COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2013/CLE/gen/01409

BETWEEN

ANGELINA TURNQUEST

Plaintiff

-AND-

STEPHEN RAHMING

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Stephen Turnquest with him Ms. Syneisha Bootle of Callenders & Co. for the Plaintiff
Mr. Adrian Hunt of Graham Thompson for the Defendant

Hearing Dates: 15, 16 March 2021, 26 May 2021, 12 November 2021

Negligence – Whether the Defendant was driving without due care and attention – Contributory negligence - Whether the Plaintiff was responsible for or contributed to the accident – Whether res ipsa loquitur applies – Assessment of damages – Pain, suffering and loss of amenities – Judicial College Guidelines – Guidelines not to be slavishly followed without regards to the requirements of the Bahamian society – Remoteness - Mitigation

By Specially Indorsed Writ of Summons filed on 15 August 2013, the Plaintiff sued the Defendant in negligence for personal injuries after being hit whilst allegedly riding her bicycle. The Plaintiff alleged that the collision was caused by the Defendant's negligent driving. The Plaintiff also relied on the doctrine of res ipsa loquitur, alleging that the accident could not have occurred without the Defendant's negligence.

The Defendant denied liability. He asserted that he did not drive negligently and that the accident was caused wholly or at least contributed to by the Plaintiff's own negligence.

HELD: finding that the Defendant's negligence caused the Plaintiff's injuries, but that the Plaintiff substantially contributed to the accident, this Court apportioned liability as follows: 75% to the Plaintiff and 25% to the Defendant. The global award to the Plaintiff is $33,320.00. Each party is to bear their own costs.

1. Where the Plaintiff's injury has been caused partly by the Defendant's negligence but also by the Plaintiff's own lack of reasonable care for her own safety, the finding on liability should be that the Plaintiff was contributory negligent: **Davies v Swan Motor Co. (Swansea) Ld. James, Third Party** [1949] 2 KB 291 and **Carlsholm (Owners) v Calliope (Owners) the Calliope** [1970] 2 WLR 991; applied.

2. Where the Plaintiff is found to be contributory negligent, the amount recoverable should be reduced – Section 3(1) Contributory Negligence Act, Ch 75. In the present case, it is reduced by 75%.

3. The Plaintiff cannot rely on the doctrine of res ipsa loquitur to prove negligence. The facts were not such that the accident had to have occurred as a result of the Defendant's negligence – **Scott v London and St. Katherine Docks** (1865) 159 ER 665.

4. Losses that are too remote are not recoverable. The test for remoteness in tort is whether the loss was of a kind that was foreseeable – **The Wagon Mound (No. 1)** [1961] AC 388 applied.

5. A plaintiff has a duty to mitigate his loss/damage. Losses that could have been prevented by the plaintiff taking reasonable steps to prevent them are not recoverable. What reasonable steps are is a question of fact – **Martindale v Duncan** [1973] 2 All ER 355 applied.

6. Damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the plaintiff's necessary medical care, operations and treatment: **Wells v Wells** [1998] 3 All ER 481 at page 507, dicta of Lord Hope of Craighead considered.

7. Slavish adherence of the Judicial College Guidelines (formerly the Judicial Studies Board Guidelines) without regard to the requirements of the Bahamian society was denounced by the Privy Council in **Scott v The Attorney General and Another** [2017] UKPC 15. The guidelines can provide an insight into the relationship between, and the comparative levels of compensation appropriate to, different types of injury. Subject to that, the local courts remain best placed to judge how changes in society can be properly catered for. Guidelines from different jurisdictions can provide insight but they cannot substitute for the Bahamian courts' own estimation of what levels of compensation are appropriate for this jurisdiction. However, if the Judicial College Guidelines are found to be consonant with the reasonable requirements and expectations of Bahamians, so be it. In such circumstances,

there would be no question of the Judicial College Guidelines imposing an alien standard on awards in the Bahamas.

8. The only general principles which can be applied are that damages must be fair and reasonable, that a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and that, although it is impossible to standardize damages, an attempt ought to be made to award a sum which accords "with the general run of assessments made over the years in comparable cases": **Bird v Cocking & Sons Ltd** [1951] 2 T.L.R. 1260 at 1263, per Birkett LJ.

9. It is important that conventional awards of damages are realistic at the date of judgment and have kept pace with the times in which we live: **Senior v Barker & Allen Ltd** [1965] 1 W.L.R. 429. There has been a gradual rise over the years of the "conventional" sum. In the present case, the sum of $75,000.00 for pain and suffering represents a fair and reasonable award to the Plaintiff less her contributory negligence of 75%.

JUDGMENT

Charles J:

Introduction

[1] At about 19:00 hours on one summer evening in August 2010, when the sun was down and it was still bright, the Plaintiff ("Ms. Turnquest"), then 69 years old, was allegedly riding her bicycle in an easterly direction along Prince Charles Drive on the grassy verge adjacent to the southern or west-bound lane when a wrecker driven by the Defendant ("Mr. Rahming") and towing another vehicle, which was proceeding in an easterly direction in the northern lane along Prince Charles Drive, collided with Ms. Turnquest's bicycle. At the time, Prince Charles Drive was a single carriageway. As a result of the collision, Ms. Turnquest fell to the ground. She suffered multiple injuries and subsequently sued Mr. Rahming in negligence for personal injuries.

[2] The parties' accounts of how and where the accident occurred are strikingly different. Ms. Turnquest says that she was heading east on Prince Charles Drive on the right side of the road when Mr. Rahming hit her bicycle from behind, causing her to fall. Mr. Rahming says that Ms. Turnquest was not riding when the accident occurred. He said that she was bending down next to her bicycle on the left side of the road. She was completely off the road and her bicycle suddenly rolled into

the road and collided with the front tire of his wrecker. He did not have enough time to avoid the collision and his wrecker collided with her bicycle which then hit her.

[3] As a result of the collision, Ms. Turnquest was knocked to the ground. Police officers with a prisoner on board their vehicle passed by but only stopped to advise them to proceed to the Elizabeth Estates Police Station. Thereafter, the police did not do much except to charge both parties with driving without due care and attention. Despite the charges made against both parties in respect of the accident, neither was prosecuted.

The pleadings

[4] By a Specially Indorsed Writ of Summons filed on 15 August 2013, Ms. Turnquest alleged that the accident was caused by the negligence of Mr. Rahming. The Statement of Claim particularized the negligence complained of as well as her injuries. The Particulars of Negligence alleged include, among other things, that Mr. Rahming was (i) driving too fast; (ii) driving without due care and attention; (iii) failing to keep a proper lookout or to have any sufficient regard for other road users who were or might reasonably have been expected to be on or in the vicinity of the sidewalk adjacent to the southern lane of the roadway; (iv) failing to see Ms. Turnquest or her bicycle in sufficient time to avoid striking her; (v) failing to stop, slow down, swerve or in any other way to manage or control his wrecker so as to avoid striking Ms. Turnquest; (vi) failing to take any or any adequate care for the safety of Ms. Turnquest and (vii) failing to steer or control his wrecker or apply his brakes adequately or at all so as to avoid striking Ms. Turnquest's bicycle. Ms. Turnquest further contended that the facts speak for themselves and that the accident would not have occurred unless Mr. Rahming was negligent. As a result of the accident, Ms. Turnquest's bicycle was damaged beyond repair and she suffered pain, injury, loss and damage. She particularized her injuries as (i) laceration to the left lateral ankle; (ii) closed injury to her left knee; (iii) wound on the lateral aspect of her left foot; (iv) posterolateral ligamentous laxity in her left knee; (v) pain and instability in her left knee and ankle; (vi) stiffness in her left

knee; (vii) injury to the mouth and broken and chipped teeth requiring a bridge; and (viii) persistent internal derangement of her left leg with no evidence of healing.

[5] Ms. Turnquest claimed special damages of $32,010.50 and continuing (which were reduced by $7,390.00 at trial), general damages, interest and costs.

[6] In his Defence filed on 15 October 2013, Mr. Rahming denied that he was negligent and averred that the accident was caused wholly by Ms. Turnquest or alternatively, she contributed to her own negligence. He also averred that, at all material times, he drove prudently and reasonably and it was Ms. Turnquest who caused her bicycle to roll into the road in front of his wrecker causing the bicycle to collide with the front tyre of his vehicle and he did not have sufficient time to avoid the collision. Mr. Rahming further asserted that Ms. Turnquest failed to take any or any adequate care for her own safety and exposed herself to unnecessary risk of injury. With respect to injuries and damages, Mr. Rahming puts Ms. Turnquest to strict proof of the same.

The issues

[7] The following issues arise for determination:

1. Whether and if so, to what extent was Mr. Rahming negligent?

2. Whether and if so, to what extent Ms. Turnquest contributed to the accident?

3. Whether the doctrine of res ipsa loquitur applies to show negligence? and

4. Assuming that Mr. Rahming is found to be negligent, whether Ms. Turnquest's history of pre-existing osteoarthritis changes should, in principle, affect the quantum of damages to be paid to her?

The law of Negligence

[8] In **The Attorney General v Craig Hartwell** [2004] UKPC 12, Lord Nicholls of Birkenhead, in delivering the judgment of the Privy Council, on negligence, stated

at para 20:

> **"Negligence as a basis of liability is founded on the impersonal ("objective") standard of how a reasonable person should have acted in the circumstances. Shortfall from this standard of conduct does not always give rise to legal liability. In order to elucidate the circumstances in which shortfall will give rise to liability the courts have fashioned several concepts, such as "duty of care". This familiar phrase is legal shorthand. Expressed more fully, a duty of care is a duty owed in law by one person or class of persons to another particular person or class of persons. The duty comprises an obligation to take reasonable care to ensure that the person or persons to whom the duty is owed do not suffer a particular type or types of damage. Thus drivers of cars owe, among other duties, a duty to other road users to take reasonable care to avoid inflicting personal injury on the latter."** [Emphasis added]

[9] Put another way, in the tort of negligence, liability is based on the conduct of the defendant and has three elements namely:

1. The existence of a duty of care situation (i.e. one which the law attaches liability to carelessness). There has to be a recognition by law that the careless infliction of the kind of damage complained of on the class of person to which the plaintiff belongs by the class of person to which the defendant belongs is actionable;

2. Breach of the duty of care by the defendant, i.e. he failed to measure up to the standard set by law; and

3. A casual connection between the defendant's careless conduct and the damage.

Existence of a duty of care

[10] On the existence of a duty of care, Lord Nicholls in **Craig Hartwell** [supra], at para 21 said:

> **"Speaking generally, one of the necessary prerequisites for the existence of a duty of care is foresight that carelessness on the part of the defendant may cause damage of a particular kind to the plaintiff. Was it reasonably foreseeable that, failing the exercise of**

> **reasonable care, harm of the relevant description might be suffered by the plaintiff or members of a class including the plaintiff? "Might be suffered" embraces a wide range of degrees of possibility, from the highly probable to the possible but highly improbable. Bearing in mind that the underlying concept is fairness and reasonableness, the degree of likelihood needed to satisfy this prerequisite depends upon the circumstances of the case. Reasonable foreseeability does not denote a fixed point on the scale of probability: see Lord Hoffmann in *Jolley v Sutton London Borough Council*** [2000] 1 WLR 1082**, 1091. There must be reasonable foreseeability of a risk which a reasonable person would not ignore. The risk must be "real" in the sense that a reasonable person "would not brush [it] aside as far-fetched": see Lord Reid in *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty (The Wagon Mound No 2)*** [1967] 1 AC 617**, 643. As the possible adverse consequences of carelessness increase in seriousness, so will a lesser degree of likelihood of occurrence suffice to satisfy the test of reasonable foreseeability."**[Emphasis added]

[11] In short, a duty of care will be owed wherever, in the circumstances, it is foreseeable that if the defendant does not exercise due care, the plaintiff will be harmed.

Breach of the duty of care/ Burden of proof

[12] A defendant will be regarded as having breached his duty of care if his conduct falls below the standard required by law. The standard normally set is that of a reasonable and prudent man. In **Blyth v Birmingham Water Works** [1856] 11 Exch. 781 at 784, Anderson B said:

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

[13] Whether the defendant's conduct has been negligent is determined by the risk factor which takes into account (i) the likelihood of harm; (ii) the seriousness of that; (iii) the importance and utility of the defendant's conduct; and (iv) the practicability of taking precautions.

The evidence

Angelina Turnquest

[14] Ms. Turnquest filed a Witness Statement on 22 November 2019 which stood as her evidence in chief at trial. She testified that she was riding her bicycle heading east on the right side of Prince Charles Drive when Mr. Rahming struck her bicycle from behind, causing her to fall off of it.

[15] Ms. Turnquest testified that she was badly injured but never lost consciousness. According to her, two police officers happened to be on the scene at the time and they took the relevant information down. She said that she told the officers that Mr. Rahming was speeding and must have been trying to overtake a vehicle to have hit her while she was on the right side of the road.

[16] Ms. Turnquest further testified that, after the accident, Mr. Rahming took her to the Elizabeth Estates Police Station as the police officers instructed him to. Whilst there, Mr. Rahming told her that he and his passenger could not stay to give a statement because he had an urgent matter to attend to and that was where he was going to when the accident occurred.

[17] Under cross-examination, Ms. Turnquest conceded that there were no witnesses to this conversation. She also said that there was quite a bit of traffic on both sides of the road at the time. She maintained that Mr. Rahming was on the left side of the road and she was on the right side of the road. She asserted that the two policemen who were at the scene told Mr. Rahming that he was "*in the wrong*" because he was speeding and that Mr. Rahming told the officers that he was late for an appointment and that is why he was speeding.

[18] Mr. Hunt read to Ms. Turnquest a statement which she allegedly made to the Bahamas First General Insurance Company ("the insurance company") which bore her signature. The statement was consistent with Mr. Rahming's account and inconsistent with her evidence. It stated that she was riding her bicycle on the grass completely off the road, next to the eastbound lane. Ms. Turnquest emphatically

denied that she gave that statement to the insurance company. She said that she was in pain and could not have written anything. She took the report from Road Traffic to the insurance company. She insisted that her signature must have been forged and she was never on the left side of the road.

[19] However, under re-examination, Ms. Turnquest admitted that she spoke with an adjuster from the insurance company who handwrote her account which she signed. She said that he was nice to her and she did not think that he would have written untruths. She said that she never signed a document directly from the insurance company.

[20] When shown the Royal Bahamas Police Force Road Accident Report: Date of accident: Tuesday, 17 August 2010 and location: Prince Charles & Sea Breeze Intersection, Ms. Turnquest stated that it is incorrect.

[21] Ms. Turnquest disputed the truthfulness of Mr. Rahming's passenger, Thomas Johnson. His account was consistent with that of Mr. Rahming. Ms. Turnquest stated that his account is untrue, which explained why he did not give a statement until long after the accident. Ms. Turnquest denied that she allowed her bicycle to roll into the road and into the path of Mr. Rahming's wrecker.

[22] She further stated that Mr. Rahming came to her house and admitted that he was at fault. He offered to reimburse her for her bicycle but said that he did not have money. He promised to return with the money.

[23] She asserted that Mr. Rahming was speeding because he was late for an appointment which is why he could not stay at the police station. She maintained that Mr. Rahming was not towing a vehicle at the time of the accident.

Stephen Rahming

[24] Mr. Rahming gave evidence on his own behalf. He filed a Witness Statement on 2 December 2019 which stood as his evidence in chief at trial. He testified that, at the time of the accident, he was heading east on Prince Charles Drive and was in

the process of towing a vehicle with a passenger, Thomas Johnson. He stated that, as he was driving in an easterly direction, he noticed Ms. Turnquest on the roadside bending over and holding the bicycle by the handlebar. At that time, no portion of the bicycle was in the road or otherwise obstructing his path. But, as he was about to pass the bicycle, Ms. Turnquest stood up and the bicycle rolled into the road. According to him, she was bending down, apparently trying to pick up something but she was not riding the bicycle. According to him, the bicycle was on an incline and it unexpectedly rolled back into the road right in the front of the bumper of his wrecker. He tried to swerve right to avoid colliding with her but he ended up touching the back wheel "*and it swung the back section of the bike around which toppled her over*." Mr. Rahming said that he was about 3 feet when the back wheel just rolled back.

[25] Mr. Rahming asserted that the police officers who were passing had a prisoner on board their vehicle. They stopped and instructed to follow them to the Elizabeth Estates Police Station and also to bring Ms. Turnquest which he did. He maintained that the police never came out of their vehicle. He said that he was travelling at approximately 20 m.p.h. He could not speed because he was towing another vehicle. He said that when his passenger said "look out", he had already seen Ms. Turnquest. When he first saw her, she was off the road. He maintained that Ms. Turnquest was at fault because her bicycle rolled in front of his wrecker as he was approaching.

[26] Under cross-examination, Mr. Rahming asserted that Ms. Turnquest was on the left side of the road, completely off the road on the grassy verge. He insisted that it is not true that Ms. Turnquest was riding her bicycle when the accident occurred. He stated that he did not swerve into the right side of the road; that he only swerved slightly to try to avoid hitting the bike after it rolled into the road.

[27] Mr. Rahming conceded that he visited Ms. Turnquest at her home. He claimed that he felt sorry for her so he volunteered to fix her bicycle but never volunteered to buy another one. He also stated that he did not admit liability on a prior occasion

but, on 25 October 2010, to his insurance company, he stated “liability is accepted”.

[28] He denied the account given by Ms. Turnquest that the police officers were at the scene and investigated.

[29] Mr. Turnquest read to him his statement which said “*the police came to the scene to investigate*”. He however maintained that it did not happen in that manner. Although the statement said “liability is accepted”, Mr. Rahming insisted that he never accepted liability. He also denied that he told Ms. Turnquest that he could not stay at the police station because he was in a hurry.

Analysis, findings and conclusion

[30] A good starting point is to remind ourselves of the general principle regarding the burden of proof which stems from the Latin maxim *onus probandi actori incumbit*, namely “*he who asserts must prove”.* In this regard, Ms. Turnquest can only succeed if she can establish that Mr. Rahming (i) owed a duty to her as a road user; (ii) breached that duty; and (ii) caused reasonable foreseeable harm as a result of that breach.

[31] In the present case, it can hardly be disputed that Mr. Rahming owed a duty of care to Ms. Turnquest; she being a road user.

[32] The next issue is whether Mr. Rahming breached that duty which he owed to her. In other words, whether he was driving negligently.

[33] Ms. Turnquest and Mr. Rahming were the only witnesses to testify and the difference in their respective accounts is stark. The parties could not even agree on the point of impact. When I visited the scene on 12 November 2021, the different points of impact were hundreds of yards apart on different sides of the road.

[34] The divergence in evidence makes the task of the Court an arduous one especially since there were no other witnesses. As the accident took place many years ago,

the Court relied heavily on the respective statements which were made shortly after the accident to the insurance companies.

[35] Both parties' evidence had inconsistencies but Ms. Turnquest's evidence had many more inconsistencies. However, having had the advantage of seeing and hearing the witnesses, I concluded that, over the years, Ms. Turnquest's recollection of the accident faded. I found as a fact that she gave an account to the insurance company on 21 October 2012 notwithstanding that she repeatedly denied it. At that time, the details of the accident were fresher in her mind and represented a somewhat more accurate version of the events of that day than at this trial. In that statement, she stated "*I was travelling east on Prince Charles Drive on my bicycle near Doris Johnson High School on August 17, 2010 at 7:00 p.m. I was driving on the grass completely off the road next to the eastbound lane. The sun was not up, but there was still light outside…. I felt an impact from behind…The other party was travelling east on Prince Charles and had collided with my bicycle….There was a police car passing in the area when the accident occurred, they stopped and advised the other party should put me in his vehicle and go to the Elizabeth Police Station…."*

[36] However, her Statement of Claim, Witness Statement and oral testimony positioned her on the the right side of the road. Mr. Rahming also gave a statement to the insurance company on 25 October 2010 in which he stated "*Liability is accepted"*. His account is consistent with his Defence, Witness Statement and oral testimony. In terms of where the accident occurred, the Royal Bahamas Police Force Road Accident Report charging Ms. Turnquest stated "*Prince Charles & Sea Breeze Intersection*", again consistent with Mr. Rahming's account. The Police Force Road Accident Report issued to Mr. Rahming simply stated *Prince Charles Drive."* In addition, the Report of the passenger, Thomas Johnson, which was taken on 15 January 2011, and tendered as an exhibit, stated "*As we were coming up, I saw a lady bending down fixing something on the bike. As we approached her the bike was sticking out a little in the road. She was bending down in the grassy area at the time. I said "look out". Steven (sic) tried to avoid hitting the bike*

by swinging out to the right side of the road. The back section of the wrecker hit the bike as we passed it....”

[37] Accordingly, on a balance of probabilities, I find Mr. Rahming’s evidence to be more plausible than that of Ms. Turnquest. That said, I did not believe everything that he said. However, I found as a fact that (i) the accident took place on the left side of the eastbound lane near the intersection of Prince Charles Drive and Beatrice Avenue, Sea Breeze; (ii) Ms. Turnquest was not riding her bicycle but was bending down picking up something or fixing something on her bike; (iii) Mr. Rahming’s wrecker was also travelling in that direction (iv) Mr. Rahming saw Ms. Turnquest from a distance and, as he was approaching her, the bicycle rolled into the road and the collision took place; (v) the passenger said “look out” and (vi) the rear of the wrecker hit Ms. Turnquest.

[38] In my considered opinion, Mr. Rahming was partly negligent because he did not keep a proper lookout so much so that the passenger exclaimed “look out”. Had he been keeping a proper look out, he would have avoided hitting Ms. Turnquest whom he said he saw from a distance. He pointed out the distance when the Court visited the *locus in quo*. I did not believe him. The fact that his passenger exclaimed “look out” suggested that he may not have been that attentive although he stated that he saw her before the passenger exclaimed. In the circumstances, he was unable to stop, slow down or swerve his wrecker without hitting her bicycle. I find as a fact that Mr. Rahming was not driving with due care and attention.

Contributory negligence

[39] Having come to the conclusion above, learned Counsel Mr. Hunt, who appeared for Mr. Rahming, persuaded the Court to find that Ms. Turnquest contributed to the accident in that she failed to take ordinary care of herself and caused her bicycle to roll into the road thereby substantially causing the accident.

[40] The English Court of Appeal in **Davies v Swan Motor Co. (Swansea) Ld. James, Third Party** [1949] 2 KB 291 determined that the plaintiff had contributed to his

own negligence by not taking adequate care for his own safety. In that case, a man had been standing on steps at the side of a lorry/truck, which was in a dangerous place, as the lorry was travelling along a narrow road. A bus tried to pass the lorry and the man was unfortunately killed. Bucknill LJ explained what gives rise to a finding of contributory negligence at page 308:

> **"In addition to that answer to the point made by Mr. Glyn Jones, there is another answer, viz., that when one is considering the question of contributory negligence, it is not necessary to show that the negligence constituted a breach of duty to the defendant. It is sufficient to show lack of reasonable care by the plaintiff for his own safety. That is set out clearly in the speech of Lord Atkin in Caswell v Powell Duffryn Associated Collieries Ld:**
>
> > **"But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand, if the plaintiff were negligent, but his negligence was not a cause operating to produce the damage, there would be no defence."**

[41] The Court in **Carlsholm (Owners) v Calliope (Owners) the Calliope** [1970] 2 WLR 991 at 1002 determined that where the loss and damage were caused partly by the Defendant and partly by the Plaintiff's own intervening negligence and to make a further or sub-apportionment of liability accordingly, the Court can find contributory negligence:

> **"The view which I have formed, for the reasons which I have given, is that it is open to the court, as a matter of law, in a case like the present, to find that the alleged consequential damage was caused partly by the original casualty, and partly by the claimant's own intervening negligence, and to make further or sub-apportionment accordingly."**

[42] The finding of contributory negligence does not preclude the Plaintiff's cause of action. The Court has the discretion to determine the proportions of responsibility. Section 3(1) of the Contributory Negligence Act provides:

> **"(1) Where any person suffers damage as a result of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced by such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:**
>
> **Provided that –**
>
> **(a) nothing herein contained shall affect the extent of any contractual liability; and**
>
> **(b) where any contract or enactment providing for limitation of liability is applicable to a claim, the amount of damages recoverable by the claimant shall not exceed the limit so applicable."**

[43] Applying the law of contributory negligence to the facts of the present case, I find that the accident was caused partly by Mr. Rahming's negligence and also by Ms. Turnquest's own lack of reasonable care for her own safety. She substantially contributed to the accident. I will therefore apportion liability as follows: Ms. Turnquest: 75% and Mr. Rahming: 25%.

Doctrine of res ipsa loquitur

[44] Res ipsa loquitur is a doctrine by which the plaintiff can prove negligence on the defendant's part in circumstances where the facts show that the defendant must have acted negligently. The doctrine was most succinctly defined in the celebrated speech of Erle CJ in **Scott v London and St. Katherine Docks** (1865) 159 ER 665 at 667:

> **"Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."**

[45] In **Airport Authority v Western Air Limited** SCCivApp No. 275 of 2012, the Bahamian Court of Appeal explained (and the Privy Council later affirmed) that both conditions must be present for a defendant to be able to rely on the doctrine

of res ipsa loquitur. At paragraph 35 of the Court of Appeal's judgment, John JA said that the doctrine applies only when:

> **"(1) the occurrence is such that it would not have happened without negligence and (2) the thing that inflicted the damage was under the sole management and control of the defendant, or someone for whom he is responsible or whom he has a right to control. Provided those two conditions are satisfied, then, on a balance of probability, the defendant must have been negligent."**

[46] The factual findings made by me precludes Ms. Turnquest's reliance on the doctrine of *res ipsa loquitur*. Mr. Rahming's wrecker, which caused the injuries to Ms. Turnquest, was under his sole management. However, having regard to the foregoing determination that Ms. Turnquest equally contributed to the collision, it cannot be said that the accident would have been prevented if Mr. Rahming had been operating his wrecker safely.

Quantum of Damages

[47] The assessment of damages for injuries sustained as a result of an accident falls under two generic heads namely general damages and special damages.

[48] The objective of the courts in assessing compensation for a victim was stated by Lord Blackburn in **Livingstone v Rawyards Coal Company** (1880) 5 App. Cas. 25 at 30, (an appeal from the House of Lords from Scotland) as follows:

> **"I do not think there is any difference of opinion as to it being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."**

[49] A conventional sum for general damages is arrived at based on comparable awards in similar jurisdictions where the socio-economic conditions are similar. English awards and practice are looked at as guides in particular, the UK practice text of Kemp and Kemp on Damages. This principle received judicial buttressing

in the Bahamian case of **Matuszowicz v Parker** [1987] BHS J. No. 80 (1985, No. 827).

[50] Above all, the award must be fair and reasonable. In **H West & Sons Ltd v Shephard** *[1964] AC 326*, Lord Pearce explained that "*The court has to perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgment for what it considers to be a reasonable sum*."

[51] The Court is also mindful that damages are awarded to an individual and not to an average person of a certain class on an actuarial calculation. Since the defendant must take the plaintiff as he finds him and must compensate him so as to put him in as good a position, as he was prior to the tort, there must be taken into account and assessed the contingencies and chances for better or for worse inherent in the plaintiff at the time of the tort and the contingencies affecting him as an individual.

[52] I shall now address Ms. Turnquest's claim for damages for personal injuries separately.

The nature and gravity of the resulting physical disability

[53] Ms. Turnquest, born on 21 October 1940, was 69 years old at the date of the accident. As to why this case took so long to be dealt with is beyond my knowledge. That said, it was first referred to me for Case Management in June 2019 and I fixed a trial window between December 2019 and June 2020. The matter was given a trial date of 11/12 May 2020. That trial date was displaced due to the Covid-19 pandemic. Ms. Turnquest is now 81 years old.

[54] At the trial, each party called their own expert. Ms. Turnquest called Dr. Robert Gibson and Mr. Rahming called Dr. David Barnett. Both gentlemen are well-known and are highly qualified and respected orthopaedic surgeons in The Bahamas.

[55] Ms. Turnquest alleged that she suffered the following injuries as a result of the accident namely:

a) lacerations to her left lateral ankle;

b) closed injury to her left knee;

c) wound on the lateral aspect of her foot;

d) posterolateral ligamentous laxity in her left knee;

e) pain and instability in her left knee;

f) stiffness in her left knee;

g) injury to the mouth and broken and chipped teeth requiring a bridge and

h) persistent internal derangement of her left leg with no evidence of healing.

[56] Most of the facts relevant to the assessment of damages are not disputed between the parties. The main point of contention between the parties was what effect did Ms. Turnquest's pre-existing osteoarthritis had on her injuries. To the extent that any of the facts relating to this issue is disputed then what is expressed must be taken as findings of facts that I made.

[57] Dr. Gibson's evidence in chief is contained in his Witness Statement filed on 17 June 2020 and Dr. Barnett's evidence in chief is contained in his Witness Statement filed on 29 January 2020. Both experts agreed that Ms. Turnquest had severe degenerative osteoarthritis before the accident. They also agreed that people with severe arthritis can have full functional mobility.

[58] Ms. Turnquest was treated at Princess Margaret Hospital ("PMH") on the evening of the accident. In a Report dated 20 May 2015, Dr. Chambers stated that, when she was seen in the Accident and Emergency Department, she complained of pain and swelling to the left knee. She was unable to bear weight or to ambulate on the left lower extremity following the accident. The left knee was swollen and tender. A cylinder plaster of Paris (POP) was placed on the left lower extremity.

[59] Ms. Turnquest was seen again at PMH on 9 September 2010. On that visit, she had abrasions to the upper back and shoulder which she reported that she had sustained in the accident. She also had an 8 cm x 5 cm pressure ulcer on the left ankle from the POP cast. Clinical examination also suggested more widespread injury to the postero-lateral corner of the left knee rather than just an isolated lateral collateral ligament injury. Surgery was discussed as the best option for the treatment. She was scheduled for surgery on 29 September 2010 but it appeared that she did not show up as Dr. Chambers stated that "*she was seemingly lost to follow up until November 2011"*. In the intervening period, it was evident that she had sought private care from Dr. Gibson who first saw her on 1 November 2010 and then, on subsequent occasions.

[60] She returned to PMH in November 2011 after her son, who was her main financial supporter, lost his job. She was seen on 1 November 2011 with a diagnosis of osteoarthritis of the left knee. Ms. Turnquest was admitted to PMH on 18 May 2012. On 19 May 2012, she had arthrotomy of the left knee as well as exploration of the postero-lateral corner. The popliteus tendon was noted to have been avulsed from its insertion and was re-implanted using staples. The anterior cruciate ligament was intact. She was discharged from the hospital on 25 May 2012.

[61] Ms. Turnquest then underwent a period of rehabilitation. On 22 November 2012, she was pain free and doing well. She was discharged from the clinic at that time.

[62] However, over time, Ms. Turnquest's traumatized knee became very painful. As a result of the loss of functionality in her traumatized knee, Ms. Turnquest began favouring her non-traumatized knee.

[63] On 26 June 2017, Dr. Gibson advised Ms. Turnquest that she needed to undergo total knee replacement arthroplasty of the left knee (traumatized knee) and possibly the right knee.

Special Damages

[64] Special damages are quantified damages of which a plaintiff has already spent as a result of the damage and loss suffered. This type of damages must therefore be pleaded for, particularized and proved. This was the view of Lord Diplock in **Ilkew v Samuels** [1963] 2 All E.R. 879, [1963] 1 WLR 991 where he said:

> **"Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized…it is plain law…that one can recover in an action only special damage which has been pleaded, and of course, proved."**

[65] In **Michelle Russell v (1) Ethylyn Simms and (2) Darren Smith** [2008/CLE/gen/00440]**,** Sir Michael Barnett, CJ at para 43 stated as follows:

> **"It is settled law that special damages must be pleaded and proven. The Court of Appeal in *Lubin v Major [No. 6 of 1990]* said:**
>
> > **43. "From the above reasoning, it is clear that what the learned Registrar is saying, correctly in our view is that a person who alleges special damage must prove the same…."**

[66] Unquestionably, it is for Ms. Turnquest to prove her damage. She claims the following as special damages:

1.	Cost of destroyed Kenton bicycle (Mr. Rahming still has the bicycle)	$249.00
2.	Cost of Medical Report	$600.00
3.	Cost of dental repair (bridge or resin) **(withdrawn at trial**)	
4.	Cost of Anthroscopy of (left) knee w/meniscal repair	$4,000.00
5.	Cost of reattachment of biceps tendon & repair of the posterior lateral corner	$2,000.00
6.	Cost of post-operative leg brace	$ 271.50
7.	Cost of post-operative rehabilitation therapy 3 x weekly for 8 wks)	$3,000.00
8.	Cost of Doctors Hospital	$8,000.00
9.	Admission for Private Surgical Theater Anaesthesia Ward at Doctors Hospital (included in Doctor's Hospital cost)	$3,500.00

10. Cost of Anaesthetist fee	$2,000.00
11. Surgical Assistant Fee	$1,000.00
TOTAL	**$24,620.50**

[67] With respect to the special damages pleaded, Ms. Turnquest has provided receipts as proof of special damages in the sum of $24,620.50 less the cost of $3,500.00 (private surgical threater anaesthesia ward) since she has not proven that the admission for private surgical theatre anesthesia ward was not included in the Doctors Hospital's invoice. Therefore, the total special damages awarded is $21,120.00.

General Damages

Pain, suffering and loss of amenities

[68] In **Scott v The Attorney General of Bahamas and another**, Lord Kerr, at paras 17 to 19, stated:

> **"17. General damages must be compensatory. They must be fair in the sense of being fair for the claimant to receive and fair for the defendant to be required to pay - *Armsworth v South Eastern Railway Co (2)* (1847) 11 Jur at p 760. But an award of general damages should not aspire to be "perfect compensation" (however that might be conceived) - *Rowley v London and North Western Railway Co (3)* (1873) LR 8 Ex at p 231. It has been suggested that full, as opposed to perfect, compensation should be awarded - *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 per Lord Blackburn:**
>
> > **"where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong …"**
>
> **18. As Dickson J, in the Supreme Court of Canada, observed in *Andrews v Grand & Toy Alberta Ltd* (1977) 83 DLR (3d) 452, 475-476, applying this principle in practice may not be easy:**

> **"The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution."**

> **19. Accepting and following this approach, the Court of Appeal in England and Wales in *Heil v Rankin* [2000] EWCA Civ 84 at para 23 said:**
>
> > **"There is no simple formula for converting the pain and suffering, the loss of function, the loss of amenity and disability which an injured person has sustained, into monetary terms. Any process of conversion must be essentially artificial."**

[69] I turn now to general damages for pain, suffering and loss of amenities ("PSLA"). In **Wells v Wells** [1998] 3 All ER 481 at 507, H.L., Lord Hope of Craighead observed that:

> **"The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum, within the broad criterion of what is reasonable and in line with similar awards in comparable cases, as represents the court's best estimate of the plaintiff's general damages."**

[70] In **Thompson and another v Strachan and others** [2017] 1 BHS J. No. 108, a decision of this Court, I stated at para 30 that:

> **"It is obvious that damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the plaintiff's necessary medical care, operations and treatment.**

[71] It is not disputed that Ms. Turnquest was an avid cyclist and the bicycle was her main mode of transportation on a daily basis. She even cycled to downtown Nassau from time to time. Since the accident, she has been both physically and mentally unable to do so mainly because of the injuries which she suffered.

[72] Both Counsel relied on The Judicial College Guidelines (formerly the JSB Guidelines) 2018 ("the UK Guidelines") for an appropriate award under this head. Under knee injuries, there are two degrees of injury: (a) severe and (b) moderate. Learned Counsel Mr. Hunt argued that Ms. Turnquest's injury to her knee is best categorized as a moderate injury falling within para M(b)(ii) of the UK Guidelines, the range of award is up to £12.050 or BSD$15,564,82. According to Mr. Hunt, the most instructive decision is **Averali v Ageas Services (UK) Limited** 29 July 2016. In that case, the claimant, aged 65, developed moderate pain in the right knee the day after the accident but, at the time of the medical report, some 3 months after the accident, it was reported as severe. The claimant also developed moderate pain in the neck and lower back which had not improved at the time of the medical report. The claimant was awarded £6,800 with an inflated value of £7,373.12 or the equivalent of BSD$9,522.29.

[73] Mr. Hunt submitted that the injuries complained of by Ms. Turnquest are not as severe as those in **Averali** and therefore a reasonable assessment for PSLA would be BSD$8,500.00.

[74] Learned Counsel Mr. Turnquest submitted that Ms. Turnquest's knee injury should be classified as "severe" and she should be awarded damages for both knees in the sum of BSD$90,000.00.

[75] On the UK Guidelines, in **Scott v The Attorney General and Another** [2017] UKPC 15, a case from this jurisdiction, the issue before the Board was what is the proper approach to the assessment of general damages for PSLA; in particular whether damages assessed by reference to the UK Guidelines should be adjusted upwards to reflect the higher cost of living in The Bahamas. In delivering the Opinion of the Board, Lord Kerr stated at paras 25, 28 and 29:

> **"25. The Bahamas must likewise be responsive to the enhanced expectations of its citizens as economic conditions, cultural values and societal standards in that country change. Guidelines from England may form part of the backdrop to the examination of how those changes can be accommodated but they cannot, of themselves,**

provide the complete answer. What those guidelines can provide, of course, is an insight into the relationship between, and the comparative levels of compensation appropriate to different types of injury. Subject to that local courts remain best placed to judge how changes in society can be properly catered for. Guidelines from different jurisdictions can provide insight but they cannot substitute for the Bahamian courts' own estimation of what levels of compensation are appropriate for their own jurisdiction. It need hardly be said, therefore, that a slavish adherence to the JSB guidelines, without regard to the requirements of Bahamian society, is not appropriate. But this does not mean that coincidence between awards made in England and Wales and those made in the Bahamas must necessarily be condemned. If the JSB guidelines are found to be consonant with the reasonable requirements and expectations of Bahamians, so be it. In such circumstances, there would be no question of the English JSB guidelines imposing an alien standard on awards in the Bahamas. On the contrary, an award of damages on that basis which happened to be in line with English guidelines would do no more than reflect the alignment of the aspirations and demands of both countries at the time that awards were made for specific types of injury.[Emphasis added]

28. It is likewise not to be assumed that the Court of Appeal decided that it need only apply the JSB guidelines to arrive at the appropriate amount, without regard to local economic conditions and the expectations of citizens of the Bahamas. As has been observed at para 25 above, if JSB guidelines happen to coincide with what is regarded as appropriate for the Bahamas, there is no reason that they should not be adopted….

29. The Board is not in a position to say that the choice of the Court of Appeal to order that general damages should be in line with the JSB guidelines involved the application of a wrong principle of law or resulted in an inordinately low award. As has been said (at para 25 above), this is primarily a matter for Bahamian courts, familiar with local conditions and the hopes and aspirations of the society which they serve".

[76] It is therefore incumbent on the Court not to slavishly adhere to the UK Guidelines unless those guidelines happen to coincide with what is regarded as appropriate for The Bahamas. If they are, then there is no reason why they should not be adopted. The guidelines can provide an insight but they cannot substitute for our own estimation of what levels of compensation are appropriate for this jurisdiction.

[77] I shall therefore look at the UK Guidelines because, until we develop our own jurisprudence, they are useful. I shall also look at a few cases from this jurisdiction

(not necessarily the same injuries) to assist me in arriving at an award which is fair and reasonable.

[78] In **Shuvon Adderley v Dr. David Barnett** (2007/CLE/gen/00273), the Plaintiff claimed damages for a knee injury. Evans J (as he then was) awarded her damages of $60,000 for PSLA. Though Ms. Adderley's injury was similar to that of Ms. Turnquest, her injury was only to one knee whereas Ms. Turnquest's injuries are to both knees. **Adderley** was decided in 2007.

[79] In **Michelle Russell v (1) Ethylyn Simms and (2) Darren Smith** [2008/CLE/gen/00440]**,** Ms. Russell suffered serious injuries as a result of a traffic accident. The injuries included (i) fracture of the humerus; (ii) compound fracture of the right tibia; (iii) fracture of the sternum with internal hemorrhaging; (iv) fracture of the pelvis and sacrum arm broken in three places; (v) fracture of the 5th and 6th rib and (vi) depression. In essence, the fractures were to her chest, arms, legs and pelvic area. According to Dr. Barnett, "*Ms. Russell was fortunate to be alive as her injuries were life threatening and being obese and diabetic meant that her tissues will take longer to heal. She had surgeries in April 2005 and March 2006. She requires further surgeries all of which cannot be performed at one sitting. The further surgeries will require her to be incapacitated for probably nine months. She will have some degree of pain for the rest of her life. Sexual intercourse for her is likely to be painful and she is unlikely to be able to have children due to the injury in the pelvic region and the pain.*" Sir Michael Barnett CJ awarded Ms. Russell $150,000.00 for PSLA.

[80] In **Thompson and another v Strachan and others** [supra], Mr. Thompson, a pedestrian, was hit by a truck. He suffered severe injuries including supracondylar fracture of the left humerus and soft tissue injury to the left thigh, ulnar nerve injury, carpal tunnel syndrome, frozen left shoulder, injury to left elbow and reduced flexion of the thumb. He was 60 years of age at the date of the accident. This Court awarded him $75,000 for PSLA in 2017.

[81] Based on the UK Guidelines for knee injuries, I am of the opinion that Ms. Turnquest's knee injury can be categorized as "severe" under (M)(a)(ii) which provides that the award for PSLA is £44,470 to £59,490. It states that these awards should be given with an uplift of 10% (£48,920 to £65,440):

> **"(M) Knee Injuries**
>
> **(a) Severe**
> **(i)**
>
> **(ii) Leg fracture extending into the knee joint causing pain which is constant, permanent, limiting movement or impairing agility, and rendering the injured person prone to osteoarthritis and at risk of arthroplasty."**

[82] The UK Guidelines state that the level of the award within the bracket will be affected by the following considerations namely (i) the presence and extent of pain; (ii) the degree of independence; (iii) depression and (iv) age and life expectancy. I bear these factors in mind.

[83] Now, the only general principles which can be applied are that damages must be fair and reasonable, that a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and that, although it is impossible to standardize damages, an attempt ought to be made to award a sum which accords "*with the general run of assessments made over the years in comparable cases*": **Bird v Cocking & Sons Ltd** [1951] 2 T.L.R. 1260 at 1263, per Birkett LJ. It is important that conventional award of damages are realistic at the date of judgment and have kept pace with the times in which we live: **Senior v Barker & Allen Ltd** [1965] 1 W.L.R. 429. There has been a gradual rise over the years of the "conventional" sum. Salmon LJ pertinently had observed in **Fletcher v Autocar and Transporters Ltd** [1968] 2 Q.B. 363 at 364 that "*the damages awarded should be such that the ordinary sensible man would not instinctively regard them as either mean or extravagant but would consider them to be sensible and fair in all the circumstances*." The award of damages is not meant to be a windfall but fair and reasonable compensation for the injuries suffered.

[84] So, using the English Guidelines in conjunction with our jurisprudence, I am of the considered opinion that the sum of $75,000.00 represents a fair and reasonable award for PSLA. I also gave a little uplift to take care of the costs of living and medical care in The Bahamas.

Future medical expenses – knee replacement surgery

[85] Ms. Turnquest claims $70,000.00 as the cost for knee replacement surgery for both knees. By letter dated 26 June 2017, Dr. Gibson confirmed that Ms. Turnquest requires a Total Knee Replacement Arthroplasty of the left knee and **possibly also the right**. He noted that she has had surgical repair to her left knee but acknowledged that there is progressive deterioration of the joint accompanied by pain. This has resulted in accelerated deterioration to her right knee as well. On his referral, Ms. Turnquest went to Dr. Dane Bowe for evaluation and treatment on 22 October 2017. Dr. Bowe issued his evaluation, indicating that Ms. Turnquest requires total left knee replacement at a cost of $30,000.00 - 35,000.00 per knee.

[86] Dr. Barnett also confirmed that Ms. Turnquest would benefit from having both knees replaced and reaffirmed the reasonableness of Dr. Bowe's cost estimate per knee.

[87] Mr. Hunt submitted that the need for the reconstructive surgery came about as a result of Ms. Turnquest's pre-existing degenerative osteoarthritis. Therefore, says Mr. Hunt, Mr. Rahming ought not be made to bear the cost of surgery required by Ms. Turnquest's pre-existing condition.

[88] On the other hand, Mr. Turnquest contended that the reason for the future reconstructive surgery was because the reattachment from the first surgery she had, had loosened, which is often a natural result. In support of this, he relied on the evidence of Dr. Gibson that staples tend to fail at attaching ligaments to bones.

[89] Therefore, the question of whether Ms. Turnquest is entitled to the cost of the future surgery depends on whether its need was brought on by her pre-existing osteoarthritis, as Mr. Hunt suggested, or by the overtime reversal of the first

surgery, as suggested by Mr. Turnquest. I prefer Mr. Turnquest's position and the cumulative evidence of Ms. Turnquest and Dr. Gibson in support of the same that although, immediately following the surgery, she was fine, ultimately, the reattachments began to loosen and that this happens very often. I accept Ms. Turnquest's evidence that although she was never pain free after the surgery, the pain was initially bearable, which was why at her initial assessment, she was declared to be free of pain, but shortly after the assessment, she began to feel the pain again. Dr. Gibson's evidence was that x-rays revealed loosening of the hardware and significant degenerative disease in the knee. Under cross-examination, Dr. Gibson said that the reason why Ms. Turnquest was okay at her initial assessment (5 months after the surgery but was not thereafter) is because "*as time progresses and the loosening of the hardware collapse to virus deformity again, because there was nothing --- definitely the repair on the outside was not holding a hundred per cent.*" He said, unfortunately, the only thing available to doctors to attach ligaments to bones in PMH is staples which he does not use in his private practice since they tend to fail.

[90] I believe that this would have occurred whether or not Ms. Turnquest had pre-existing degenerative osteoarthritis in her knees. No doubt, the accident contributed to the pain. Put another way, had it not been for the accident, she would not have required reconstructive surgery. Therefore, I find that she is entitled to damages for the reconstructive surgery. However, since the issues with Ms. Turnquest's non-traumatized knee was brought on by the favouring of that knee and failure to mitigate loss by using a crutch, cane etc., she should be awarded for reconstructive surgery only for her traumatized knee, and not for both knees.

[91] It is well established that losses that are too remote are not recoverable. The test for remoteness in tort was set out in **Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd**, commonly known as **Wagon Mound (No. 1)** [1961] UKPC 2 - whether the damage was of a kind that was foreseeable. Further, plaintiffs cannot recover for losses that could have been avoided by taking

reasonable steps to mitigate further loss. What is considered reasonable steps to mitigate is a question of fact and not law.

[92] Under cross-examination, Dr. Barnett stated that the reason patients are given support in the form of canes, crutches, a walker etc. is to avoid injury to the non-traumatized leg. Therefore, I think the non-traumatized knee becoming non-functional was not a loss that was foreseeable from the accident. Rather, it was a loss consequential from the injury to the traumatized knee and more particularly, failure to prevent that loss by using a cane, crutch, walker etc. Using a cane is a reasonable step to avoid or at least mitigate the effects of straining the non-traumatized knee. Therefore, the loss of functionality to the non-traumatized knee is not a recoverable loss.

[93] For these reasons, I would limit the cost of replacement surgery to one knee which is $35,000.00.

The outcome

[94] The outcome for Ms. Turnquest will be **reduced by 75%** to reflect that she contributed to the accident.

Special damages awarded: (25% of $21,120.00)	$5,280.00
General Damages for pain, suffering and loss of amenities (25% of $75,000.00)	$18,750.00
Cost of Knee Replacement (25% of $35,000.00)	$8,750.00
TOTAL	**$33,320.00**

[95] The total global sum awarded to Mr. Turnquest will be $33,320.00 with interest at the rate of 6.25% per annum from the date of judgment to the date of payment.

Costs

[96] In civil proceedings, costs are always discretionary: see Order 59, rules 2(2) and 3(2) of the Rules of the Supreme Court ("RSC") and section 30(1) of the Supreme Court Act.

[97] As a general rule, the successful party is entitled to his costs. But that does not preclude a judge from departing from this normal practice. However, a judge ought to give reasons when deciding to make an unusual order as to costs: see **Eagil Trust Co Ltd v Pigott-Brown and Another** [1985] 3 All ER 119 at 122 - per Griffiths LJ.

[98] In the present case, neither party was entirely successful. This is a sad case. Ms. Turnquest is now in her early 80's and retired. In my opinion, an appropriate cost order would be that each party should bear their own costs.

Dated this 14th day of February 2022

Indra H. Charles
Justice