COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2018/CLE/gen/00119

BETWEEN

PAMELA GRAHAM

Plaintiff

AND

COST RIGHT NASSAU LIMITED

Defendant

Before:	**The Honourable Madam Justice Camille Darville Gomez**
Appearances:	**Mr. Edward B. Turner (now deceased) and Mr. Roberto Reckley and Ms. Tai Pinder for the Claimant**
	Mrs. Viola Major for the Defendant
Hearing Dates:	**4th, 5th, and 20th October, 2021**

Negligence – breach of duty of care – whether existing system was adequate or whether existing system was working to an extent where it could be said that defendant took all reasonable steps to discharge duty of care owed to claimants – whether constitutes an unusual danger

Negligence – contributory negligence- no evidence to support – Claimant not to be faulted for doing what is reasonable expected of a shopper.

RULING

Darville Gomez, J.

This action arose out of injuries sustained by the Claimant while shopping at Cost Rite when a package containing toilet tissue fell from a shelf onto her and caused her loss and damage. She alleged that the Defendant was negligent. The Defendant denied liability and claimed contributory negligence.

At the outset, I must apologize for the delay in the delivery of this Ruling which is due in part to the untimely death of the Claimant's original attorney in March, 2022 prior to the receipt of the transcripts. Therefore, a new attorney had to be engaged to draft closing submissions. Further, after the delivery of the ruling in April, 2024 and before it had been finalized the Court sought clarification of the special damages which took the new attorney some time to address. This clarification was recently obtained.

HELD: I find that the Defendant breached the duty of care owed to the Claimant and as a result she suffered loss and damage. Therefore, I award general damages to the Claimant in the sum of $12,000 and special damages of $19,545.17 for the reasons hereinafter set out.

Facts

1. The Claimant was a 63 year old female at the time of the alleged incident took place. Prior to the accident, the Claimant had been involved in a motor vehicle accident in 2014 and as a result had suffered from a number of pre-existing health conditions. She was deemed an invalid by the National Insurance Board in April, 2014.

2. On the 18th July, 2017 the Claimant entered the Defendant's establishment for the purpose of grocery shopping along with her sister, Joan Gomez when she alleged was struck by a large package containing toilet paper which caused her loss and injury.

Issues

3. The following issues must be determined by the Court in order for the Claimant to succeed in her claim for negligence:

    (i) Whether the Defendant owed her a duty of care.
    (ii) Whether the Defendant breached that duty of care.
    (iii) Whether the Defendant's breach caused her to suffer damage.

4. Before delving into these issues it is worth noting that the Court will not address the first issue because the Defendant at the outset accepted that it owed a duty of care to the Claimant as a customer entering its store.

5. Therefore, the only issues to be addressed are (ii) and (iii) both of which are denied by the Defendant.

6. The Claimant claimed in her Statement of Claim that the Defendant breached its duty owed to her by:

    (a) Failing to take any or any reasonable care to see that the Claimant would be reasonably safe;

    (b) Causing or permitting the said case of paper towels to be a hazard and a danger to persons lawfully using the said premises;

    (c) Failing so far as is reasonably practicable to properly stack the said case of paper towels to avoid causing injury to persons lawfully entering the same premises;

    (d) Failing to warn the Claimant adequately or at all of the hazardously stacked case of paper towels so as to enable the Claimant to avoid the same cases of paper towels.

7. The Claimant has summarized her claim for damages as follows:

(i)	Special damages	$28,649.14
(ii)	General damages	$33,000.00
(iii)	Future medical expenses	$72,464.00
	TOTAL DAMAGES	**$134,113.14**

8. The Claimant gave evidence on her own behalf, and also called four (5) witnesses including her sister, Joan Gomez, and four medical experts namely Rhoda Hanna, Physical Therapist, Dr. Valentine Grimes, Orthopedic Surgeon, Dr. Francis Williams, Family Medicine Specialist, and Dr. Nevilene Williamson – McPhee, Physician.

9. The Defendant called three (3) witnesses, Sharon Wilchombe, a former employee of the Defendant, Raymond Rolle, an employee of the Defendant and Dr. David Barnett, a medical expert.

The Evidence

The Claimant's Case

Pamela Graham

10. The Claimant testified that she went to Cost Right to shop with her sister, Joan and while in the last aisle on the western wall she approached the shelf where the Nature Valley granola bars were kept. She testified that she had not yet touched the granola bars when a jumbo pack of toilet tissue fell from the top of a very high shelf and hit her like "a blanket". She said that it hit her head, face, ear, nose, neck, shoulder and arms and caused her teeth to become shaky. Further, she said that it caused the shades that she was wearing to hit her in her eyes.

11. On the same day of the accident, she testified that she attended at the Princess Margaret Hospital where she was assessed and given medication before being discharged.

12. The day following her discharge, the Claimant testified that she attended at the South Beach Clinic because she was experiencing severe pain in her ear and eyes. She stated that her eyes her blurry, red and swollen. She was again prescribed medication and referred to an Ear Nose and Throat Specialist whom she visited. In addition, it was recommended by the physician that she visit a Physiotherapist.

13. The Claimant claimed that her life has not been the same since the day of the accident.

14. During cross examination the Claimant testified that she went to purchase a pack of Nature Valley granola bars which was located on the lower shelf. She swore that she did not remove the granola bars from the shelf because she did not have an opportunity to touch them before she was hit by the toilet paper. She testified that she took it off the shelf afterwards.

15. The Claimant also admitted to a number of pre-existing health conditions and that she was injured in a motor vehicle accident in 2014.

16. Ms. Graham also testified under cross examination that she had reported the incident to the Store manager after it had occurred. There was a video recording after the incident had occurred which had been tendered into evidence by the Defendant. In that video the Claimant was seen speaking with the Store Manager explaining that she had taken the box of Nature Valley granola bars from the shelf to examine it, when the package of toilet tissue fell on top of her. This story differed from her evidence-in-chief where she testified that she had not yet touched the granola bars. Further, she identified the package of toilet tissue seen in the video as the one that fell onto her, however, under cross examination, she disputed this and maintained that the package of tissue that hit her was bigger and longer.

Joan Gomez

17. In her evidence-in-chief she confirmed that she went shopping with her sister, the Claimant at Cost Right and that she was pushing a cart behind her when a bundle of toilet tissue fell from the top shelf hitting her sister in the head and shoulder area. She alleged that her sister's glasses (which her sister had referred to as shades) were knocked off her face and her cap was twisted.

18. During cross examination she admitted that she did not see what had hit her sister until it already fallen because she was behind her.

19. She indicated that she recalled the Claimant complaining about pain in her eyes, shoulders, head and ears. Under cross examination she testified that the Claimant's neck was tender, swollen and red.

20. Under cross examination she also testified that the tissue was not the tissue as seen on the video on the conveyor belt which appeared to a Member's Mark brand. Rather, she alleged that it was not a Member's Mark brand of tissue, but that it was in clear wrapping.

Everline Hanna

21. She testified that she attended to the Claimant in relation to a spinal injury prior to the date of the accident which occurred in 2017. However, when the Claimant came to her on 18th October, 2017, she found her to be in a little pain. However, she testified that she was responding well to treatment. She noted that the Claimant discontinued her sessions. Upon her assessment when the Claimant came to her in 2017 the pain level was 6 and went down to 2; and in 2018 she was painful and spastic and the pain levels were 7 or 8. She assumed that it was attributed to the gap between the treatment. However, she admitted under cross examination that she was unaware that the Claimant had previous issues with pain in the left shoulder or that she had been diagnosed with arthritis in the shoulder.

Dr. Valentine Grimes

22. Dr. Grimes met with the Claimant on the 11th December, 2019 and prepared a report which was admitted into evidence. He testified that he recommended three (3) surgeries to correct the Claimant's neck and rotator cuffs based on how the Claimant presented at the time of her examination. He testified that he assessed information from her past medical history inclusive of images and reports.

23. During cross examination, he admitted that the Claimant had an issue with her C-spine prior to the date of the incident and he was made aware of other pre-existing conditions after reviewing Dr. Barnett's report and assessment.

24. Dr. Grimes testified that the MRI showed pre-existing and new injuries. Therefore, he disagreed with Dr. Barnett that nothing could be attributed to the incident of the 18th July, 2017 particularly as treatment pre-injury was different from treatment post- injury.

Dr. Nevilene Williamson - McPhee

25. Dr. McPhee confirmed that she attended to the Claimant while at the South Beach Health Center on the 19th July, 2017. She testified that the Claimant complained of shoulder pain and was prescribed medication. She testified further that upon examination she observed swelling to the face and left shoulder. In her opinion, the injury was consistent with the trauma of 18th July, 2017.

Dr. Francis Williams

26. Dr. Francis Williams testified based on a medical report he prepared on the 21st July, 2017. The report confirmed that Pamela Graham was seen at PMH on the 18th July, 2017 and diagnosed with left shoulder sprain, shoulder tendonitis and possible concussion syndrome. During cross examination he confirmed that she was seen by both Dr. Govi Bodha and Dr. Nevilene Williamson- McPhee.

The Defendant's Case

27. The Defendant's called upon the Defendant's store managers Sharon Wilchcombe (no longer employed with the Defendant) and Raymond Rolle to give evidence and one (1) medical expert, Dr. David Barnett, an Orthopedic Surgeon.

Sharon Wilchcombe

28. The witness advised that she no longer worked for the Defendant. However, at the time of the alleged incident, Wilchcombe was the Front End Manager for the Defendant. She testified that on the day of the alleged incident that the Claimant came to the front of the store to lodge a complaint that a pack of toilet tissue had fallen from the top shelf and had hit her on her head and shoulders. Thereafter, Ms Wilchcombe informed the store manager and they followed the Claimant to the location where the alleged incident took place. She also testified that the package of toilet tissue that the Claimant complained of was a 45- roll Member's Mark package; however, some of the rolls were missing which caused it to be placed among the reduced price items. In addition, Ms.Wilchcombe stated that the Claimant did not appear to have any visible injuries.

Raymond Rolle

29. Raymond Rolle, the Store Manager testified that the Defendant has stocking policies in accordance with wholesale industry standards to ensure that items are securely placed on the shelf. Additionally, that stock clerks attend training courses to ensure that items are not easily dislodged by unintentional movements of customers and to ensure that everything around the store is in place. Mr. Rolle also noted that he would do a walk-about every 30 – 60 minutes through the

aisles. Notably, he testified that to avoid any risks to customers, heavier items are placed at the bottom shelves, and lighter items on the top shelves.

30. He testified that he asked the Claimant to show him the location where she claimed the incident took place and he recorded everything she had to say.

31. That recording was put into evidence for the purpose of the trial.

32. During cross examination, Mr. Rolle testified that the package of toilet tissue that was on the conveyor belt in the video was the package of toilet tissue that the Claimant alleged had hit her.

33. He confirmed that the shelving units where the items were kept are detachable however, the shelves do not exceed six feet, two to three inches.

Dr. David N. Barnett

34. Dr. Barnett, an orthopedic surgeon testified that the Claimant had pre-existing injuries and health concerns based on his assessment of her medical records. He concluded that the Claimant did sustain minor trauma as a result of the incident which took place on the 18th July, 2017. However, he noted that each injury he assessed would not exceed a minor categorization of 1-2% of the whole.

ISSUE I: Whether the Defendant owed the Claimant a duty of care

35. The Defendant has saved time by conceding that the Defendant owed the Claimant a duty of care as a customer to its store. The law in this area is well settled.

36. I refer to the Defendant's submissions on this issue:

"The Defendant does not dispute that it owes a duty of care to all customers that enter its store, and that it therefore, owed a duty of care to the Claimant. The duty owed was a duty to use reasonable care to prevent damage to the Claimant from unusual dangers which the Defendant knew or ought to have known."

ISSUE II: Whether the Defendant's breached its duty of care to the Claimant

37. The Defendant submitted that it is unlikely that a package of toilet tissue paper fell on the Claimant because she is not a credible witness and there is an effective system in place to prevent against such damage to invitees.

38. In support of the Defendant's argument, Mr. Raymond Rolle, the store manager referred to the stocking policies based on industry standard that the Defendant and its servants or agents follow. Further, that the stock clerks undergo training in such area when first hired. Rolle also testified that he would walk the store every 30 – 60 minutes to ensure that all was in order. Additionally, he walked the aisle by the reduced price items and there was nothing out of place.

39. Store Manager, Raymond Rolle also testified that lighter items are placed on higher shelves while heavier items are placed lower for the purpose of avoiding danger to invitees.

40. There was a dispute between the parties regarding the package of tissue paper that fell onto the Claimant. However, I have seen the video taken after the incident where the Claimant admitted by reference to the package of toilet paper on the conveyer belt labelled 'Members Mark' that it had fallen on her. Accordingly, I accept her evidence that this package of toilet tissue with the noticeably missing rolls that had been taped up was what fell from the shelf onto her causing her injury and loss.

41. Adderley JA in ***Beulah Rahming and The Mailboat Company Ltd. SCCivApp & CAIS No. 54 of 2015*** aptly elucidated the law of negligence as it relates to occupier's liability in his judgment:

> *"All elements of the tort of negligence, namely, the existence of a duty of care, a breach of that duty and injury caused by the breach, must be proven before such a claim can succeed.*
>
> *The standard of care owed at common law depends on the basis upon which the claimant entered the premises: if the claimant entered by virtue of a contract the rights of the contractual entrant to the premises are to be found by reference to his contract. There is an implied duty of the occupier to take reasonable care to make the premises safe for the contemplated purpose of the contract. <u>If the claimant entered as an invitee the occupier's duty is to use reasonable care to prevent damage from unusual dangers which he knows or ought to have known existed</u>."(my emphasis added)*

42. Lord Porter in ***London Graving Dock Co. Ltd. v Horton [1951] 2 All ER 1*** discussed the legal principle surrounding unusual danger and said:

> *".. I think 'unusual' is used in an objective sense and means such danger is not usually found in carrying out the task of fulfilling the function which the invitee has in hand, though what is unusual will, of course, vary with the reasons for which the invitee enters the premises."*

43. In determining whether the Defendant's breached their duty owed to the Claimant, Justice Sawyer in ***Cox v Chan [1991] BHS. J. No.110*** opined that:

> *" The duty the defendant owes to a person like the claimant is not an absolute duty to prevent any damage to the claimant but is a lesser one of using reasonable care to prevent damage from unusual danger of which the defendant knew or ought to have known and, I may add, of which the Claimant did not know or of which he could not have been aware."*

44. Winder J in the case of ***Elva Lindsay and Goodmans Bay Development Company Limited 2004/CLE/ gen/00492*** cited Lord Megaw in *Ward v Tasco [1976] 1 ALL ER 219* where His Lordship aptly explained the duty of the Claimant and Defendant regarding occupier's liability:

> *"It is for the Claimant to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the Defendants than the absence of fault; and to my mind the learned Judge was wholly right*

in taking that view of the presence of the slippery liquid on the floor of the supermarket in the circumstances of this case: that is that the Defendants knew or should have known that it was not an uncommon occurrence, and that if it should happen and should not be promptly attended to, it created a serious risk that customers would fall and injure themselves...

If the Defendants wish to put forward such a case to escape liability, it is for them to show that, on balance of probability, either by evidence or by inference from the evidence that is given or not given, this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection to customers. That, in this case, they wholly failed to do."

45. While the evidence of the Store Manager was that there was a system designed to place heavier items on the lower shelves and lighter items on the top shelves, this assumes that they remain where they are placed throughout the day. This is not a reasonable assumption in a store because items can be removed and replaced by customers at any time and not always in the exact location from where they were retrieved. However, the question is whether the Defendant's system was effective to discharge its duty of care owed to the Claimant against such unusual danger resulting in injury.

46. Having assessed the evidence, I do find that it was an unusual danger which occurred. It is unusual that an invitee would, in normal circumstances while shopping, encounter a package of toilet tissue falling on them and causing injury. Such danger insinuates that the Defendants have failed to implement a satisfactory system to guard against such injury to the Claimant: ***Dorestant v City Markets Ltd. [2002] BHS No. 119.*** The item was not appropriately fixed on the top shelf which resulted in the unusual danger.

47. Additionally, the fact that the store manager walks the aisles every 30 – 60 minutes does not rebut the presumption that the package of toilet tissue paper did not fall on the Claimant. I reiterate that in a store items on the shelves are being moved and removed all the time by customers entering the store who may or may not put the item where it ought to be placed.

48. The Defendant's have pleaded contributory negligence claiming that the Claimant did not take reasonable steps to ensure her own safety. They submitted that the Claimant's touching of the granola bars caused the movement of the shelf. Surely, this cannot be fair. The Claimant cannot be faulted for doing what is reasonably expected of her. Although her evidence was inconsistent because on the one hand, she said she had not touched the granola bars and on the other hand, she admitted to touching them. In any event, whether she touched them or not, the package of toilet tissue fell on her and her injuries were consistent with her story based on the evidence of the doctor that attended to her. The Claimant and other customers can reasonably be expected to remove and replace items in the store prior to purchasing them. That is what customers do.

49. In the circumstances, I find that that the Defendant's breached their duty of care by failing to adequately minimize the likelihood of risks/danger to the Claimant.

ISSUE II: Whether the breach by the Defendant resulted in the injuries sustained by the Claimant?

50. The Claimant called five (5) expert witnesses to prove the injuries caused by the Defendant's breach of duty of care to her.

51. Dr. Francis Williams, Acting Deputy Medical Chief of Staff testified that on the 21st July, 2017 he prepared a report on behalf of the Claimant. He testified that he believed that the Claimant was seen by Dr. Bodha and Dr. McPhee when she visited Princess Margaret Hospital ("PMH") on the 18th July, 2017. His evidence is that clinical assessment revealed a tender left shoulder with a diagnosis of left shoulder sprain. The Claimant was prescribed analgesia for pain which she experienced from the injury. Further, on 20th July, 2017 the Claimant was readmitted to PMH and was diagnosed of Left Shoulder Tendonitis and possible concussion syndrome.

52. During cross examination, the witness said that degenerative osteoarthritis can also cause pain which can limit or decrease range of movement.

53. The Defendant's medical expert, Dr. David Barnett testified that clinical examinations are primary and MRI scans are secondary because they are not determinative. He said *"Your clinical symptoms which have been repeatedly stated, those are the things that would guide you as to what is happening to this person."*

54. I interpret this to mean that it is appropriate to consider clinical assessments in the first instance, particular as in this case, Dr. Govi Bodha was the first physician to meet with and assessed the Claimant on the same day of the incident and Dr. Williamson- McPhee a few days later. This is also evidenced by Dr. Barnett's report dated 6th January, 2020.

55. Dr. Nevilene Williamson – McPhee also testified that on 19th July, 2019 she attended to the Claimant at the South Beach Health Center who had swelling to her face and left shoulder. Her evidence is that the injury was consistent with the trauma the Claimant experienced on the 18th July, 2017.

56. The Defendant's witness, Dr. David Barnett concluded in this report that Pamela Graham did sustain minor trauma as a result of the incident which occurred on the 18th July, 2017. I preferred the evidence of Dr. Barnett over that of Dr. Grimes primarily because he had the benefit of the Claimant's past medical history. Therefore, I have accepted Dr. Barnett's evidence that the Claimant would have arrived at the same state, whether or not she had been hit by a package of tissue, and any accident related to being hit by a package of tissue only made a minor contribution to injuries of 1-2%.

57. The Claimant also produced evidence to support her eye injury claim. Dr. Ash prepared a report dated 20th July, 2017, two days after the alleged incident took place and was diagnosed with Traumatic Iritis of the left eye. Ms. Graham was prescribed prednisolone forte 1% eye drops and Nevanac. During follow up visit in 21st September, 2017 and 18th January, 2018, Dr. Ash found all to be well with the Claimant's left eye.

58. In November 2018, the Claimant was also assessed by Ophthalmologist, Dr. K. J. A. Rodgers on request by the Defendants for further evaluation. The questions I find relevant to the present issue are as follows:

(1) Whether the alleged injured (in particular those related to her eye) are consistent with an incident occurring in the manner described above?

"The patient described that following the injury she had some discomfort in her eye and when seen by Dr. Ash was found to have a traumatic iritis which could have been consistent with minor trauma to the eye. Dr. Ash treated this with the appropriate medication and in subsequent follow-up the inflammation resolved and the patient reportedly felt better..."

(3)Whether, and if so how, the alleged injuries affected her previously existing eye condition?

"It appears that the accident has not affected the successful outcome of the cataract surgery, except for the fact that perhaps there was some temporary increase in inflammation after the accident which resolved with the drops, but the vision at this point in time is very good."

(4) Whether the treatment she received as appropriate?

"Yes the treatment Dr. Ash gave her was appropriate. We normally teat traumatic injuries to the eye with a steroid drop like Pred Forte and a non-steroidal inflammatory like Nevanac."

(7) Given her previously existing eye condition, whether her current diagnosis or prognosis would have been the same, regardless of the alleged injury; or whether the alleged injury leaves her worse off than if it had no occurred?

"The trauma to the left eye has had no material impact on her vision or the status of the surgery that was performed and should have no impact on it in the future."

59. The Defendant's themselves have conceded to two (2) of the Claimant's injuries at paragraph 89 of their submissions:

> *"...of all the injuries pleaded by the Claimant, the only diagnosis which have been proven through the evidence are those related to the left eye (traumatic iritis of the left eye) and those related to the left shoulder (left shoulder tendonitis and left shoulder sprain)."*

60. At the outset, the Claimant indicated that some of the alleged injuries were on the left side of her body.

61. Much was said of the Claimant's past medical history, however the 'egg shell' skull rule must be applied to the instant case. *We must take our victim as we find her.*

62. Lord Parker at page 1161 of ***Smith v Leech Brain & Co [1961] 3 All ER 1159*** had this to say:

> *"For my part, I am quite satisfied that the Judicial Committee in The Wagon Mound did not have what I may call, loosely, the "thin skull" cases in mind. It has always been the law of this country that a tortfeasor takes his victim as he finds him. It is unnecessary to do more*

than refer to the short passage in the decision of Kennedy J in Dulieu v White & Sons ([1901] 2 KB at p 679), where he said:

> *"If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart."*

To the same effect is a passage in The Arpad ([1934] All ER Rep. at p 331; [1934] P at pp 202, 203). But quite apart from those two references, as is well known, the work of the courts for years and years has gone on on that basis. There is not a day that goes by where some trial judge does not adopt that principle, that the tortfeasor takes his victim as he finds him. If the Judicial Committee had any intention of making an inroad into that doctrine, I am quite satisfied that they would have said so."

63. The Claimant had in April, 2017 undergone a cataract removal surgery. In these circumstances, it is likely that a jumbo package of tissue paper falling from a top shelf could cause some irritation or injury to her eye, whether severe or minor; the possibility is great. In the same token, the Claimant presented with shoulder pains for a very long time. Weight may likely exacerbate pain. These injuries, however minor were a foreseeable result of the incident at the Defendant's establishment.

64. I find that the Claimant has proven, on the balance of probabilities that she suffered injury to her left eye and left shoulder as a result of the breach by the Defendant. The evidence produced in support of those injuries met the threshold of determining that they were in fact a resulting cause of the Defendant's breach. Particularly the report of Dr. Ash who attended to the Claimant two days after the said incident.

65. The Claimant had, in her pleadings also complained of injury to her neck, spine, head, and ear and tooth. In my opinion, those injuries complained of were exaggerated and farfetched and not associated with where the Claimant claimed the pack of tissue fell on her.

66. In ***Hall v The Ruffco Holding Corporation Bahamas Ltd [2008] 2 BHS J. No.*** 15 Adderley J stated at paragraph 35 of the Judgment that:

> *"35 It is the duty of the claimant to prove on the balance of probability that the defendant was negligent. This must be done by evidence and on the evidence the claimant has fallen far short of the mark. Such evidence as there was of the defendant's provision of staff, materials, and a system of work and the other evidence do not support the claim that the defendant was guilty of negligence or breach of its common law duty under the head of occupier's liability in accordance with principles laid down in Donaghue, Lochgelly, Wilsons & Clyde Coal Company and Smith v. Baker."*

67. I also accept the case of **Dawson v Murex (1942)** 1 All ER 483 submitted by Counsel for the Claimant where the court noted that

> *"...In an accident case, the Claimant is not called upon to prove precisely how the accident happened. Where the claimant by competent evidence showed that his*

explanation of what happened is the more probable one, the judge is entitled to accept his case and find in his favour."

ISSUE III: Whether the Claimant is entitled to damages.

68. According to the evidence proffered, the Claimant is entitled to damages based on the injuries sustained as a result of the Defendant's breach.

69. Her evidence was that the package of toilet tissue hit her head, face, ear, nose, neck, shoulder and arms and caused her teeth to become shaky. Further, she said that it caused the shades that she was wearing to hit her in her eyes.

70. I found that the Claimant has only proven two injuries sustained as a result of the Defendant's breach; viz, injury to her eyes and to her shoulder. While the attending physician had referred to a concussion syndrome two days after the incident, it was the shoulder and the eyes that required further and follow up treatment and care.

71. Therefore, I found that the Claimant did not prove that the injuries to her head, face, neck and were directly related to the breach of the Defendant's duty.

72. The Claimant in her Amended Writ of Summons filed on 20th December, 2019 claimed under the head of special damages:

Medical expenses (and continuing)	$ 4,098.98
Physical Therapy treatment	$10,189.92

73. Additionally, the following amounts were itemized and the physical therapy treatment of $10,189.92 added for a total of $30,050.11. I lifted these figures directly from the Amended Writ:

1.	Dr. Ash invoice dated	11/25/2019	4,312.40
2.	Princess Margaret Hospital	18/07/2020	77.52
3.	Princess Margaret Hospital	20/07/2020	535.00
4.	Princess Margaret Hospital	24/07/2017	70.00
5.	Heaven Sent Pharmacy	8/12/2017	43.33
6.	One on One	9/28/2017	30.10
7.	Hearlife Clinic	19/16/2017	188.66
8.	Comprehensive Family Medical	1/10/2017	100.00
9.	Dr Nubirth	17/10/2017	800.00
10.	Rhoda Hanna	9/01/2018	10,189.92
11.	MRI	30/01/2018	450.00
12.	Ash Eye Institute	26/04/2018	577.28
13.	Ash Eye Institute	2/11/2018	560.00
14.	MRI Specialists	2/11/2018	767.86
15.	Dr. Nubirth		2,000.00
16.	Bahamas Vision Center		705.60
17.	Rhoda Hanna	14/12/2018	4,599.84
18.	Dr Grimes	26/11/2019	257.60

19.	Open MRI	5/11/2019	3,440.00
20.	Dr Grimes	11/12/2019	336.00
	TOTAL		30,050.11

74. However, in the Claimant's Bundle of Documents, the Special Damages claimed was for the sum of $28,649.14 broken down as follows:

	Institution	Date	TAB	Amount
1.	Princess Margaret Hospital ("PMH")	18th July, 2017	1	72.00
2.	PMH	20th July, 2017	2	535.00
3.	PMH	24th July, 2017	4	70.00
4.	Ash Eye Institute	21st September, 2017	8	740.00
5.	Ash Eye Institute	26th September, 2017	9	690.26
6.	One on One Pharmacy	28th September, 2017	10	30.00
7.	Hear Life Clinic	16th October, 2017	13	188.66
8.	Comprehensive Family Medical Clinic	17th October, 2017	14	100.00
9.	Ash Eye Institute	8th November, 2017	16	682.76
10.	Rhoda Physiotherapy	9th January, 2018	19	10,189.92
11.	PMH	30th January, 2018	20	450.00
12.	Ash Eye Institute	26th April, 2018	23	537.00
13.	Ash Eye Institute	26th April, 2018	23	797.76
14.	Correspondence from Ash Eye Institute	28th November, 2018	31	560.00
15.	Quote from Open MRI of Nassau (" Open MRI")	12th November, 2018	34	860.00
16.	Correspondence from Comprehensive Family Medical Clinic	22nd November, 2018	36	2,000.00
17.	Bahamas Vision Center Quote for optical service and prescription	10th December, 2018	37	705.60
18.	Rhoda Physiotherapy	14th December, 2018	38	4,599.84
19.	Department of Social Services approval for payment for MRI	5th November, 2019	41	3,440.00
20.	Statement from Ash Eye Institute for glasses	7th November, 2019	42	223.00

21.	Statement from Ash Eye Institute	25th November, 2019	48	920.00
22.	Receipt from Dr. Valentine Grimes	26th November, 2019	49	257.60
				$28,649.14

75. Counsel for the Claimant submitted cases from Kemp & Kemp (The Quantum of Damages) and also the Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases, 7th edition to support her claim.

76. Additionally, the Claimant's Counsel requested that the court consider an 'uplift' in light of the cost of living and cited the case of Matuszonwinz v Parker (1987) W. I. R 24.

77. In turn, Counsel for the Defendant submitted, and I accept, that the Privy Council has condemned the practice of applying an uplift as a method for assessing general damages. The court had this to say at paragraph 42 of the judgment in **Scott v The Attorney General and another [2017] UKPC 15:**

> *"It is plainly impossible to take judicial notice of the difference in cost of living between the Bahamas and England. Where that difference was accepted in cases such as Acari and Matuszowicz, it must have been on the basis of agreement or assumption. Absent agreement, however, this is not something which can be assumed. For the reasons given earlier, the Board considers that a mechanistic adherence to JSB guidelines with an automatic increase cannot be the proper way in which to assess general damages in the Bahamas. If such an approach was appropriate, it could only be contemplated on the basis of evidence to establish the fact that there was a difference in the cost of living between the two countries, rather than an assumption that this was so. It should be made clear, however, that the Board does not commend such an approach. As already observed, JSB guidelines can provide an insight into the proper awards of compensation for pain and suffering and loss of amenity in the Bahamas but only in so far as they meet the standards and expectations of Bahamians. An automatous method of assessing general damages by seeking out the norm in England and adding an automatic increase cannot fulfil those requirements."*

78. Counsel for the Defendant submitted that the Claimant's claim for Special Damages in the sum of $14,288.90 in the Re- Amended Writ of Summons is flawed for a number of reasons particularly due to charges stemming from doctor visits prior to the incident of 18th July, 2017. Also, that the Claimant claim for special damages ought to fail.

79. The Defendants submitted the following cases in support of general damages should the Court find that the Claimant is so entitled: **Aaron Forbes v Dafiyya Feaste 2018/COM/lab/00641; Adderley v Green et al. SC No. 627 of 1997; Johnson v Mackey trading as Mackey's Trucking & Murray SC 2009/CLE/gen/678; Bowleg v Super Value Food Store SC No. 210/CLE/gen/204.**

80. Having considered the authorities, I award Twelve Thousand to the Claimant for the following injuries which I deemed to have been sustained as follows:

(i)	Shoulder tendonitis and sprain	$ 5,000.00
(ii)	Traumatic Iritis of the left eye	$ 7,000.00
		$ 12,000.00

81. There appeared to be discrepancies between the figures claimed and the evidence submitted to substantiate them. It is trite law that special damages must be specifically pleaded and proven. The Honourable Justice Ian Winder (as he then was) quoted Lord Diplock in the case of **Ilkiw v Samuels** [1963] 2 All ER where he affirmed this position and stated as follows:

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

82. Therefore, for the sake of clarity, I set out in the table below, the special damages that have been proven as it related to those injuries that I found were sustained as a result of the accident. They total: $19,545.17 and were comprised as follows: (i) her visits to the Princess Margaret Hospital where she was initially treated and where she went for follow up visits; (ii) her visits to the Ash Eye Institute for the injury sustained to her eye, save for the cost of her glasses at tab 23 for which there was no indication that she required glasses as a result of the accident and an exclusion in the invoices at tabs 8,9, and 16 of the amount owed for over 90 days because it would have been prior to the accident; (iii) Rhoda Hanna for physiotherapy which had been recommended; (iv) medication and (v) her visit to Dr. Valentine Grimes.

83. I have excluded the sum of $7,194.26 for items which I deemed to not have been incurred in relation to the incident including from (i) Bahamas Vision because her evidence was that she visited the Ash Eye Institute and it was unclear what her visit to the Bahamas Vision Centre was in reference to and further, it was labelled "quote"; (ii) Nurbirth Hearing Services and Hear Life because I did not accept that her hearing was an injury attributable to the accident and in any event, it appeared that the invoice for hearing aids was billed to the Department of Social Services; (iii) Open MRI because the invoice for $3,440 appeared to have been billed to and settled by the Department of Social Services and the other was labelled "quote". I have highlighted these items in the table for ease of reference.

84. I make no award for future medical expenses.

#	Institution	Date	TAB	Amount
1.	PMH	18th July, 2017	1	77.52
2.	PMH	20th July, 2017	2	535.00
3.	PMH	24th July, 2017	4	70.00
4.	Heaven Sent Pharmacy	12th August, 2017	7	43.35
5.	Ash Eye Institute	21st September, 2017	8	107.50

6.	Ash Eye Institute	26th September, 2017	9	301.01
7.	One-on-One Pharmacy	26th September, 2017	10	30.10
8.	**Hear Life**	**16th October, 2017**	**13**	**188.66***
9.	Comprehensive Family Medical Centre	17th October, 2017	13	100.00
10.	Ash Eye Institute	8th November, 2017	16	107.50
11.	Rhoda Physiotherapy	9th January, 2018	19	10,189.92
12.	PMH	30th January, 2018	20	450.00
13.	**Ash Eye Institute**	**26th April, 2018**	**23**	**577.28***
14.	Ash Eye Institute	26th April, 2018	23	797.76
15.	Ash Eye Institute	2nd November, 2018	31	560.00
16.	**Open MRI – quote**	**12th November, 2018**	**34**	**860.00***
17.	**Dr. Deborah Mackey Nubirth**	**Undated but billed to Dept of Social Services**	**36**	**2,000.00***
18.	**Bahamas Vision Centre – quote**	**10th December, 2018**	**37**	**705.60***
19.	Rhoda Physiotherapy	14th December, 2018	38	4,599.84
20.	**Open MRI – quote Order from Dept of Social Services**	**8th October, 2019 18th October, 2019**	**41**	**3,440.00***
21.	Ash Eye Institute	25th November, 2019	42 & 48	920.80
22.	Dr. Valentine Grimes	26th November, 2019	49	257.60
23.	Dr. Valentine Grimes	26th November	51	336.00
			Total	$19,545.17

85. I was made aware that the Defendant made a payment into court prior to the trial, therefore, I will make no order regarding costs at this stage. In the circumstances, I invite the parties to agree the appropriate order for costs within 21 days of the date of this written ruling. In the event that the parties are unable to agree, they are to provide written submissions to the Court as to the appropriate costs order within 5 days thereafter in no more than 10 pages.

86. In the circumstances therefore I give judgement to the Claimant in the amount of $31,545.17 as follows:

(i) General damages (PSLA) $12,000.00
(ii) Special damages $19,545.17

The said sums shall bear interest at the rate of 3% from the date of the filing of the Statement of Claim until judgment and shall accrue thereafter at the statutory rate.

Dated this 19th day of November, A. D., 2024

Camille Darville Gomez
Justice