and/or standing in an area where there was any alleged spillage and/or wet and/or slippery surface, the existence of which at any material time is not admitted, without any or any due or proper regard for her own safety.

c. Failing to look for and/or pay due and/or any proper heed to reasonably obvious dangers while walking and/or moving through the airport;

d. Failing to walk and/or step and/or stand in such a way as to avoid reasonably visible dangers and/or obstacles;

e. Failing to have due regard for her own safety.

104. The Claimant's evidence was that the puddle of water was on the floor behind the Customs Officer's desk which she did not see and the Customs Officer told her that he too did not see it. There was no evidence to contradict this aspect of the Claimant's testimony and as I have stated before the contemporaneous document which was the Claimant's report to CAL of the incident corroborates the Claimant's evidence of the location of the puddle of water on the floor in the Customs Hall.

105. In my opinion, the Claimant could not have reasonably expected to see the puddle of water on the floor since due to its location and there was no signage indicating that the floor was wet. In those circumstances, the Claimant cannot be found to have stepped into the puddle of water without regard to her safety since the danger was not obvious to her. For these reasons I do not find that the Claimant contributed to the cause of her injuries arising from the said fall.

Is the AATT entitled to be indemnified by T&T Carpet for any loss suffered by the Claimant?

106. It was not in dispute between the AATT and T&T Carpet that they had a contract whereby T&T Carpet was contracted by the AATT to provide custodial maintenance/ janitorial services at the Airport.

107. The particulars of negligence pleaded by the AATT in the Ancillary Statement of Case against T&T Carpet were -

i. "Failed to leave warning signs in the vicinity of the puddle of water and/or any wet portion of the Airport floor as to the conditions thereto";
ii. "Failed to warn members of the public of the slippery and/or dangerous condition of the said floor";
iii. "Failed to maintain the floor area in or about the area where the claimant alleges that she fell in a safe and/or dry condition".

108. At paragraph 3 of T&T Carpet's Defence it stated "*that the indemnification clause of the contract only arises where the Ancillary Defendant is proven to be negligent or has breached a statutory duty or where the injuries, death or damage is* (sic) *caused by the willful act of the Contractor, its employees, servants and/or agents."*

109. It was submitted on behalf of the AATT that if the Court finds that it is liable for the Claimant's loss, based on Clause 6(e) (i) of the Contract, the AATT is entitled to be indemnified for the loss since the breach was caused by the negligence of its employees.

110. T&T Carpet argued that it did not have a sufficient degree of control of the Customs Hall therefore it did not owe a general duty of care to the Claimant. It contended that its duty of care arose out of its contractual obligations with the AATT. Under the Contract it had a duty to carry out its operations with reasonable care towards all those who may be affected by their work and that at the time of the incident the employees of T&T Carpet were not carrying out any functions as required and therefore there was no breach of the Contract.

111. **Charlesworth & Percy on Negligence 13th Edition** at paragraphs (35) and (36) sets out the liability of an independent contractor as:

> "Liability for independent contractors. In determining whether an occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that, for example, where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair 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. The duty may also extend to ensuring that the independent contractor has put in place appropriate safety precautions. In some circumstances the duty may include asking the contractor about his insurance position, but there is no general rule to this effect.
>
> Persons who contract with the occupier. Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty which he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on then, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, is the common duty of care….."

112. The evidence of the Claimant and her witness Tracy Fernandez was that at the time of the incident there were flight crew in the Customs Hall and that no employees of T&T Carpet were present. This was consistent with the unchallenged evidence of Mr Kenneth Campbell, Ms Phyllis Hercules, Ms Julia Williams and Mr Lennox Osbourne who all stated that the employees of T&T Carpet were not permitted to be present in the Customs Hall when passengers and flight crew were present unless authorized to do so.

113. Therefore T&T Carpet did not have a common duty to the Claimant as an occupier of the Customs Hall since its employees access was restricted.

114. I now turn to the Contract. It was not in dispute that according to Clause 6 (e) (i) of the Contract the:

> "Contractor shall: accept liability for and keep the Authority indemnified against all losses and claims for injuries, death or damage to or of any person or property whatsoever which shall be caused by or may arise out of, or which is a consequence of, any negligence or any breach of statutory duty or wilful act by the Contractor its employees, servants and/or agents, and against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto."

115. Clause 6 (e) (ii) states:

> "Without prejudice to its liability to indemnify the Authority, the Contractor shall at its own expense at all times maintain with reputable insurers such insurances as may be necessary to cover the said liability and all other liability which the Contractor may (apart from the preceding sub-clause) incur, including coverage for Workmen's Compensation and Employer's Liability as are necessary to cover the liability of the Contractor in respect of personal injury or death arising out of, or in the course of, or caused by the carrying out of works. Nothing in this clause shall impose any liability to the Contractor in respect of any negligence or any breach of statutory duty by the Authority"

116. Clause 6 (g) (ii) provides that:

> "The Contractor shall:
>
> > (ii) be responsible for the supervision of its employees' performance and for the behaviour of its employees while they engaged in the services hereunder. More specially, the behaviour of the Contractor's employees relates to, but is not necessarily limited to complying with the Authority's policies and procedures; complying with all legitimate instructions and demands of the Authority's personnel specified under Clause 5 hereof, as well as Security personnel; and ensuring that there are no abuses of, or

unauthorized interference with the Authorities facilities or unauthorized access to the Authorities facilities."

117. In my opinion, the relevant clause is 6(e) (i) which contemplates a situation where the employees of T&T Carpet were negligent in their duties resulting in loss and in those circumstances the AATT is entitled to rely on the indemnity provision in the Contract.

118. The evidence Mr Kenneth Campbell, Ms Phyllis Hercules, Ms Julia Williams and Mr Lennox Osbourne was that the employees of T&T Carpet were unaware of any spillage prior to the alleged fall of the Claimant and no reports were made according to the set procedure either orally or in writing by the Customs Officers to T&T Carpet Supervisor or to the Duty Manager.

119. If such an accident was indeed reported to the employees of T&T Carpet at the material time, their position and contractual obligation in the circumstances would have been to act in accordance with the terms of the Contract. However, given the unchallenged evidence the employees of T&T Carpet would not have been in the Customs Hall at the time of the incident and as such would not have been aware of the spillage and would not have been in a position to act in accordance with the terms of the Contract[18].

120. I have concluded that T&T Carpet did not have a sufficient degree of control over the Customs Hall and it therefore did not owe a general duty of care to the Claimant. Further the evidence demonstrated that T&T Carpet was not aware of the spillage therefore it was not in breach of its duty under the Contract and the AATT is not entitled to be indemnified by T&T Carpet for any loss suffered by the Claimant arising from the fall.

[18] The Safety Requirements at section 7 of the Contract and the Scope of Works as set out at section 8 of the said Contract

Did the Claimant suffer loss and if so what is the measure of the loss?

121. The Claimant pleaded loss of past earnings for the period 31st October 2014 to 30th November 2014 in the sum of $13,992.00. She also pleaded future loss and expenses for future medical expense since she need to undergo a long period of physiotherapy at a cost to be determined; loss of future earnings at the sum of $6,996.00 per month or $83,952.00 per annum. She included a claim for loss of opportunity as a pilot which I will address later and a claim for general damages for pain and suffering.

General Damages

122. In determining the award for general damages the Court is guided by the principles in **Cornilliac v St Louis [19]** namely:

(a) The nature and extent of the injuries sustained;
(b) The nature and gravity of the resulting physical disability;
(c) Pain and suffering;
(d) Loss of amenities;
(e) The extent to which pecuniary prospects were affected.

I will now examine the evidence under these headings.

Nature and extent of the injuries sustained and resulting physical disability

123. In the instant case, the Claimant pleaded that her injuries were as follows:

(a) Chondromalacia patellae both knees;
(b) Lumbosacral strain;
(c) Bilateral sacrolitis;
(d) Left rotator tendonitis and,
(e) Soft tissue neck injury with mild spondylosis.

[19] (1966) 7 WIR 491

124. The Claimant gave evidence in support of the pleaded injuries and she adduced medical evidence from Dr. Pierre, Dr. Santana and Dr. Mencia.

125. According to the Claimant's witness statement after the incident in January 2011 she attend CAL's medical unit in Woodbrook where she was attended to by one of doctors. In February 2011 she attended Dr Phillips and later she was seen by Dr Ian Pierre, Dr Santana and Dr Mencia. The Claimant testified that Dr Pierre recommended physiotherapy but she stopped the sessions since the transportation which was provided by CAL to take her to her doctor appointments and physiotherapy were too late or on the wrong days even though she would call ahead and request the transportation. As a result, the Claimant was often late for her physiotherapy sessions. Further, the physiotherapist experienced difficulties with receiving payment for her services from CAL and both the physiotherapist and Dr. Pierre requested a letter of continuation of treatment from CAL to continue the Claimant's treatment. However CAL did not respond.

126. In cross-examination the Claimant stated that she could not say if Dr. Santana was the doctor who recommended surgery but it was recommended 6 or 7 months after the injury. She then said that Dr. Santana at some point recommended that she have surgery for the rotator cuff injury. She said she conducted research online to determine what the surgery entailed and her research revealed that such a surgery should be done immediately after the accident. She said she decided not to have the surgery based on the research she did online.

127. Dr Pierre is a specialist in orthopaedic surgery. In his report dated the 23rd January 2017 ("the Pierre Report") he diagnosed the Claimant with the pleaded injuries. He recommended physiotherapy, Acroxia and Nexium. According to Dr Pierre, at the clinic visit on the 13th September 2012, the Claimant complained of persistent pains in the left shoulder, entire back, left knee and neck. In cross-examination Dr. Pierre accepted that although the radiological examination revealed that the Claimant suffered from mild cervical spondylosis and thoracolumbar scoliosis, those conditions were not caused by the Claimant's fall.

128. Dr Santana is an orthorpaedic surgeon who had examined the Claimant six (6) years ago. He filed a medical report dated 24th January 2017 ("the Santana Report"). According to Santana Report, the Claimant complained of a fall at work. His examination of the Claimant revealed pain beneath the acromion on abduction/flexion, consistent with impingement syndrome. An MRI was done on the 7th June 2011, the findings of which were consistent with a rotator cuff injury.

129. In cross-examination, Dr. Santana admitted that he had not examined the Claimant recently. He opined that surgery would have resulted in a significant decrease in the pain in the Claimant's left shoulder and that there was no time limit within which surgery could take place. He also stated that it would take 3-6 months to recover after the surgery and the Claimant did not complain of any back or knee pain to him. He admitted he also recommended physiotherapy but he added that it is unlikely that the Claimant would have fully recovered with physiotherapy alone.

130. Dr. Mencia is an orthopaedic surgeon. He complained to the Court that he was not willing to give evidence due to the manner in which he was brought to the Court. Despite his concerns, he was forthright in his responses. He saw the Claimant in 2012, approximately 5 years ago. According to his medical reported dated 10th January 2017 ("the Mencia Report"), the Claimant was involved in a work related accident on the 31st December 2010 and she sustained injuries predominant to her left shoulder, back, neck and left knee.

131. According to Dr Mencia, he conducted a clinical examination of the Claimant which was confined to the left shoulder, left knee and lower back. In relation to the left shoulder, there was no obvious wasting but tenderness was noted. The Claimant's shoulder movements were limited and all movements were painful at the end of each range. There were no specific signs that suggested impingement or instability. There was reasonable cervical spine movement although tenderness was felt at the lower cervical spine. Lumbar movements were within 80% of the normal range with mild local tenderness over the local lumbar region. There was no neurological deficits of the left upper arm or lower limb. The Claimant's left knee showed a full range of movement with no evidence of an effusion but there was mild tenderness over the medial joint line with a negative McMurray's and

Lachman's test. In his opinion, neither the early degenerative changes nor the scoliosis of the Claimant's thoracic spine could have been attributed to the injury on the 31st December 2010. Additionally, the Claimant's injuries following her accident were classified as soft tissue in nature.

132. Dr Mencia noted that the Claimant's MRI scan of her left shoulder demonstrated a partial tear to the supraspinatus tendon which was likely to been caused by the injury since there were no pre-injury symptoms. In his opinion the Claimant's treatment for the shoulder injury was satisfactory. He stated that the persistence of her symptoms both in the shoulder as well as the other areas suggested a degree of complex regional pain syndrome and that it can be treated by physiotherapy as well as medication. He recommended regular physiotherapy with a maximum of two sessions per week for twelve months. He did not recommend surgery.

133. Dr Mencia was of the opinion that the Claimant was unable to continue with her job as a flight attendant and even her activities of daily living are severely compromised. He said given the length of time from injury it is assumed that the Claimant's condition is permanent which is unlikely to completely resolve. He recommended that consideration was to be given to retire the Claimant on medical grounds and he assessed her permanent partial disability at thirty-five percent (35%).

134. In cross-examination, Dr. Mencia stated that the Claimant suffered soft tissue damage to her shoulder and lower back. He said his clinical examination of her involved a testing of movement of shoulder, back and knee which was done in order to assess any dysfunction of those areas by paying attention to the client's reaction which was a subjective testing of pain. When asked what the term "Regional Complex Syndrome" meant, he testified that the patient in such a case experiences worse pain than the doctor would expect. He said he could not say definitely that it was Complex Regional Syndrome the Claimant was suffering from since he arrived at this conclusion based on what the Claimant had told him and not from an independent verification.

135. Dr Mencia stated that depending on the severity of the fall there might be swelling in the knee and shoulder and that all injuries should have manifested within five minutes of the fall. He admitted that the Claimant had limited movement in her shoulder and there was no indication of nerve injury. He said that a rotator cuff injury should improve with therapy and the normal recovery period is about one year for a patient to return to normal function. He said there could be a full recovery and that if there was no improvement then steroid injections can be administered to the shoulder. He added that the success rate for surgery in rotator cuff injuries is high. Dr Mencia also testified that an activity such as lifting suitcases can affect the shoulder and lead to a rotator cuff injury and that it can be caused by bone spurs, however the MRI did not refer to any bone spurs. He added that delaying physiotherapy could hamper recovery in such injuries. He testified that severe scoliosis could cause numbness in the lower back.

136. In relation to the Claimant's permanent partial disability diagnosis, Dr. Menica confirmed in cross-examination that he had recommend physiotherapy for no more than 12 months. He said the Claimant received two years of treatment and he suggested a further year would be required to achieve maximum medical improvement, meaning the pain level should have been less, function would have been improved to such an extent that she would not need assistance with daily living. He stated that such treatment would have decreased the Claimant's permanent partial disability assessment. He testified that he asked to see the Claimant and give an updated report but she never attended his office. Dr Mencia also confirmed that the early degenerative changes and scoliosis of the Claimant's back could not reasonably be attributed to her fall. He formed the view that her injuries were soft tissue injuries.

Pain and suffering

137. The Claimant's evidence was that after she fell she was still able to walk and she only felt pain in her left knee. She worked on a flight on the 3rd January 2011 where she worked in the first class cabin alone with the purser who allowed her to sit for the majority of the flight because she experienced some discomfort. She also worked on a turn-around Miami

flight, where she experienced more pain which caused her to call in sick for her flight the following day. She saw CAL's doctor who placed her on two weeks sick leave which was extended to an additional week.

138. The Claimant's next flight was a domestic flight. On the way to work she requested CAL's transportation take her to the medical unit because her neck and shoulder muscles were throbbing. By the time she arrived at the medical unit, the pain in her neck and shoulders were excruciating and she could barely walk. She was given a muscle relaxant which caused the pain to decrease so she decided to work that day. According to the Claimant her pain intensified in the subsequent weeks. Her pain was more severe along her shoulder, neck and upper back.

139. In cross-examination the Claimant stated that when she fell she got back up and the pain she felt was the initial impact on her knee. She went home since she did not feel the need to go to the hospital. It was only a couple days after the fall she began experiencing pain. She denied telling Dr. Pierre that she felt pain in her hands when she fell. She said that when she saw Dr Franklin at the end of January 2011 she complained about pain in her entire back and knee.

140. Dr Santana's evidence was that the Claimant reported to him that she did not feel pain at the time of the incident but on the 3rd January 2011 she began experiencing intense and sudden pain at the tip of her left shoulder blade and between the shoulder blades half-way through a flight. She was given 11 days sick leave by Dr. Randolph Phillips after which she resumed work. Sometime later she began having intense pain on her way to the airport for a flight. She was seen by a person from the medical unit of CAL on the 17th January 2011. During that time she was unable to sit or stand for long periods and had to spend most of her time lying down. She reported that the pain had improved however she began to experience numbness down the left arm.

141. In cross-examination Dr. Santana admitted that the Claimant's history of pain was reported to him by her and that he was unable to independently verify the information about the

intense pain she reported to him, the pain she experienced on her way to the airport and her inability to sit for long periods.

142. According to Dr Mencia at the time of the Mencia's Report the Claimant's pain was confined to her left shoulder and left knee. She described significant pain in her left shoulder which resulted in limited movement and an inability to perform daily living activities easily. He stated that the pain radiated from her shoulder along the lateral side into her trapezius area as well as into her left arm and hand producing intermittent numbness. The Claimant indicated to him that her left shoulder pain led to occasional lower back pain which was made worse by standing or sitting. He stated that complaints of knee pain were confined mainly to the medial aspect of the knee and made worse on climbing stairs. In cross-examination Dr Mencia stated that he expected that a person would suffer pain for a few hours after the fall which the Claimant experienced.

Loss of amenities

143. There was no evidence in the Claimant's witness statements on the impact the injury had on her daily activities. Dr Pierre's Report stated that the Claimant complained that due to the pain she has no social life, she is unable to sit for more than one and half hours. However Dr Pierre admitted in cross-examination that his statements pertaining to the impact of the injury on the Claimant's life were those of the Claimant and not independently verified by him. He said from a functional point of view the Claimant cannot drive or ride a motor cycle which was possible previously. However Dr Mencia stated in cross-examination that the Claimant can drive since she had normal function in her knee. Dr Mencia also stated that the Claimant reported that her level of function had deteriorated to the point where some of her activities of daily living had to be facilitated by family members but he could not independently verify this information.

Effect on pecuniary prospects

144. The Claimant's evidence was that at the date of the incident she was employed as a flight attendant and her gross salary was $6,996.00 per month. The letter from CAL dated the 4th

October 2010 confirmed this sum as her monthly salary. She was 28 years old at the time. As a result of the incident the Claimant was on sick leave for the period 4th January 2011 to 30th April 2012. During this period CAL had obtained sick leave /injury leave certificates from a medical practitioner. However from the 1st May 2012 to 15th October 2014 the Claimant's absence from work was not supported by any sick/ injury leave certificate from a medical practitioner. According to the evidence of Mr Ronald Sukbhir, the Claimant was paid her salary up to the 21st October 2014 when she was removed from CAL's payroll. The Claimant was terminated by letter dated the 15th October 2014. The reasons given was that the Claimant had failed to provide medical authorization to support the reason for her absence from work for the period 1st May 2012 to 15th October 2014. There was no evidence of the retirement age for flight attendants. The Claimant's evidence was that after she was terminated by CAL in October 2014 she has not been able to resume work due to her pain.

145. The Claimant also testified that she wanted to make the switch from cabin crew to flight crew. She had aspirations of becoming a pilot. She applied for and received her Student Pilot Authorisation Card and a medical certificate effective 22nd November 2010 which were issued by the Trinidad and Tobago Civil Aviation Authority. However with her continuous pain when sitting she did not pursue her aspiration of becoming a pilot. She said she did not do the second medical because she knew she would not pass it. She is currently unemployed and she has been assessed with a 35% permanent partial disability. She has no income and she has considered self-employment but she has no more savings to do so since CAL stopped paying her salary.

Analysis of evidence

146. In analyzing the evidence I have considered the following factors in arriving at an award of damages for the injuries sustained by the Claimant:

(a) The Claimant was diagnosed with having soft tissue injuries to the left knee, shoulder and lower back. All the doctors who treated the Claimant recommended physiotherapy for at least one year and stated that if she had continued it for the said year her condition

would have significantly improved and her 35 Permanent partial disability assessment would have decreased. The Claimant chose not to continue it. Dr Santana recommended surgery for the shoulder which he classified as a rotator cuff injury and which the Claimant decided against after an internet search. In my opinion the Claimant did not act reasonably by not pursuing the physiotherapy and the surgery for the shoulder since the unchallenged medical evidence was that both recommendations would have significantly improved her condition.

(b) With respect to Dr Mencia's assessment of 35 % permanent partial disability for the Claimant is a whole body assessment and it is not helpful in assessing damages since as Kangaloo JA said in **Persad v Seepersad**[20] *" an explanation of the effect of injuries on a person's earning capacity in words as opposed to figures would be greater use to the Courts in their assessment of damages at common law."*

(c) I accept that the Claimant suffered pain in her knee when she fell and that she experienced pain thereafter in her knee, shoulder and lower back subsequently. While the Claimant may have continued to experience pain after the incident I am of the view that this pain had diminished substantially over this said period. According to both Dr. Santana and Dr. Mencia, the Claimant would have improved significantly within a 6-12 month period if she underwent the recommended surgery/treatment. The Claimant did not undergo any of the recommended treatments. In my opinion, the Claimant cannot reasonably complain of any continuing pain in her shoulder after having opted not to do the surgery. Indeed the letter of Dr. Franklin which records the communication of the Claimant's refusal to have the surgery. If the intensity and consistency of the pain was as described by the Claimant it is reasonable to assume that she would have taken the option for the surgery.

(d) In the case of physiotherapy, the Claimant failed to establish an unwillingness on the part of CAL to provide her with the required transportation to have the physiotherapy done. In any event, the Claimant ought to have made alternative arrangements to go to

[20] Civ Appeal No 136 and 137 of 2000

physiotherapy since she was not impecunious since she was in receipt of her salary and she was under a duty to mitigate her damage by making arrangements to attend physiotherapy. In my opinion if the Claimant had continued to experience the level of pain she asserted she would have either continued the physiotherapy using her own finances or she would have sought medical attention from a public health institution. There was no such evidence. Indeed she did the opposite which leads me to conclude that while she may have suffered some pain it was not of the severity which the Claimant sought to persuade the Court accept.

(e) In my opinion if the intensity and consistency of the pain was as described by the Claimant it is reasonable to assume that she would have taken the option of the surgery and she would have taken steps to continue the physiotherapy. She did the opposite which leads me to conclude that while she may have suffered some pain it was not of the severity which the Claimant sought to portray to the Court.

(f) There was no evidence that the Claimant's life expectancy has been affected. The impact of the injury on the Claimant's daily activities was limited to not being able to drive or ride a motorcycle. I have not attached any significant weight to the inability to do these activities since there was no evidence from the Claimant that she did these activities previous to the injury. I have concluded that the Claimant's loss of amenities was not significant.

147. In determining the award of general damages other similar cases are also guidelines for the possible range of an award of damages[21]. The Claimant submitted that the Court should considered the awards made in the local cases of **Jacqueline Pemberton v Y De Lima and Co[22]; Dhanraji Dial v Ali[23]; Pemberton v Hi-Lo Food Stores[24]; Aldreen Clarke v British Petroleum**[25] and the English case of **Rupert Mc Donald v East Ocean Textiles**

[21] Azziz Ahamad v Raghubar 12 WIR 352
[22] HCA 2012of 1987
[23] HCA 1709 of 1976
[24] HCA 6039 of 1988
[25] S972 of 70

Ltd[26]**.** In my opinion the local authorities cited by the Claimant were not recent. The Privy Council in **Seepersad v Persad** [27]indicated its reservation on the practice of relying on older decisions and using an adjustment formula to arrive at an unlikely award.

148. In my opinion the following are the relevant cases to consider an award for general damages in the instant matter.

149. In **Gillian Isaac v Shaun Solomon and anor**[28] the claimant was involved in a motor vehicle accident and she suffered from severe restriction of motion of her cervical spine in all planes to about only 30% of that which would be expected, moderate cervical muscle spasm, reversal of normal lordosis of her cervical spine with degenerative narrowing of the C6/C7 disc space and posterior osteophytes. She was prescribed medicine and referred for physiotherapy. However, her neck pain worsened and a further MRI scan revealed loss of the normal lordosis consistent with some degree of cervical muscle spasm, mild spondylotic changes, endplate changes, osteophytic lipping at C6/C7 level, osteophyte disc complexes the anterior epidural fat at the C4/C5 and C6/C7 levels but no evidence of cervical cord or nerve root compression, mild bulging at the L5/S1 disc with no impingement of nerve roots. She was diagnosed with whiplash type injury to the cervical and lumbar spine. Her permanent partial disability was assessed at 20%.

150. The Court found that although the claimant continued to experience neck and back pains, her symptoms had settled down but were not completely gone and the physiotherapist reported that she was feeling better. The Court also took into account that the claimant did not give any evidence of seeking medical attention for her condition for approximately 3 years and she produced no bills or receipts for pain killers or muscle relaxants during that period. The Court found that the claimant was not experiencing the same degree of pain and suffering as she had suffered initially. In respect of her loss of amenities, the claimant gave evidence that she could not carry out her household duties or lift heavy objects. She also experienced pain in sexual intercourse and this affected her in performance and

[26] CL 1990/M 179
[27] (2004) 64 WIR 378 (PC)
[28] CV2007 – 04400 delivered in December 2009

regularity. The Court awarded general damages in the sum of $40,000.00 in December 2009 for pain, suffering and loss of amenities.

151. In **Henry Belford v. Khamerajie Dass and Motor One Insurance Company Limited**[29] the claimant was injured in a motor vehicular accident when he was thrown several yards off his motorcycle and he ended up face down on the grass area of the median. He was taken to the San Fernando General Hospital, bleeding from different parts of his body including his arms, left shoulder and left knee where he was in tremendous pain even when his injuries were treated. Surgery was performed on him on 8th January 2009 and he remained warded at the hospital until 20th January 2009. During this period, he continued to experience severe pains in his shoulder and left knee and was only able to cope because of painkillers. He was unable to move on his own from the moment of impact on the highway until he was discharged. He was made to use bed pans and adult pampers whilst at hospital and relied on the nurses to clean him. He claimed that he was weak and could not hold a cell phone; he was fed by nurses or relatives and upon discharge had to purchase a wheelchair, locking knee brace and crutches.

152. Whilst at home, he continued to get pains in his shoulder and left knee and was still unable to move around much on his own. He purchased a commode to place next to his bed. About 1 week after discharge, he returned to the hospital to remove his stitches, which was very painful and even caused some bleeding. A week later, he started having severe pains in his stomach until 17th February, 2009 when he was rushed to the Eric Williams Medical Science Complex (EWMSC), where he was kept for 1 week before being discharged. Some 2 weeks later, he was once again rushed back to EWMSC with pain in his stomach and was kept for 4 days on a stretcher on intravenous painkillers, before being admitted to a ward. He was treated for a blood clot in his lungs, spent 1 month at EWMSC and then continued as an outpatient. He started the physiotherapy at EWMSC which he did for 6 months from April to September, 2009. About 6 months after the accident, he started using a walking stick, which he stopped using in early 2012. He hired household help and did physiotherapy to assist with the continuing pains. As a result of the accident, he was unable to move

[29] CV2012-02204 judgment delivered in April 2014

around properly or walk for 8 months. He was on sick leave for that period. Despite the physiotherapy, he still had problems sleeping. He continued to experience pain whilst on his job driving the truck for long periods and even mashing the brakes caused pains to his left knee and to his leg.

153. As to his loss of amenities, he was unable to lift any heavy object, stoop or climb steps. He had difficulty engaging in sexual activity. He had to use a bench to change tyres or anything that required bending. He could run or walk for too long without getting pain, which was worse when the weather was cold. He also could not dance or go out to a party. He had problems getting up if he sat too long or too low and problems to bathe properly. He also testified to being unable to ride his bike with other friends and that he used to play basketball every evening for recreation and fitness which he could no longer do. He was granted general damages in the sum of $150,000.00

154. In **Andy Marcelle v. The Attorney General of Trinidad and Tobago**[30] the claimant there was a Prison Officer who worked at the Royal Gaol. He was injured after falling into a trench 2 feet wide and 2 feet deep and suffered a left shoulder injury which the Judge described as a dislocated shoulder. The claimant's evidence was that he was unable to work for 260 days; he returned to work and was assigned light duties; he was described as feeling weakness in his shoulder then and said he is unable to lift weights. Before, he engaged in exercising, doing chores and social activities but his injuries affected his ability to do so. He was awarded general damages in the sum of $50,000.00.

155. In **Giselle Kahl v Seelal Harrilal and Guardian General Insurance Limited**[31] the Claimant was injured in a motor vehicle accident.A medical examination conducted a day after the accident revealed painful but full movements of the left shoulder and tenderness over the anterior chest wall and neck pains of moderate severity but with no restriction of neck movements. The claimant was prescribed cataflam for the pain and physiotherapy and she was diagnosed with disc disease of C-spine/herniation at C5-6 and C6-7 levels with C6

[30] CV2013-02048 judgment delivered in June 2016
[31] CV2015-01254 delivered November 2016

nerve root impingement. The claimant was subsequently examined by Dr. Adam who diagnosed her as suffering from neck strain with left C6 nerve root involvement from herniated disc. He recommended management of her continuing pain by physiotherapy, neck exercises and medication and stated that if there was no improvement, surgery would be considered.

156. The Court observed that the MRI report mentioned that the claimant had previously suffered neck pain for five years and that the failure of the claimant to disclose this material fact raised doubts about her candour. The Court also found that although Dr. Adam linked the accident to the claimant's injury and he had no scientific basis for doing so. Further, none of the medical reports made a valid connection between the accident and the claimant's cervical spine illness. The Court assessed general damages for pain and suffering on the basis that following the accident, the claimant suffered from painful but full movement of the left shoulder, tenderness over the anterior chest wall and neck pains of moderate intensity but with no restriction of movement. Also, her shoulder and chest pains appeared to resolve themselves satisfactorily. Her continuing neck pain was not taken into account for the reasons set out above. The Court awarded general damages in the sum of $30,000.00 in November 2016 for pain and suffering.

157. In my opinion the injuries in the **Belford** case are far more serious than that of the Claimant in the instant case. The Claimant's injuries are more in line with the injuries in the **Gillian Isaac; Andy Marcelle;** and **Giselle Kahl** cases where the range for the awards for general damages were from $40,000.00 in 2009 to $50,000.00 in 2016. In my opinion, taking into account the time that has passed and the general trend of increasing awards in my opinion an appropriate award for the Claimant's general damages is $60,000.00.

Future surgery

158. There was no sum pleaded as the costs for the future surgery and there was no evidence from the Claimant of the said costs. The Santana Report recommended surgery but there was no cost set out in the said report. Further the Claimant's own evidence was that although surgery was recommended she had done an internet search and she had decided

against the option of surgery. In light of the absence of any pleaded sum for the costs of future surgery, the absence of evidence of any sum and more importantly the Claimant's decision not to pursue this option no award is made for the cost of future surgery.

Loss of future earnings

159. The Claimant pleaded loss of future earnings in the sum of $83,952.00 per annum since due to her injury she has not been able to return to work and she would continue to suffer loss of earnings at those rates unless there is significant improvement in her prognosis with physiotherapy. With respect to the claim for loss of future earnings the Claimant pleaded and her evidence was that she was issued with a Student Pilot Authorization and a Civil Aviation Medical Certificate on the 22nd November 2010. She pleaded that in the event she was able to complete all the requirements she would have been eligible to work as a pilot and receive a higher salary than that which she earned at the date of the fall 31st December 2010.

160. It was submitted on behalf of the Claimant that in determining the Claimant's loss of future earnings the Court should take into account the evidence from Mr Ronald Sukbhir that there have been a few persons of the flight crew who have gone on to become pilots and that the starting salary for pilots is $20,000.00 to $25,000.00 and it increases to between $75,000.00 to $80,000.00 per month. It was also argued that Dr Mencia assessed the Claimant's permanent partial disability as 35% which was unchallenged.

161. Counsel for CAL agreed that the Claimant should only be compensated to the extent of her permanent partial disability. However it was submitted that it should be up to and only until 23rd July 2013 which was one year after her visit to Dr. Mencia when she was expected to recover fully. CAL also argued that the salary to be used for the purpose of computing the multiplicand ought to be $6,300.00 which was the Claimant's salary after tax salary and which was the Claimant's evidence during cross-examination. CAL agreed that applying the 35% permanent partial disability to the salary of $6,300.00 the Claimant's loss would be $24,260.00 per annum (35% of $6300.00 x 12). However, CAL argued that since the

Claimant was in receipt of her salary until 21st October 2014. Therefore the Claimant is not entitled to any damages for past loss of earnings or any future loss of earnings since she would have fully recovered by 23rd July 2013.

162. In **Munroe Thomas** [32] Kangaloo JA drew a distinction between loss of future earnings and loss of earning capacity. An award for loss of earning capacity as stated by Browne LJ in **Moeliker v A Reyrolle and Co Ltd** only arises where the claimant is employed at the date of the trial but there is a substantial or real risk that he may lose this employment at some future time and may as a result of the injury be at a disadvantage in getting another job or an equally well paid job.

163. In the instant case, the Claimant's evidence was that she was not employed at the date of the hearing of the trial. In the circumstances, since the first condition in **Moeliker** has not been satisfied I will now consider if an award for loss of future earnings can be made.

164. An award for loss of future earnings can be made if the Claimant demonstrates that there is a continuing loss of earnings which is attributable to the accident[33]. Where there are evidential uncertainties which prevent a court from using the multiplier/multiplicand method to assess damages for loss of future earnings the courts have disregarded this conventional approach and arrived at a lump sum figure to compensate the Claimant for the future loss of earnings **(Blamire v South Cumbria Health Authority)[34].**

165. In order to prove loss of pecuniary prospects the Claimant has to show that the injury was of such a nature that it rendered her incapable of performing his duties as a flight attendant, or any other form of work whatsoever. If it rendered her incapable of performing as a flight attendant but it did not prevent her from doing other work, it was necessary to show that in order to mitigate the loss. In discharging this onus, the medical evidence as to the nature of the injury and the residual effect that the injury may have had on the Claimant's ability to

[32] Civ Appeal 25 of 2007
[33] Civ Appeal 25/2007 Munroe Thomas v Malachi Forde and ors.
[34] (1993)P.I.Q.R.Q1,C.A

work is critical[35]. In the instant case there was no evidence that the Claimant made any effort after she was terminated in October 2014 to obtain any other job and there was no evidence to account for her failure to do so. Therefore there was no evidence that the Claimant took steps to mitigate her loss.

166. Between the date of the incident i.e. 31st December 2010 to the 21st October 2014 the Claimant was paid her salary by CAL and therefore she suffered no loss of income for that period. This was despite the evidence that she had only submitted medical certificates up to 1st May 2012. Therefore there was no loss of income by the Claimant up to October 2014.

167. With respect to the period after October 2014, the Mencia Report stated that the Claimant had pain in her left shoulder, left knee and lower back and he recommended physiotherapy of 2 sessions per week for 12 months and medication. In July 2012 he was of the opinion that the Claimant could not continue her job as a flight attendant and he recommended that consideration be given for retiring the Claimant on medical grounds. He assessed her permanent partial disability at 35%.

168. Dr Pierre who saw the Claimant on the 13th May 2013 noted pain in the Claimant's left shoulder, back, neck and left knee. He also recommended physiotherapy but he did not suggest a period save and except for a long period of time without any interruption before a proper assessment could be made on the Claimant's disability.

169. As stated previously, the Claimant's evidence was that despite the recommendations from both Drs Mencia and Pierre she did not undertake any physiotherapy sessions as recommended. Based on Dr Mencia's evidence if she had undergone the recommended physiotherapy she would have experienced significant improvement at least by July 2013.

170. In my opinion the Claimants' loss of future earnings is limited to her inability to continue to work as a flight attendant since Dr Mencia recommended to CAL that the Claimant be

[35] CV A 110/2001 Seudath Parahoo v SM Jaleel & Co Ltd, Hamel-Smith JA at para. 8

retired on medical grounds. I do not consider that the Claimant's prospect of becoming a pilot was a lost opportunity since in my opinion there was no evidence that at the time of the incident the Claimant had taken any exams or training courses to become a pilot. The Claimant's evidence was that she had wanted to become a pilot and she had only taken the first medical and received the Student's Pilot Authorization card. In any event in **Herring v Ministry of Defence**[36] the English Court of Appeal stated that loss of chance claims do not replace the conventional means of assessing future loss of earnings but are more appropriate in cases where the chance to be assessed is where the chance is that the career of the claimant would take a particular course leading to significantly higher overall earnings than those which it is otherwise reasonable to take as the baseline for calculation.

171. Therefore, in assessing the Claimant's loss of future earnings the multiplicand is the net income of $6,200.00 per month. However, the challenge that I am faced with in the instant matter is there was no evidence adduced by the Claimant of the retirement age of flight attendants and the absence of such evidence I cannot speculate on an age and therefore I cannot arrive at a multiplier.

172. In my opinion given the limitations in the evidence, the appropriate course is to award a lump sum payment. In my opinion, an appropriate lump sum would be the Claimant's net income of $6,200.00 per month for 12 months since this was the period for physiotherapy which was recommended by Dr Mencia. While I accept that the Claimant did not undertake the physiotherapy when it was previously recommended, the general consensus of the medical evidence was that physiotherapy for one year would significantly assist the Claimant. The lump sum I award is $74,400.00.

Special damages

173. The Claimant pleaded past earnings for the period 31st October 2014 -30th November 2014 in the total sum of $13,992.00 as special damages. In my opinion this period is taken into

[36] [2003] EWCA Civ 528, [2004] 1 All ER 44

account under the award for loss of future earnings and therefore to make an award here would amount to duplication of the award.

ORDER

174. Judgment for the Claimant against the Second Defendant (AATT).

175. The Claimant's action against the First Defendant (CAL) is dismissed.

176. The Second Defendant (AATT) to pay to the Claimant damages in the sum of $60,000.00 as general damages for pain and suffering and a lump sum of $74,400.00 as future loss of earnings. No award is made for special damages.

177. The Second Defendant (AATT) to pay interest at the rate of 3% per annum from the 30th December 2014 to the date of judgment on the sum of $60,000.00.

178. The Ancillary Claim is dismissed.

179. The Ancillary Claimant (AATT) to pay the Ancillary Defendant's (T&T Carpet) costs to be assessed in default of agreement.

180. I will hear the Claimant, the First Defendant (CAL) and the Second Defendant (AATT) on costs.

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Margaret Y Mohammed
Judge