
CANADA / JUDGMENT

Druet v. Sandman Hotels, Inns & Suites Limited

2011 BCSC 232

COURT

Supreme Court of British Columbia

DECIDED

25 February 2011

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2011 BCSC 232 Druet v. Sandman Hotels, Inns & Suites Limited

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Druet v. Sandman Hotels, Inns & Suites Limited,

2011 BCSC 232

Date: 20110225

Docket: S071499

Registry: Vancouver

Between:

Catherine Ann Druet

Plaintiff

And:

Sandman Hotels, Inns & Suites Limited,

Northland Properties Corporation

Defendants

Before: The Honourable Mr. Justice Savage

Reasons for Judgment

Counsel for the Plaintiff:

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G.C. Baldwin

B. Malach

Place and Date of Trial:

Vancouver, B.C.

October 4-8, 2010

Place and Date of Judgment:

Vancouver, B.C.

February 25, 2011

I. Introduction

- [1] On March 19, 2005 the plaintiff Catherine Druet ("Druet") was staying with girlfriends at the Sandman Inn on Georgia Street (the "Hotel") while visiting Vancouver. It was raining outside. She had just returned from eating dinner with her girlfriends Pat Sumner ("Sumner"), Janelle Bledsoe ("Bledsoe") and Stephanie Smith ("Smith") (collectively referred to as the "Girlfriends") when she slipped and fell in the Hotel's lobby (the "Lobby"), injuring her ankle.
- [2] Druet says that the defendants, Sandman Hotels, Inns & Suites Limited and Northland Properties Corporation (collectively referred to as "Sandman"), are occupiers of the Hotel and liable for her damages pursuant to the Occupiers Liability Act, R.S.B.C. 1996, c. 337 (the "Act").
- [3] Sandman in its omnibus pleading denies causation and liability, says Druet was herself negligent, voluntarily assumed the risks, denies she suffered damage, and if she did, says she failed to mitigate her damages.

II. Background

- [4] Druet is a 52 year old nurse who resides in Olympia Washington. At the time of these events she was 46. She met the Girlfriends with whom she travelled to Vancouver through her church. They decided to visit Vancouver and rented rooms at the Hotel.
- [5] After arriving on the evening of March 19, 2005, and checking into the Hotel, Druet and her Girlfriends went out for dinner to a Greek restaurant on foot. They did not drink alcohol at dinner. After dinner they returned to the Hotel. It was raining. It was about 8:30 p.m. when they returned.

- [6] Druet went into the Lobby and looked at a computer which listed activities the group could do in the city.
- [7] She was there about five minutes.
- [8] Druet realized that two of her Girlfriends had not entered the Hotel and went back outside where they were smoking. She spoke to Sumner and Bledsoe in the area of the covered entranceway and then re-entered the Hotel. At the entrance was a sandwich board warning sign. She crossed a mat and then stepped onto the tile floor. She was wearing two month old running shoes which were wet from being outside.
- [9] Druet slipped on the floor (the "Accident"). Her friends attended on her. They say that the floor squeaked under foot as they walked on it. Druet thought she slipped on water but acknowledges that she did not see any water. She was immediately in pain and could see from the unnatural angle of her right ankle that she was injured.
- [10] A floor manager attended on her as did Lorenzo Jensen, and Peter Riesen, the Hotel's employees. An ambulance was called. Druet was taken to Vancouver General Hospital. Her ankle was immobilized. The next day she returned to Olympia, Washington.
- [11] Druet suffered a bimalleolar ankle fracture. She had open reduction surgery. The break was fixed with metal screws. The metal screws were removed by a further operation. She had ongoing complaints of stiffness and lack of range of motion. She had a lack of dorsiflexion and could not invert or evert her right hindfoot very well. In June 2008 she had scar tissue surgically debrided and a gastrocnemius recession was performed.
- [12] By 2009 Druet's condition was stabilized, but she had stiffness and arthrofibrosis of her right ankle, related to her bimalleolar ankle fracture. She is not considered at high risk for future injuries, provided she stays within reasonable restrictions.
- [13] She walks with a slight limp and can no longer run as she once did, but can walk significant distances, which she does with walking partners. She has some concerns about the work she does as a nurse, but is still able to perform the work required to the satisfaction of her current employer.

III. Causation

- [14] In *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 326, 72 D.L.R. (4th) 289, the Supreme Court of Canada defined causation as:

...an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former.

[15] In Snell, the defendant doctor continued to perform eye surgery on the plaintiff despite observing bleeding in her eye. Experts agreed that the proper course of action in the circumstances was to stop the surgery and that the defendant's decision to continue was one, but not the only, possible cause of the plaintiff's subsequent blindness in that eye.

[16] Writing for the Supreme Court of Canada, Sopinka J. supported a less rigid application of the traditional approach to causation at 328:

I am of the opinion that the dissatisfaction with the traditional approach to causation stems to a large extent from its too rigid application by the courts in many cases. Causation need not be determined by scientific precision. It is, as stated by Lord Salmon in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490 [(H.L.)]:

essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

Furthermore, as I observed earlier, the allocation of the burden of proof is not immutable. Both the burden and the standard of proof are flexible concepts. In *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, Lord Mansfield stated at p. 970:

It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

[17] At 330, Mr. Justice Sopinka wrote that while the burden of proof does not shift to the defendant:

evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence.

[18] In summary, Mr. Justice Sopinka said, at 330:

The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept [quoted above]....

IV. The Cause of Druet's Accident

[19] It is not possible to determine what caused Druet to slip with scientific precision. She asks that I infer from scientific and eyewitness evidence that the condition of the floor of the Lobby caused her Accident.

[20] The defence says that even if I find the Lobby was in an unsafe condition, the plaintiff must prove that that condition caused her injuries.

- [21] The Accident occurred inside the entrance to the Hotel just off the Lobby. At this entrance is a mat which the Sandman witnesses identified as an "absorptive" mat. There is a small area of dark tile larger than the mat at the entrance. There is then a larger area of light tile which extends to near a stairwell. The stairwell and a small area around it are of dark tile. There is a rail on the stairwell which descends a few steps to the Lobby which is also tiled.
- [22] I accept Druet's evidence that she slipped, as opposed to stumbling, while on the tile surface just past the mat at the entryway to the Hotel off Georgia Street. She could not identify which of two tiled surfaces she slipped on. While she testified that she slipped on water, she acknowledged that she did not see any water at or near the location of the slip.
- [23] The question arises whether Druet slipped on the dark tile or the light tile. There is only a small area of dark tile not covered by mat. That coupled with Druet's explanation of where she fell, make it more probable than not that she slipped on the light tile.
- [24] Granville Airton ("Airton") is a professional engineer. Airton testified about the entrance, the tile surfaces, and the slip resistance of the tile surfaces under wet and dry conditions. He was accepted as an expert witness qualified to give the results of his tests and the opinions expressed in his report.
- [25] Airton used a Slip Test Mark II slip resistance tester (the "Mark II Tester") to determine a coefficient of friction for the tile surfaces on site. The Mark II Tester was developed by Dr. Robert Brungraber, an American slip resistance testing expert. A friction coefficient of .35 is considered acceptable. A higher coefficient is better. A lower coefficient of friction is not considered acceptable. The defence did not challenge the .35 cutoff.
- [26] Airton did in situ tests using rubber, leather and neolite test blocks, representing a variety of shoe soles. As he did the test in situ at or near the surface where the Accident occurred, he tested the surfaces with whatever sealer and/or polish had been applied to the surface. No evidence was adduced to suggest that the sealer or polish at the time of testing was different than that used at the time of the Accident.
- [27] The light coloured tile produced acceptable coefficients while dry for all test blocks but produced "unacceptable" results for all test blocks while wet. The dark tile produced results which were acceptable for leather and neolite when dry but which showed that that surface was unacceptably slippery for dry rubber and for all test blocks while wet. The results are as follows:

Tests done with the tiles dry

Light coloured tile

Test block

Result

Comments

Rubber

.44

Acceptable

Leather

.50

Acceptable

Neolite

.69

Acceptable

Dark coloured tile

Test block

Results

Comments

Rubber

.24

Much lower than .35 therefore unacceptably "slippery"

Leather

.49

Acceptable

Neolite

.57

Acceptable

Tests done with the tiles sprayed with water

Light coloured tile

Test block

Result

Comments

Rubber

.03

Very low therefore unacceptably "slippery"

Leather

.04

Very low therefore unacceptably "slippery"

Neolite

.29

Much higher than the rubber and leather but still about 17% lower than .35 so unacceptably "slippery"

Dark coloured tile

Test block

Result

Comments

Rubber

.02

Very low therefore unacceptably "slippery"

Leather

.02

Very low therefore unacceptably "slippery"

Neolite

.32

Very low therefore unacceptably "slippery"

[28] I accept Airton's evidence that the light tile surface was unacceptably slippery for the test blocks tested when wet. Although the precise substance of the soles of Druet's running shoes was not identified, I find it more likely than not that the same result --unacceptably slippery when wet-- would have been achieved if her shoes had been tested. That was the result for the broad range of sole types tested; I cannot find the result would have been any different for the precise shoe soles she wore. The defence produced no expert evidence critiquing the results or providing other results, although Airton was cross-examined.

- [29] While Airton did the "wet" tests by spraying the tile with water, his report specifies that the results he achieved would be the same whether the moisture came from the tile itself or the soles of the shoes worn on it. Therefore the further question arises whether either the surface of the light tiles where Druet slipped or the soles of her shoes were wet. There is some evidence of actual water being in the location where she slipped. The defendants' duty manager, Peter Riesen ("Riesen"), testified that there were two or three drops the size of a dime in that location. But by the time he noticed these Druet had been attended on by her friends and staff, had been given blanket, etc. Therefore it is not possible to determine whether that water was present when she slipped or whether it was brought to the scene by those attending her or, for that matter, whether those attending her picked up water on their clothing.
- [30] Druet's Girlfriends testified that they saw standing water in another location on the tile floor. After the fall that water was towelled dry. Airton testified that when he attended at the scene to do his test it had been raining and there was water pooling at the entrance in two locations. Photographs of the scene taken the morning after these events also showed pooled water at the entrance. The drains were not effective to remove the water and seemed to have been installed as an afterthought.
- [31] The evidence of all the witnesses is that it had been raining on and off throughout the day and was raining when Druet and her friends were returning from their restaurant meal. Druet testified that her shoes were wet. Sumner and Bledsoe testified that their shoes squeaked on the tile surface when they walked.
- [32] The defendants say that I should not infer that the plaintiff slipped on water on the tile floor. They say there is no evidence of water, that claims that there was water at the relevant place are speculation and that, following the reasoning in *Van Slee v. Canada Safeway Limited*, 2008 BCSC 107, I should be cautious about inferring such a hazard.
- [33] In that case, this Court held that it could not presume negligence because the plaintiff suffered an injury. The plaintiff did not observe water on the floor, but assumed that water had accumulated, causing her fall. There was no evidence of a hazard and therefore no evidence that a hazard caused the plaintiff's accident.
- [34] Black's Law Dictionary, 9th ed. defines "speculation" as "[t]he act or practice of theorizing about matters over which there is no certain knowledge". Speculation should be distinguished from inference. "Infer" is defined as "to conclude from facts or from factual reasoning".

- [35] On the evidence before me, although there is evidence that there was some water on the floor, to find that there was water on the floor that caused the slip is speculative. The facts indicate that there was also some water on the floor in other areas of the Lobby. After several people attended Druet there were very small spots of water found in her vicinity. This is insufficient to lead me to conclude that the water on the floor of the Lobby in the location where Druet slipped caused her Accident.
- [36] However, Airton's evidence persuades me that the floor itself was a hazard to people wearing shoes with wet soles. There is no suggestion here that Druet was doing anything untoward at the time. Her footwear, two month old Asics running shoes, are not, in my opinion, inappropriate, unusual, or unexpected footwear for a visitor to be wearing on such occasion. In my opinion the plaintiff has established on a balance of probabilities that the cause of her Accident was the unacceptably slippery surface of the white tiles when wet or when walked upon by wet shoes.

V. Occupiers' Liability

- [37] Section 3(1) of the Act places on an occupier a duty of care "...that in the all the circumstances of the case is reasonable to see that a person ... on the premises ... will be reasonably safe in using the premises". The defendants admit that they are occupiers.

- [38] The relevant statutory provisions are as follows:

1 In this Act:

"occupier" means a person who

- (a) is in physical possession of premises, or
- (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and, for this Act, there may be more than one occupier of the same premises

...

2 Subject to section 3(4), and sections 4 and 9, this Act determines the care that an occupier is required to show toward persons entering on the premises in respect of dangers to them, or to their property on the premises, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which the occupier is responsible by law.

3 (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

- (2) The duty of care referred to in subsection (1) applies in relation to the
 - (a) condition of the premises,
 - (b) activities on the premises, or
 - (c) conduct of third parties on the premises.
- (3) Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to
 - (a) create a danger with intent to do harm to the person or damage to the person's property, or
 - (b) act with reckless disregard to the safety of the person or the integrity of the person's property.

...

- [39] The Act does not create a presumption of negligence on the part of an occupier. Druet must prove some act or failure to act that constitutes negligence or a breach of the Act: *Bauman v. Stein* (1991), 78 D.L.R. (4th) 118 at 127, (C.A.), *Lansdowne v. United Church of Canada et al.*, 2000 BCSC 1604.
- [40] Where the plaintiff establishes a prima facie case of negligence, the occupier may rebut its alleged breach of the standard of care with evidence that at the time of the Accident it had a reasonable system of cleaning and inspection in place and that it was being followed: *Bjerregaard v. Westfair Foods Ltd.*, 2003 BCSC 1755 at para. 14; *Atkins v. Jim Pattison Industries Ltd.* (1998), (1999) 61 B.C.L.R. (3d) 183, 146 B.C.A.C. 83.
- [41] The test is one of reasonableness, not perfection: *Carlson v. Canada Safeway Limited* (1983), 47 B.C.L.R. 252 (C.A.), and *Thuveson v. Robert H. Ash & Associates* (21 May 1997), Courtenay S4348 (B.C.S.C.).

VI. Sandman's Liability

- [42] I have found that the floor of the Lobby was unacceptably slippery when wet or when walked on with wet shoes and that the combination of this slipperiness and the moisture on the soles of the plaintiff's shoes caused her injury. Therefore the question of whether Sandman is liable for the plaintiff's injuries is one of whether having a floor which is slippery when wet is a breach of the Act.
- [43] As I have said, in slip and fall cases, such as the one before me, courts undertake a traditional negligence analysis. However once a prima facie case of negligence has been established, the occupier has an opportunity to rebut the evidence that it breached the applicable standard of care.

- [44] This approach permits an occupier to demonstrate that it took reasonable steps to discharge its duty to the plaintiff and that, as a result, it should not be held liable for the plaintiff's injuries.
- [45] In my view Druet has established a prima facie breach of the Act by Sandman. Sandman had a floor which was unacceptably slippery for a variety of shoe soles when the floor was wet, or when walked on by wet shoes.
- [46] Rain and wet weather is commonplace in Vancouver, particularly at the time of year when these events occurred. People coming and going in and out of the rain at a hotel entrance, such as this, is also commonplace. It was Saturday night.
- [47] A consideration of the condition of the premises, the activities on the premises, and the conduct of third parties on the premises in my opinion supports the view that having an unacceptably slippery floor, when wet or when walked on with wet shoes, is prima facie negligent. That is, such is prima facie a breach of the duty required of occupiers to ensure persons will be reasonably safe when using the premises.
- [48] Where there is evidence of a prima facie breach of the Act, an occupier, such as Sandman, may rebut the breach of duty by leading evidence that it had put into place a reasonable system of care, inspection and maintenance that was being followed at the time of the Accident.
- [49] I must now consider whether Sandman had a reasonable system in place that was being followed to guard against this hazard. The burden is on the defendants to adduce this evidence.
- [50] The hazard here is the combination of the floor tile and moisture, either on the floor itself or on the soles of shoes. I note that the test which permits the occupier to rebut a prima facie case that it has breached its duty is of limited assistance in circumstances such as these as Sandman controls only one of the variables.
- [51] Sandman placed a large mat just inside the door entrance. Sandman's witnesses referred to this as an "absorptive mat". The mat nearly covered the area of dark tiles at the entrance. The dark tile area was found by Airton to be unacceptably slippery with all but one shoe type when either wet or dry. Sandman also placed common yellow "sandwich" board warning signs inside the door entrance and outside the door entrance when it rained.
- [52] With respect to maintenance Sandman's witnesses testified that the duty manager, bellman, and other staff were instructed to be on the lookout for wetness or other hazards on the floor at all times. In other words, there was no systematic or scheduled recorded inspection of the premises by any person or group of persons. In *Coulson v. Canada Safeway Limited* (1988), [1989] 2 W.W.R. 264, (1989) 32 B.C.L.R. (2d) 212 (C.A.), *Hutcheon J.A.* found such a system inadequate.

- [53] After these events staff towelled dry the area, although they indicated little water was found, and another nearby area which it was admitted had quantities of standing water.
- [54] With respect to the sealer or polish used on the floor, Airton testified that the "Highway One sealer" used at the time is reported to meet the Underwriters Laboratory of Canada UL-410 standard, but such standard pertains only to determining the coefficient of friction tested in dry conditions. Airton concluded that the fact that the sealer used meets such standard is not helpful in determining whether it is appropriate for use in conditions here. Airton was cross-examined. Sandman introduced no evidence of its own regarding the floor sealer or polish and its suitability or lack thereof in wet conditions or where peoples' shoes were wet.
- [55] In my view, despite the mat and warning signs, Sandman did not have a reasonable system for monitoring the condition of its floors at the entrance to the Hotel. The un-contradicted evidence of Airton was that the Lobby floor was unacceptably slippery for a variety of shoe types when wet or walked on with wet shoes. By placing the signs and mat it is clear that Sandman knew the floor was slippery in such circumstances. There was no system of regular systematic inspection of the area or mat.
- [56] However, even if Sandman had a regular system of monitoring and inspection, such a system could not guard adequately against a floor surface that was unacceptably slippery when walked upon with wet shoes. In my opinion Sandman is liable.

VII. Contributory Negligence

- [57] Sandman says that Druet had an obligation to keep a proper look out for her own safety and to be aware of her surroundings. Had she done so she would have observed their warning signs at the entrance and inside the entrance.
- [58] Sandman says there was an absorptive mat at the entrance. Druet had been walking in the rain. Druet knew or ought to have known her footwear was wet. She could have taken extra care on entering the premises. For example, she could have dried her feet on the mat. The defendants' witnesses testified that the mat was dry.
- [59] In this case Druet entered the premises after walking in the rain from a restaurant to the Hotel. Although there is some conflict in this, in my view it is likely that there was some pooled water at the entrance, as shown in the photographs taken after the events. So she knew or ought to have known her feet were wet. She went into the Hotel, rejoined her friends outside, then walked in again. She had an opportunity to observe the yellow sandwich board warning signs on both sides of the door as she walked in and out twice within 5-10 minutes.
- [60] Because of the shine on the floors water on the floors would not necessarily have been obvious. It was not reasonable for Druet not to wipe her feet on the mat and not to take extra care in stepping off the mat and onto the floor. Her evidence is that she did neither. In my opinion she did not take reasonable care for her own safety.

- [61] In the result both parties are at fault. The Negligence Act, R.S.B.C. 1996, c. 333, requires me to apportion the degree to which each party was at fault. In *Etson v. Loblaw Companies Limited* (Real Canadian Superstore), 2010 BCSC 1865 Fisher J., apportioned liability equally where she found that the plaintiff failed to look out for her own safety. Smith J., as she then was, came to a similar conclusion in *Castillo v. Westfair Foods Ltd.* (2 June 1999), New Westminster SO-37569 (B.C.S.C.).
- [62] While the circumstances in the cases are rarely on all fours, in my view these cases are instructive. Further, s. 1 of the Negligence Act says that where it is not possible to establish different degrees of fault, liability must be apportioned equally. In the circumstances I apportion liability equally.

VIII. Damages

A. Non-Pecuniary Damages

- [63] The parties are significantly at odds with respect to damages. The plaintiff claims approximately \$305,000 in damages, including non-pecuniary damages of \$85,000. The defendants argue that non-pecuniary damages should be \$30,000 and there should be no award under any other head.
- [64] The plaintiff relies on *French v. Hodge*, 2005 NSSC 44; *Rizzolo v. Brett*, 2009 BCSC 732, aff'd 2010 BCCA 398; *Wormell v. Hagen*, 2009 BCSC 1166; and *Falati v. Smith*, 2010 BCSC 465 in estimating non-pecuniary damages at \$85,000. The defendants argue that non-pecuniary damages should be \$30,000, relying on *Squires v. Badesha* (29 December 1995), New Westminster SO-8166 (B.C.S.C.); *Flentje v. Nichols* (21 September 2006), Doc. 04-CV-26382SR (Ont. S.C.J.); *Levy v. Brampton (City)* (15 June 2005), Doc. 03-CV-248174SR (Ont. C.J.); *Choromanski v. Malaspina University College*, 2002 BCSC 771; and *Ball v. Moorman*, 2002 BCSC 395.
- [65] In my opinion the cases on which the plaintiff relies involve either more serious injuries or more substantial sequelae to the injuries suffered.
- [66] I have described the injuries above. As a result of those injuries the plaintiff had three surgeries, although two were in succession. She had implantation of a plate, a rod and surgical screws in March 2005 which were removed in September 2005. Her ankle was debrided in June 2008.
- [67] Druet missed a total of three months of work as a licenced practical nurse arising from the injuries and surgeries. She walked with crutches for a short time after the Accident while recuperating. She had limited physiotherapy in 2005 but not since. She wears orthotics.

- [68] Druet has substantially resumed her previous activities, except running. She now walks two miles a day, five days a week. She did substantial walking during a vacation to Europe in 2006 and a holiday in New York in 2008. She can walk five kilometres. She participates in 5K walks and completes them 10 to 15 minutes slower than when she ran.
- [69] Druet relies primarily on French and Falati with respect to quantum. In French the plaintiff suffered an ankle injury as well as soft-tissue injuries. The plaintiff was hospitalized for two weeks. The plaintiff had two operations performed within that period, including the insertion of a plate and screws. He was in physiotherapy for more than a year. His prognosis was for an ankle fusion, and he developed post-traumatic osteoarthritis, as well as neck and back soft-tissue injuries. The plaintiff in French was disabled from working in his previous employment and was required to take a sitting or sedentary job which would require retraining. Recreation such as fishing, walking with his children, and playing catch were either not possible or his enjoyment greatly diminished. The accident exacerbated his pre-existing anxiety disorder.
- [70] In Falati the plaintiff had a crush injury to his left tibia and fracture of the fibula. He was hospitalized and underwent surgical stabilization of his fractures with intramedullary nailing. Four days were spent in hospital. Five months after discharge his physician recommended he refrain from standing for more than 30 minutes, not walk for more than 100 metres, and not climb ladders or stairs. The plaintiff was left with some element of permanent left ankle disability. The hardware in his ankle was not removed but might be removed in the future. The plaintiff had a fairly significant anxiety reaction and "reactive depression". He had symptoms suggestive of post-traumatic stress disorder but not enough to be classified as "full PTSD syndrome".
- [71] Both of these cases involve, in my opinion, more significant sequella and elements of significant psychological impacts. The cases cited by the defendants, however, involve less serious injuries. In my opinion non-pecuniary damages fall between the two parties' positions. I award \$55,000 under this head.

B. Loss of Income

- [72] Druet claims loss of past income because of time she was required to take off work. She was off work from March 21, 2005 until May 31, 2005 immediately after the fall. She missed work from September 19, 2005 to September 22, 2005 when the hardware was removed. She missed work from June 20, 2008 until July 6, 2008 when her ankle was debrided. I accept the plaintiff's calculation of this wage loss at \$8,944.74.
- [73] Druet also used up "sick days" to allow for salary continuance during some of the time she was off work. Had she not used up sick days she would have received one-half of the salary she was entitled to for not using these days. I accept the plaintiff's calculation of these at \$527 and \$849.24 for a total of \$1,376.24.

- [74] Druet does not alleged that she was out of pocket for all of these losses. Her benefit plans provided short term disability coverage for some of these losses.
- [75] In *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, 69 D.L.R. (4th) 25, the Supreme Court of Canada applied the general principle that damages in tort should seek to compensate the victim for her loss while avoiding over-compensation in the context of the "private insurance exception" and an award for lost earnings.
- [76] The "private insurance exception" permits a plaintiff to recover twice: once from the tortfeasor and once from the proceeds of private insurance. The exception is applied if the plaintiff can show some evidence that she contributed to funding the plan: *Ratych* at 972-73.
- [77] In *Kask v. Tam* (1996), 21 B.C.L.R. (3d) 11 at para. 23, 72 B.C.A.C. 133, our Court of Appeal reviewed the jurisprudence since *Ratych* and found that the evidentiary requirement is low; "some evidence" of negotiation to give up something for the insurance coverage is sufficient.
- [78] Druet gave evidence that this coverage was provided as part of her wage package and that the benefits she received from her insurance were taxable.
- [79] Pursuant to the Supreme Court of Canada decision in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, 113 D.L.R. (4th) 1. This is sufficient evidence that she contributed to her private insurance plan to permit her insurance benefits to fall within the private insurance exception. Writing for the majority, Cory J. said, at 407:

Generally speaking, any of the following examples, by no means an exhaustive list, provide the sort of evidence that could well be sufficient to establish that the employee paid for the benefit:

- (2) Evidence of some money foregone by the employee in return for the benefits. For example if the employees gave up the return of a percentage of their Unemployment Insurance Plan premiums in return for the benefits.
- [80] Druet paid tax on the money she received from her insurance company. She therefore paid something to receive them and is entitled to recover the insured amounts from the defendants.

C. Loss of Future Earning Capacity

- [81] There is a claim for loss of earning capacity. Garson J. in *Perren v. Lalari*, 2010 BCCA 140 recently affirmed the approach that one must first enquire into whether there is a substantial possibility of future income loss before embarking on methods to assess a loss. A future or hypothetical possibility is only considered if it is a real and substantial possibility and not a speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235.
- [82] Dr. Mankey in his report of June 2009 opined that Druet's prognosis is that her condition is fixed and stable, and not considered to deteriorate or improve significantly from this point. She is not at high risk for future injury.

- [83] Druet has considered upgrading her qualifications from those of a licenced practical nurse to become a registered nurse. Counsel argues that Druet is now foreclosed from doing so, as most registered nurses work in hospitals, which involves much more walking and physical work than she presently does.
- [84] Druet maintains her pre-Accident employment, six years post-Accident. She is now 52. She does substantial walks five times a week for exercise and recreation in addition to any walking done during her full-time employment. While she has concerns regarding her future employment, these are not, in my view, substantiated by the medical evidence. In my opinion she has not shown that there is a real and substantial possibility of an event leading to a future income loss.
- [85] I would not make any award under this head.

D. Cost of Future Care

- [86] Under this head the plaintiff claims the cost of orthotics, some pain killers and Tylenol, podiatrist visits and orthopedic surgeon visits. The orthotics cost \$398 per pair and last a couple of years. She requires different orthotics for work and dress shoes.
- [87] The claims for podiatrist and orthopedic visits seem inconsistent with her fixed and stable prognosis. I accept that there will be an occasional need for consultation, but not with the regularity asserted by counsel.
- [88] Under this head I would award the plaintiff a total of \$3,000.

E. Loss of Future Housekeeping Capacity

- [89] The plaintiff argues that she may have to incur housekeeping expenses in the future, to assist her where her mother currently provides some assistance. In my view the evidence falls short of establishing this head of damage.

F. In Trust Claim

- [90] Druet claims in trust on behalf of her mother, Vera Taylor, for the gratuitous services of Ms. Taylor in caring for Ms. Druet upon discharge from hospital. Ms. Taylor did assist her daughter post-Accident. In my opinion, however, applying the tests set out in *Eggleston v. Watson*, 2010 BCSC 890, the help provided falls within the usual "give and take" of family members.

G. Special Damages

- [91] In her statement of claim, the plaintiff alleges that she has incurred medical expenses because of the defendants' negligence and seeks to recover those costs.

[92] The majority of the plaintiff's medical expenses were incurred in the United States and were paid directly by one of several private insurance companies (the "Insurers"). At trial, an itemized list of the plaintiff's claim for special damages was tendered. Among the damages claimed are expenses incurred by the Insurers.

[93] The only case relied upon by the parties in respect of the Insurers' costs is Ratych, cited above. That case involved a claim in which a police officer alleged that he should recover the value of lost wages against a tortfeasor, though his employer had continued to pay him during his period of disability. At the end of its analysis, the Court said, at 983:

These comments should not be taken as extending to types of collateral benefits other than lost earnings, such as insurance paid for by the plaintiff and gratuitous payments made by third parties. Those issues are not before the Court and must be left for another day.

[94] However Ratych was applied in Napoleone v. Sharma, 2008 BCSC 1746 outside the context of wage loss indemnity. The plaintiff sought recovery of the portion of her special expenses which had been reimbursed to her under insurance provided through her husband's employer. There was no evidence that the plaintiff's husband had contributed to funding the benefits and therefore they did not fall within the private insurance exception.

[95] I do not find these cases of assistance in the matter before me. This is not a case in which the plaintiff seeks to recover twice so that she may have the benefit of private insurance she funded through her own forethought. Instead she asks this Court to reimburse her for amounts expended by third parties, her Insurers, on her behalf. She says if such an award is made, she will be required to repay her Insurers; she therefore asks us to make an award for the benefit of third parties who are not joined in this action.

[96] No authority was put before me which would permit me to do so, however the plaintiff did argue that the Insurers have a right of subrogation. On subrogation, the Court in Ratych concluded, at 982-83:

[a]s a general rule, wage benefits paid while a plaintiff is unable to work must be brought into account and deducted from the claim for lost earnings. An exception to this rule may lie where the Court is satisfied that the employer or fund which paid the wage benefits is entitled to be reimbursed for them on the principle of subrogation. This is the case where statutes, such as the Workers' Compensation Act, R.S.O. 1980, c. 539, expressly provide for payment to the benefactor of any wage benefits recovered. It will also be the case where the person who paid the benefits establishes a valid claim to have them repaid out of any damages awarded. Absent legislation or a third party claim, the only device available to the Court to effect transference to the third party would be trust. Given that the third party has effective ways apart from trust of enforcing the claim, I would not extend the trust doctrine applied in Teno [Arnold v. Teno, [1978] 2 S.C.R. 287] and Thornton [Thornton v. Prince George Boards of School Trustees, [1978] 2 S.C.R. 267 and Arnold v. Teno, [1978] 2 S.C.R. 287] to collateral benefits in the usual case. At the same time, I would not rule out that a judge might use this device to transfer payment to a third party where the Judge is satisfied that this is both necessary and appropriate in the interests of justice.

Generally speaking, however, some sort of obligation, moral if not legal, to repay the third party would need to be established to permit application of the trust device. [Emphasis added.]

[97] There is no legislation or third party claim in this case therefore the plaintiff's claim relies on establishing that the Insurers have an in trust claim.

[98] In closing submissions, plaintiff's counsel pointed to an explanation of benefits from Regence BlueShield as evidence of its right of subrogation. On the form, beside the item lines which detail the services provided and paid for by that insurer on behalf of the plaintiff, is a code which reads T03. The form explains that this code means "Subrogation Case in Process. Payment may be reclaimed."

[99] This falls short of establishing that this insurer has a right of subrogation and does not assist with the argument that the plaintiff's other insurer has such a right.

[100] The interests of justice do not require that I award an in trust claim. On these facts, there is no other basis for me to award non-parties a remedy for amounts they paid to fourth parties on behalf of the plaintiff.

[101] It was open to the Insurers to seek to recover their expenses and they did not do so.

[102] The plaintiff's claim for special damages that she did not incur is dismissed. I allow her claim for her out of pocket expenses related to this accident in the amounts of CDN\$446.31 and USD\$9,786.53. I note that the Canadian and US dollars are almost at par today.

IX. Summary

[103] The plaintiff has demonstrated, on a balance of probabilities, that the slipperiness of the light tiles in the Lobby of the Hotel caused her to fall and resulted in injury to her ankle.

[104] The defendants have demonstrated, on a balance of probabilities, that the plaintiff failed to keep a proper lookout and take reasonable care on re-entering the Lobby with wet shoes and that this failure contributed to her fall and resulting ankle injury.

[105] I apportion liability equally.

[106] I award the plaintiff 50% of the following damages:

Description

Amount

1.

Non-Pecuniary Damages

55,000.00

2.

Loss of Income

10,320.98

3.

Cost of Future Care

3,000.00

4.

Special Damages (US)

9,786.53

5.

Special Damages (CAD)

446.31

[107] As success has been divided, unless there is something of which I am not aware that impacts costs, the parties shall bear their own costs.

"The Honourable Mr. Justice Savage"

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