

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2019/CLE/gen/01040

BETWEEN

THEODORA THERESA CLARKE

Plaintiff

AND

COMMONWEALTH BREWERY LIMITED

(d.b.a. Burns House and also d.b.a. 700 Wines & Spirits)

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

**Appearances: Cheryl Whyms for the Plaintiff
Audley Hanna Jr. with Fola Swain for the Defendant**

**7 and 11 February 2022, 1 June 2022, 19 November 2022, 5 December 2022 and 6
January 2023**

JUDGMENT

WINDER, CJ

This is a personal injury claim where the plaintiff (Clarke) claims that she suffered loss and injury as a result of a fall at work on 5 August 2016. Clarke asserts that the fall was as a result of the negligence of her employer, the defendant (CBL).

[1.] Clarke's case is that she was at work at CBL's warehouse, where she was employed as a customer service representative, when she fell over a box in the walk way. Clarke says that the box was left sitting in the walkway, by a servant and or agent of CBL, exposing her and other employees to the risk of injury.

[2.] Clarke says that the injury was as a result of the negligence and or breach of statutory duty imposed by the Health and Safety at Work Act (the Act). Clarke particularizes her claim at paragraphs 4 and 5 of her Statement of Claim (Re-Amended) as follows:-

...

4. The said injury resulted from CBL's negligence/Breach of Statutory duty imposed by Section 4(1) of the Health and Safety at Work Act ("HSWA").
PARTICULARS OF NEGLIGENCE/BREACH OF STATUTORY DUTY
 - a) Failing to maintain the warehouse in a safe condition so as to avoid risk of injury (in breach of Section 41 and (2)(d) and (e) of the HSWA);
 - b) Failing to provide/maintain a safe working environment for Ms. Clarke so as to prevent risk of injury (in breach of Section 4(1) and (2)(d) and (e) of the HSWA):
 - c) Placing/causing the box to be placed in the walkway.
 - d) Failing to warn Ms. Clarke of the presence of the box in the walkway.
5. By reason of the matters aforesaid Ms. Clarke suffered personal injury loss and damage. ...

[3.] CBL denied the claim in a Defence (Amended), which pleaded at paragraphs 3, 4, 5, 6, 7, 8 and 11 as follows:

...

3. Paragraph 2 of the Amended Statement of Claim is denied as pleaded. In particular, it is denied that the Defendant was in any way negligent whether

by its servants, agents or otherwise and the Plaintiff is put to strict proof of, inter alia:

- (i) circumstances in which any box which may have been in the area in question was so left; and
 - (ii) whether she took reasonable steps to ensure her own safety having regard to her knowledge of her place of work and in particular of the fact that, as a warehouse, boxes were generally expected to be in the workspaces.
4. With respect to the National Insurance Report referenced at paragraph 2 of the Amended Statement of Claim, it is admitted that such a report was made; however, the Defendant avers that this report was made based upon information provided to the Defendant by the Plaintiff and is not intended to be an admission as to the plaintiff's chronology of events generally and specifically is not intended to be an admission as to any act or omission on the part of the Defendant.
5. Further, with respect to paragraph 2 of the Amended Statement of Claim the Plaintiff is put to strict proof that:
 - i) that the alleged trip and fall actually occurred;
 - ii) that the alleged trip and fall occurred in the manner claimed; and
 - iii) that the alleged trip and fall occurred in the location that the Plaintiff alleges that it occurred.
6. Without prejudice to the generality of the foregoing, the Defendant contends:
 - i) more than adequate lighting was provided throughout the warehouse which would have made any box, the presence of such box being not admitted, clearly visible;
 - ii) the premises are an industrial workspace wherein items are frequently packed and unpacked. All employees working at the warehouse are aware of the presence of boxes and are aware that they should take reasonable care in traversing the premises;
 - iii) its employees were at regular intervals provided with instruction as to the proper manner in which to organize the warehouse and the correct manner in which to traverse the warehouse;
 - iv) in all of the circumstances, the Defendant operated a safe system of work.
7. The Defendant makes no admission with respect to paragraph 3 of the Amended Statement of Claim and the Plaintiff is put to strict proof that she was acting in the course of her duties at all material times.
8. Paragraph 4 of the Statement of Claim and its particulars are denied. In particular the Defendant avers that:

- a) at all material times it ensured that its warehouse was maintained in a safe condition;
- b) at all material times it ensured that there was a safe work environment for the Plaintiff and its other employees, inclusive of providing proper and adequate training as to the manner in which the warehouse should be organized and traversed;
- c) at no time did it place or cause to be placed a box in any walkway; and
- d) to the extent that there was a box in the area in question, the Plaintiff would reasonably have been expected to observe and avoid the box having regard to the nature of the working environment and her experience on the premises.

...

11. Further, with respect to Paragraph 5 of the Amended Statement of Claim and its particulars of injury described therein, the Defendant maintains that the alleged incident, and any injuries which may have arose therefrom, was not due to any negligence on its part. Rather, the defendant avers that if such an incident in fact occurred, which is not admitted, the same would have been wholly caused by the Plaintiff or, in the alternative, substantially contributed to by the Plaintiff's own negligence.

PARTICULARS

The Plaintiff was negligent in that she:

- a) traversed the relevant area in a manner which was unsafe to do;
- b) failed to keep any or any proper lookout while traversing the relevant area;
- c) failed to traverse the relevant area in a manner exhibiting reasonable care and concern for her safety.
- d) traversed the relevant area in question in a manner which was negligent in all the circumstances, to wit: navigating the area in such a manner which would have resulted in any tripping.

Evidence

[4.] At trial, Clarke gave evidence and called Corise T Rolle (Rolle) and Dr Clyde Munnings as witnesses. Dr Clyde Munnings gave expert evidence. CBL called Carolyn King (King) and Dr David Barnett as witnesses in their case. The evidence of Drs Munnings and Barnett were in the nature of expert evidence.

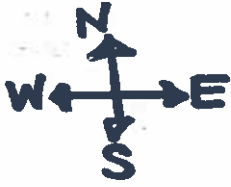
[5.] Clarke's witness statement filed on 21 July 2021 was admitted into evidence as her evidence-in-chief. Clarke was subject to cross-examination and was re-examined.

[6.] Clarke says that she had been employed with CBL as a customer service representative for 28 years when her employment ended on 25 July 2019. On 5 August 2016, at 11:15am, she went into the warehouse, at work, to check on a customer's order. As she was leaving the area she tripped and fell over a box that she says was in the walkway. Clarke says that when she tripped she fell sideways and tried to break the fall using her left hand. As she was unable to break the fall her left side struck the wall forcefully causing bruising from her left shoulder down to her knee. She experienced immediate pain and discomfort and was referred to Kirk Johnson, CBL's safety officer for assistance. Ointment was placed on her neck and shoulder. Rolle and King were present when the fall took place.

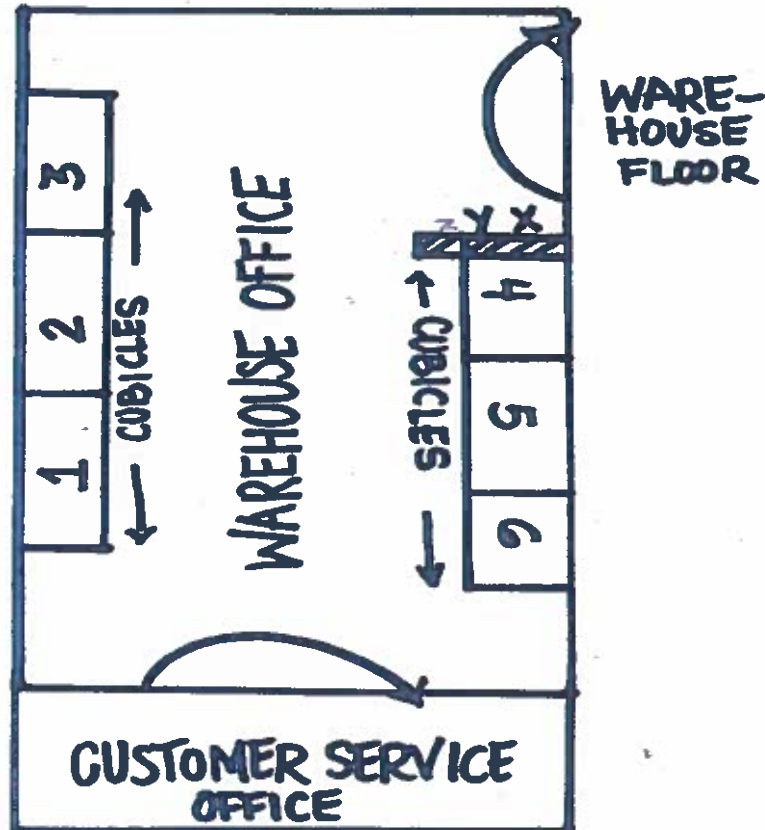
[7.] Clarke says that she remained at work for the rest of the day but the pain persisted. The following day she attended the Walk-In Clinic as a result of the extreme pain she was experiencing. She was given pain medication and muscle relaxants.

[8.] On Tuesday 6 August she attended CBL's doctor and received an injection for the pain. The pain persisted and she later attended Doctors Hospital. Since that time she has been attended to and treated by various physicians, including Dr Clyde Munnings, Dr Dane Bowe, Dr Ian McDowell and Dr Edwin Demeritte.

[9.] Clarke relies on a sketch plan of the warehouse office which is appended to her witness statement. That sketch is shown below:



"EXHIBIT JTC3"



According to the evidence, the letter "Z" on the sketch represents the location of the box, the letter "Y" represents her (Clarke's) position and the letter "X" represents Rolle's position just prior to the fall.

[10.] When cross examined, Clarke indicated that the sketch of the area attached to her witness statement was drawn by Rolle, who witnessed the fall. Rolle was in charge of the warehouse office. Rolle is no longer an employee of CBL. Clarke says that her usual work space is not depicted on the plan, as customer service is on the other side of the warehouse office. Rolle's cubicle is identified as No. 4 on the map. The slanted lines in front of cubicle 4 is a countertop. She went to the countertop side of cubicle 4 and spoke to Rolle over her cubicle. She walked out of the customer service office and went to the

counter/cubicle prior to the incident. When asked *when she left the Customer Service office and walked up to speak with Rolle over the countertop she would have had to have passed the box*, Clarke responded that she did not see anything there.

[11.] Clarke says that at some point Rolle left the cubicle and walked into the warehouse to check the order. She was in the warehouse for 5-6 minutes. When Rolle came back she was standing at the point marked X and she (Clarke) was at Y. Rolle was in the back of her. Clarke says that she stood in the Y position for the whole time. She was facing the west, facing the Customer Service office and looking straight for the entire 5 minutes. Only she and King were in the area. She did not see anyone place the object there. Clarke says that it was a small box but she could not give any particulars about the box.

[12.] Clarke said that boxes were not usually in that warehouse office area and that in the 8 years since that area was the warehouse office she didn't remember seeing any warehouse type objects in that office area. Going into the warehouse was part of her job so she went there every couple of minutes to check on orders. According to her, while she was talking to Rolle they were both looking straight (south) towards the countertop and not looking at each other, just glancing. When she turned to leave she could not remember how much steps she took, if any, prior to encountering the box. The object, she says, would have been directly in front of her. When it was suggested that *if she was travelling in the direction of object Z, she would have fallen forward*, she said that she could not say and that she fell sideways.

[13.] Clarke denied the suggestion that the object Z was against the countertop. She then said that it was *"probably not right at the countertop; but, I mean, close to the countertop."* Clarke says that X and Y are in a walkway *"because we have to walk that way to go to the warehouse"*. Clarke nonetheless agreed that the object Z was a fair distance away from the entrance to the warehouse. She did deny the suggestion that if someone placed object Z in this position, they would be placing it out of the way.

[14.] Clarke admitted that she had issues with high blood pressure and with her sugar but that only the high blood pressure would be out of control from time to time. She says that she had some back issues from sitting in the office chair all day and which also caused a stiff neck. Clarke also admitted that in June of 2009 she attended the emergency room of Doctors Hospital complaining of severe back pain but says that she was having problem with a kidney stone which was causing the pain. She also admitted that she had been experiencing back pain in January 2016 prior to the accident.

[15.] Clarke accepted that her employment did not come to an end until 3 years after the fall. She was paid on days that she was unable to work. She was out of office for a significant number of days. Her job was mainly on the phone and with the computer and dealing with the warehouse and customers. Clarke accepted that she was cleared to return to work on 16 July 2019 by Dr Demeritte but says that when she did return she was asked to go back home by human resources. Clarke also accepted that the National Insurance Board had denied her claim in 2018 because it was not satisfied that she had either a condition or a serious condition. Clarke says that she appealed the determination but did not receive a response to her appeal.

Rolle's evidence

[16.] Rolle's witness statement filed on 21 July 2021 was admitted into evidence as her evidence-in-chief. Rolle was subject to cross-examination and was not re-examined.

[17.] Rolle says that at the time she gave evidence she was unemployed having worked with CBL for 24 years when her job was made redundant on 11 December 2020. She worked with Clarke for over 10 years at CBL's warehouse on JFK Drive.

[18.] On 5 August 2016, Clarke came into the warehouse office, to her, to check on a customer's order as was the usual practice. She and Clarke were standing along the counter near the area marked X and Y on the sketch. A box was immediately to the west of where Clarke was standing at the area marked z on the sketch plan. The box was about 12 inches high and 9 inches wide and 12 to 14 inches long. It had been placed there by a member of staff earlier that day. The box would not have usually been in that

spot. As Theresa turned to leave the area where they were standing, she tripped over the box and fell.

[19.] Under cross examination Rolle stated that Clarke's attorney Cheryl Whyms drew the sketch which is before the court. She (Clarke) drew a layout of how the office was laid out and sent it to attorney Cheryl Whyms. She confirmed that the layout before the Court was accurate. Rolle says that she normally works in the warehouse office at Cubicle No. 4. Above cubicle No. 4, there is a rectangle with lines drawn through them which represents a countertop, almost like how a bar is set-up.

[20.] The box was a standard size box, about the size of a beer box or wine box. She didn't know the exact measurements. It's a usual looking box. If you're standing up right to the countertop, you won't be able to see it. Rolle said that "*if you're not paying attention, you wouldn't notice it.*" She said that she could have seen it because she knew it was there. She says that she can't say that someone else would have seen it but she knew it was there so she would have looked out for it and could have seen it.

[21.] Rolle says that she could not say who placed the box there but that it was probably a "picker", someone who brings boxes into the warehouse. She also said that it was not unusual for boxes to be brought into the office and she would not be surprised to see boxes in the area.

[22.] Rolle says that CBL had a health and safety officer, and back then they were getting into keeping the office safe; but she could not say, for sure, if back then they were into safety like they are now. When she left, they were really into making sure the office was safe and everything was in its place but she cannot say it was that way back then in 2016.

[23.] Rolle says that her first interaction with Clarke was around 11:00 am when she came into the office to check on a customer's order. She was already standing at X when Clarke came over. She was facing her. She usually stands at the counter near to the printer and recording the picks there. At the countertop there is a picker log where they record every pick slip that comes into the warehouse. She was facing south towards

customer service. The countertop is used as a form of desk. At the time of the incident she could not recall if she came from another area in the warehouse or from the cubicle.

[24.] Rolle said that she knew that the box was there from the picker brought it into the office. It could have been her who asked him to bring it into the warehouse office for some reason or it could have been a manager. Rolle initially said that the box was out of the way and against the countertop. She then later said she wouldn't say it was out of the way, just against the countertop. She couldn't say how long she was talking to Clarke or how far apart they were. She was busy recording picks so she couldn't say how Clarke turned. When confronted with the witness statement she appeared to want to adjust her viva voce evidence.

[25.] Rolle admitted that she was not looking directly at Clarke as she left and tripped over the box. She saw her on the floor, but didn't actually see her fall. She was not sure if she was recording the picks. She knows that Clarke fell; she was on the floor. Rolle admitted that she couldn't really say Clarke fell over the box just that it was there.

[26.] In response to a follow up question from Clarke's Attorney, Mrs Whyms, Rolle stated that if the box was up against the partition it was under the countertop. She could not say how far under.

King's evidence

[27.] King's witness statement filed on 20 August 2021 was admitted into evidence as her evidence-in-chief. King was subject to cross-examination but was not asked any questions. Her evidence was therefore unchallenged.

[28.] King says that she is employed with CBL as an accountant clerk at the main office situated on Thompson Blvd. Between 2016 and 2019 she was a warehouse clerk. At the time of the incident involving Clarke, King says that she was present but in the midst of working and did not directly witness the fall. Upon hearing the commotion she peered

over her cubicle wall and noticed a medium sized box about the size of a case of beer in the vicinity and that Clarke appeared to be injured.

[29.] According to King, the warehouse is a very active and fluid environment, and so she was always aware of the necessity to be vigilant and taking care to avoid personal hazards, particularly having regard to the nature of the work environment.

[30.] King says that during her tenure with CBL she has always known it to take considerable care for the safety and well-being of its employees. Employees are required to take reasonable common sense approaches to ensure their own safety and that of their coworkers.

Issues

[31.] The principal issue for resolution in this dispute is whether CBL has breached its duty to provide Clarke with a safe system and if so, what is the measure of damages for the injury and damages sustained.

Law, Analysis and Discussion

[32.] This is a claim in occupier's liability which alleges negligence as well as the breach of CBL's duties under the Act. Occupier's liability does not impose a strict or absolute duty on an occupier, such as the defendant, to prevent any and all damage to an invitee or licensee. The state of the law was ably put by **Sawyer J.** (as she then was) in the case of **Cox v Chan [1991] BHS. J. No. 110**. At paragraph 21, of the decision, **Sawyer J** states:

“[I]t is clear from the decided cases, including *Indermaur v. Dames*, that the duty of care which a person like the defendant owes to a person like the plaintiff is not an absolute duty to prevent any damage to the plaintiff but is a lesser one of using reasonable care to prevent damage to the plaintiff from an unusual danger of which the defendant knew or ought to have known and, I may add, of which the plaintiff did not know or of which he could not have been aware. If it were otherwise then the slightest alleged breach of such a duty would lead to litigation and could, perhaps, hamper the progress of quite lawful and needful businesses.”

[33.] Section 4 of the Act provides:

4. (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.

(2) Without prejudice to the generality of an employer's duty under subsection (1) the matters to which that duty extends include in particular —

- (a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;
- (b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
- (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;
- (d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;
- (e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work. "It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees."

[34.] **Charles J** (as she then was), in the case of ***Adrianna Thompson v Clearview Management Ltd. d/b/a Sandals Grande Emerald Bay [2022] 1 BHS J. No. 13*** discussed occupiers liability in The Bahamas in the context of the Act. She states at paragraphs 19-21 as follows:

(19.) In The Bahamas, the liability of occupiers is governed by common law principles as there is no statute governing Occupiers Liability. In *Wilson and Clyde Coal Co. Ltd v English* [1938] A.C. 57, the House of Lords decided that *Wilson & Clyde Co Ltd*, as an employer, had a duty of care to ensure a safe system of work

and this duty could not be fully delegated to another employee. Thus, the employers always remain responsible for a safe workplace for their employees and are vicariously liable for any negligence of another. This duty includes three aspects; providing proper materials, employing competent workers and providing valuable supervision.

(20.) In *Hall v The Ruffco Holding Corporation Bahamas Ltd* [2008] 2 BHS J. No. 15, in considering the meaning of common law negligence, Adderley J (as he then was) stated at paras 24 and 25 of the Judgment that:

“24. When applied within the context of employer and employee, at common law the employer’s duty of care is that implied in the rule of common employment as set forth in *Wilson & Clyde Coal Company Ltd v. English* [1938] AC. 55 [“Wilson & Clyde Coal Company”] cited by counsel for the plaintiff where Lord Wright at p. 84 described the employer’s duty as follows:

“The obligation is threefold, as I have explained, i.e. “the provision of a competent staff of men, adequate material and a proper system and effective supervision.”

25 Halsburys Laws of England Volume 20 1911 edition at paragraph 234 states which is still good law:

“It is an implied term of the contract of service at common law that a servant takes upon himself the risks incidental to his employment...”

...

Apart from special contract or statute therefore, he cannot call upon his master, merely upon the ground of their relationship of master and servant, to compensate him for any injury which he may sustain in the course of performing his duties. ...

“The master does not warrant the safety of the servant’s employment; he undertakes only that he will take all reasonable precautions to protect him against accidents...” In *Smith v. Baker & Sons* [1891] A. C. 325 [“Smith v. Baker”] at p. 360 Lord Herschell states: “Where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible he no doubt voluntarily subjects himself to the risks inevitably accompanying it and cannot, if he suffers, be permitted to complain that a wrong has been done to him even though the cause from which he suffers might give to others a right of action.” [Emphasis added]

(21) It is a well-established legal principle that where a person holds a particular position he will be expected to show the degree of knowledge normally expected of a person in that position and to guard against risks normally incidental to that position. Thus, Sandals could reasonably expect Ms. Thompson to appreciate and

to guard against special risks and dangers inherent and ordinarily incidental to the tasks she was engaged to perform.

[35.] The law also expects that employees will exercise care for their own safety in the context of the particular work place surroundings. In the case of *Sturup v. Resorts International (Bahamas) 1984 Ltd. [1991] BHS J. No. 103. Hall J* (as he then was) stated at paragraphs 53-55 as follows:

(53.) The mere fact that an injury – even a severe injury – is sustained by a person on the premises of another does not, without more, establish negligence. Even in the work place, in my judgment, an employer would have to be in breach of his common law or statutory duty or there would have to be some unusual dangers (as in *Jennings v. Cole [1949] 2 All ER 191*) to ground liability for injuries so sustained.

(54.) Each person, even while performing his duty as an employee, has to assume a measure of responsibility for his own safety and, by way of example, the plaintiff upon her daily circuit of the kitchen would have to be alert to several potential hazards – not from any breach of duty on the part of the defendant – but because such hazards would exist in the kitchen as would not exist at the Plaintiff's work station or in other parts of the hotel and only from the mere fact that it is a hotel kitchen.

(55.) In my judgment, the plaintiff has failed to show that her injury was caused other than by the style of shoe she chose to wear having become caught in a mat properly placed by the Defendant for the safety of its workers.”

[36.] Clarke, in her submissions, argues that:

(2.) Ms. Clarke was employed with CBL for more than 29 years when she tripped over a box left in the walkway of the Defendant's warehouse office. She alleges that:

- i. On the 5th of August 2016 while checking on a customer's order in the warehouse office at work, she tripped over a box left in the walkway and fell injuring herself.
- ii. That the box was left in the walkway by CBL's servant or agent who was negligent and CBL is liable for the negligence of its employee in the circumstances.
- iii. Further or alternatively, CBL breached its statutory duty under Section 4 of the Health and Safety at Work Act to ensure (in so far as reasonably practicable) her health and safety at work.

...

(15.) What operates at the forefront of this submission is that the relevant standard of proof of this fact is the balance of probabilities. In other words, certainty is not

required, the lesser standard of balance of probabilities is. As such, if this court is satisfied that it was more probable that Miss Clarke tripped and fell over the box, than not, Ms. Clarke has discharged the burden of proof in respect of this fact.

(16.) It is submitted that the evidence of Ms. Clarke, CBL, Corise Rolle and Carolyn King when taken together prove on the balance of probabilities that Ms. Clarke slipped and fell over the box as she alleged.

[37.] Let me begin by saying that it was difficult to accept much of Clarke's evidence which contradicted her own witness. For example, Clarke says that it was unusual to find boxes in the warehouse office which was contrary to what Rolle had to say about it. Additionally, she says that Rolle left her standing and went into the warehouse for 5 minutes or so to check on her query while Rolle's evidence is that she stood at the countertop for the entire time Clarke was there. I accepted the evidence of Rolle where they differed. Clarke was guarded in giving her evidence and did not present as entirely truthful. It is likely that Clarke tripped on the box, albeit I have considerable difficulty in reconciling the motion of her tripping on a box in front of her and falling sideways hitting a wall which was on the other side of Rolle.

[38.] Whilst the evidence of Rolle was generally more acceptable than Clarke's it was clear that she did not want to say anything to hurt Clarke's case by *walking back* some of her evidence when pressed, which made me somewhat cautious about how to treat with her testimony.

[39.] At the heart of Clarke's pleaded claim is paragraph 2 of the Re-Amended Statement of Claim, where it states that she "*...tripped over a box that was left sitting in the walkway and fell injuring herself.*" I am not prepared to find however, that on balance, the box was *left sitting* in a walkway as alleged by Clarke. I find, on the evidence which I accepted, the box was placed up against the counter at Rolle's cubicle #4, beneath a protruding countertop and out of the walking path of staff. I therefore wholly accepted CBL's submission on this, where it stated:

"Accordingly, the lynchpin which binds the instant action was that a box was left by the Defendant in an area designated to be traversed by foot traffic. While in any event, the Defendant's position was that this would not be an unusual hazard in a workplace such as that in which the Plaintiff worked, it became clear during Ms.

Rolle's evidence that there was never in fact a box in a walkway. All reports suggesting that a box was in a walkway were based entirely on the Plaintiff's accounting of events. Meanwhile, it is accepted that there were only two individuals who would actually have seen the box and the immediate aftermath of the alleged incident being the Plaintiff herself and Ms. Rolle. In this regard, Ms. Rolle was entirely resolute that the box in question was certainly not in a walkway but rather tucked away under a shelf. It is respectfully submitted that the testimony of Ms. Rolle is, in fact, entirely dispositive of the pleaded case of the Plaintiff."

[40.] The location of the box also leads me to find that there was no unusual danger in the placement of the box. Besides not being in a walkway, it was placed under the lip of the countertop and against the partition. In fact, Clarke's Counsel makes the point forcefully in her questioning of Rolle when she stated:

"...I'm asking if the box would have been out of the walking path of someone proceeding to the left. Because if it was all the way underneath the counter, it would not have been in the walking path..."

As indicated, I am content to find that the box was all the way underneath the counter, and would not have been in the walking path of Clarke.

[41.] The evidence before the court, from Clarke's own witness, Rolle, was that there was nothing unusual about the presence of boxes in the warehouse office. Boxes of products were regularly brought into the warehouse office so that they could cross-reference orders and deal with any customer queries or complaints. In fact Rolle's evidence was that it was likely that she caused the box to be brought into the warehouse office. Whilst CBL clearly knew about the presence of the box, it was not an unusual danger for which Clarke had to be warned. I therefore accepted CBL's submission that the placement of the box, under the countertop, out of the walking path, was a sensible place to place a box in the circumstances of a busy warehouse office which deals actively in processing boxes of items.

[42.] Further, in as much as boxes were not unusually to be found in the warehouse office, it must be accepted that Clarke ought to have been alert to the fact that boxes could be present and govern herself accordingly. As Hall J stated in *Sturup v. Resorts*

International (Bahamas) 1984 Ltd, “each person, even while performing his duty as an employee, has to assume a measure of responsibility for his own safety”.

[43.] It would also appear, on Clarke's own case, that the presence of the box likely posed no danger, certainly not an unusual danger for which she was unaware. Her case is that a box was placed in the walkway, which she had to have walked passed on her way to the counter where Rolle was standing. However, in walking to the counter she failed to notice the box. Putting aside my finding that the box was not in the walkway, having walked pass the box the first time, it is difficult for her to assert that it was an unusual situation for which she was unaware. I am satisfied that Clarke simply forgot that the box, that she passed to get to her place in front of the counter, was still there. She has, in my view, failed to show that the accident was caused by any other means than her failure to keep a proper lookout as to where she was going.

[44.] In the circumstances I am not satisfied that Clarke, upon whom the burden lies, had proven that there has been a breach by CBL of its duties as alleged whether under the common law or under the Act. CBL, as the employer is not responsible for every injury on the workspace premises and the evidence (mostly unchallenged) before the Court was that CBL took their employees' safety seriously, had a health and safety officer, and encouraged staff to be aware of dangers inherent in a warehouse setting.

Conclusion

[45.] In all the circumstances, I am not satisfied that Clarke has made out her case against CBL for breach of its duty of care whether under the common law or under the Act. The issues of quantifying damages therefore does not arise.

[46.] Clarke's claim is therefore dismissed with costs to CBL to be taxed if not agreed.

Dated the 5th day of January 2024



Sir Ian R. Winder
Chief Justice