

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN**

**DAVID AUBAIN,**

Plaintiff,

v.

**KAZI FOODS OF THE V.I., INC.  
D/B/A PIZZA HUT ST. THOMAS,**

Defendant.

CIVIL NO. ST-12-CV-461

**ACTION FOR DAMAGES**

**JURY TRIAL DEMANDED**

**MEMORANDUM OPINION**

**THIS MATTER** is before the Court on Defendant Kazi Foods of the V.I., Inc.'s Motion for Summary Judgment (filed on September 2, 2014). For the reasons expounded below, the Court will grant the motion.

**I. Background**

Defendant Kazi Foods operates a Pizza Hut restaurant on the waterfront in St. Thomas. Plaintiff David Aubain alleges he was injured on September 5, 2011, when the bench he was sitting on at Kazi's restaurant collapsed underneath him on account of a loose wooden peg; Aubain alleges that he struck his chin, back, and hip in the fall. He filed this lawsuit against Kazi for negligence on August 20, 2012. Kazi denies that Aubain ever fell,<sup>1</sup> but does not contest Aubain's allegation for the purposes of this summary judgment motion. Kazi's motion turns heavily on the

---

<sup>1</sup> Instead, Kazi says that, at most, Aubain's seat may have dipped slightly.

details of deposition testimony in the record. Therefore, the Court will first summarize in relevant detail the deposition testimony of Vanzell Bass, Kazi's maintenance supervisor, Edward Pemberton, Kazi's security guard, and Jacqueline Thomas, Kazi's waterfront Pizza Hut manager.

### **Deposition Testimony of Vanzell Bass**

Vanzell Bass has worked for Kazi as the maintenance supervisor since 2005 or 2006. Def's Ex. 1 at 14; Plt's Ex. 1 at 16. His duties include checking the equipment, the buildings, and the furniture at Kazi's four restaurants on St. Thomas. Def's Ex. 1 at 16; Plt's Ex. 1 at 18, 27-28. Bass and Simon, an employee who works with Bass, both check the furniture on a weekly basis. Plt's Ex. 1 at 42-43. They do this in the morning, before the restaurants are open for business. Plt. Ex. 1 at 61. According to Bass, he and Simon were checking the furniture weekly at the time of Aubain's accident, but Bass did not observe any loose pegs prior to Aubain's accident. Plt's Ex. 1 at 60-62. No report or record is made relating to the weekly furniture check. Plt's Ex. 1 at 43, 59-60.

When Bass and Simon inspect the benches, they "normally turn the tables, the benches up to look for loose things," including "loose pegs and these types of things." Plt. Ex. 1 at 60-61. Bass testified that he has never had to repair the bench Aubain sat on, but he has repaired loose screws on tables and chairs. Plt's Ex. 1 at 62-63. Bass indicated that he once had to replace rotten wood and tighten screws on a bench in one of Kazi's other restaurants in Subbase. Plt's Ex. 1 at 64.

### **Deposition Testimony of Edward Pemberton**

Edward Pemberton is a security guard at the waterfront Pizza Hut. Plt's Ex. 3 at 68. In Pemberton's estimation, Bass "is there almost every day," "practically every day." Plt's Ex. 3 at 33, 35. He has observed Bass perform a routine inspection of tables and chairs once per month, and has specifically seen Bass looking at the benches. Plt's Ex. 3 at 34, 37. These inspections, according to Pemberton, are done outside business hours. Plt's Ex. 3 at 46. Bass is also "there every day to check if something is wrong," particularly in the kitchen. Plt's Ex. 3 at 34-35.

Regarding the benches, Pemberton explained that he himself does not "normally do bench repairs," but that he would repair a bench if he observed something wrong. Plt's Ex. 3 at 41. "Sometimes" he continued, "there is a peg" on the bench that "starts to move" or "loosens somewhat." Plt's Ex. 3 at 41-42. Pemberton said he has observed this twice in two separate benches. Plt's Ex. 3 at 42-43. The first occasion was the loose peg he observed in the bench that caused Aubain to fall, immediately after the accident. Plt's Ex. 3 at 43. In the other instance, Pemberton observed a loose peg in another bench, but said "I think it was after" Aubain's accident. Plt's Ex. 3 at 43.

### **Deposition Testimony of Jacqueline Thomas**

Jacqueline Thomas started working at Pizza Hut as a waitress in 1984 and was eventually promoted to manager in 1988 or 1990. Plt's Ex. 2 at 8, 11. She

supervises twelve employees, but does not supervise Bass and does not know his schedule or working hours. Plt's Ex. 2 at 11, 19. When the restaurant opens, Thomas has to "be on the floor, back and front, all over." Plt's Ex. 2 at 14. During non-business hours, Thomas does paperwork in her office. Plt's Ex. 2 at 14. She added that she is not responsible for maintaining the equipment or furniture. Plt's Ex. 2 at 18.

Thomas gave details of her understanding of Bass's duties. She said Bass is responsible for maintaining the furniture, but did not recall Bass ever fixing chairs or benches in the store or calling Bass to fix a chair or bench. Plt's Ex. 2 at 18, 22. Thomas added that no one checks the benches and chairs during business hours, "just me." Plt's Ex. 2 at 23. She has never seen any of the benches repaired, but said, "I don't know if when I'm not there..." Plt's Ex. 2 at 43.

## II. Analysis

Kazi now moves for summary judgment pursuant to Fed. R. Civ. P. 56 (as incorporated by Super. Ct. R. 7). To succeed, Kazi must demonstrate "that there is no genuine dispute as to any material fact [such that Kazi] is entitled to judgment as a matter of law." *Id.* A genuine dispute of material fact exists if, based on the evidence in the record, a reasonable jury could find in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In analyzing this motion, the Court must "view all inferences from the evidence in the light most favorable to . . . [Aubain] and take [his] allegations as true if properly supported." *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379 (V.I. 2014) (citing *Perez v. Ritz-Carlton (V.I.), Inc.*, 59

V.I. 522, 527 (V.I. 2013)). However, because Aubain is the plaintiff in this case, and therefore bears the ultimate burden of proof, it is not necessary that Kazi “support its motion with [evidence] negating [Aubain’s] claim.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Rather, since Kazi has “informed the . . . [C]ourt of the basis for its motion,” *id.*, “the burden shifts to [Aubain] to present ‘affirmative evidence’ from which a jury might reasonably return a verdict in his favor.” *Chapman v. Cornwall*, 58 V.I. 431, 436 (V.I. 2013) (citing *Celotex Corp.*, 477 U.S. at 322-25; *Liberty Lobby*, 477 U.S. at 248). Therefore, Aubain must offer at least some evidence from which to draw an inference; he “may not rest upon mere allegations.” *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008). “[T]he mere possibility that something occurred in a particular way is not enough, as a matter of law, for a jury to find it probably happened that way.” *Saldana v. Kmart Corp.*, 43 V.I. 361, 368 (3d Cir. 2001).

### **Premises Liability**

To prove his negligence claim, Aubain must show 1.) that Kazi owed him a duty of care; 2.) that Kazi breached that duty; 3.) that Aubain suffered damages; and 4.) that Kazi’s breach of duty caused Aubain’s damages. *Machado v. Yacht Haven U.S.V.I., L.L.C.*, 61 V.I. 373, 380 (V.I. 2014).

Relying on *Machado*, Aubain devotes most of his Opposition to arguing that his accident was foreseeable. However, the foreseeability question in *Machado* is out of place here because foreseeability is only relevant to the first element of negligence:

whether a defendant owes a plaintiff a duty of care in the first place.<sup>2</sup> A foreseeability analysis is entirely unnecessary here because Kazi, operating a restaurant open to the public, does not dispute that it owed Aubain the highest duty of reasonable care - the duty owed to what would have been called an “invitee” under the old regime.<sup>3</sup> Duty (element one)<sup>4</sup> has already been conceded and does not need to be addressed in this Opinion.

Instead, the question here is whether Aubain has introduced enough affirmative evidence such that a reasonable jury, drawing all reasonable inferences in Aubain’s favor, could find that Kazi breached its undisputed high duty of reasonable care (element two). To answer this question, the Court must follow the Supreme Court’s lead in *Machado* (and *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 533 (V.I. 2013)) and ask not whether Aubain’s entry and consequent injury were foreseeable, but ask instead whether Kazi had notice, actual or constructive, of the dangerous condition that injured Aubain, i.e. the allegedly loose wooden bench peg. While the two tests — foreseeability of the harm and notice of the condition — share a certain conceptual overlap, they are not the same because their objects are not the same. Notice requires a far more concrete inquiry into the

---

<sup>2</sup> The Supreme Court in *Machado* dismantled the traditional discrete categories of entrants to land (along with their correspondingly discrete levels of duty imposed on the land possessor) and replaced them with a single continuous spectrum of duty based on how foreseeable it is that the plaintiff would enter the defendant’s premises and suffer injury.

<sup>3</sup> Because Aubain was a customer at Kazi’s restaurant, Kazi owed Aubain a duty to protect him from foreseeable harms by maintaining its premises, including the benches, in a safe condition. Cf. *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 533 (V.I. 2013)

<sup>4</sup> As well as causation (element three) and damages (element four) for the purposes of summary judgment.

particular cause of Aubain's injury, i.e. the loose wooden peg in the bench Aubain used, as opposed to a more general foreseeability of harm analysis that looks instead to whether Kazi ought to have expected customers to enter its Pizza Hut restaurant and sit on the furniture there.<sup>5</sup>

Therefore, the test for whether Kazi breached its duty to protect Aubain from foreseeable harms through the exercise of reasonable care is whether Kazi had actual or constructive notice of the bench hazard that injured Aubain. Although the Court will draw inferences in Aubain's favor, it is still up to Aubain to identify evidence in the record from which it is possible to reasonably infer a breach. Aubain's Opposition identifies an impressively long list of evidence that he says creates a genuine dispute

---

<sup>5</sup> This conclusion is compelled by the logic and structure of *Machado*, in particular *Machado*'s holding that "[t]he foreseeability of harm is the touchstone of the existence of a land possessor's *duty of reasonable or ordinary care*." 61 V.I. at 386 (quoting *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 533 (V.I. 2013) (emphasis added)) and the opening language in *Machado*'s section on breach of duty:

Even though Machado created a jury question on Yacht Haven's duty of reasonable care by producing evidence that her use of the median was foreseeable to Yacht Haven, to survive summary judgment Machado was also required to submit evidence supporting the contention that Yacht Haven breached its duty to take reasonable steps to protect her against foreseeable harm. To do this, Machado was required to produce evidence that could support a finding that Yacht Haven had actual or constructive notice of a dangerous condition.

*Id.* at 392. Despite this clear language, Aubain's position does not entirely lack support: the Supreme Court, in summarizing the section in *Machado* on *breach of duty*, declared "the touchstone of premises liability in the Virgin Islands is foreseeability – if a possessor could anticipate that the conditions on its property would result in injury to those foreseeably using the property, the possessor can be held liable for those injuries," *Id.* at 394. This second statement on touchstones might reasonably be construed to mean that foreseeability is tied to breach of duty and liability generally (as opposed to duty only). Aubain's interpretation is bolstered by *Antilles School, Inc. v. Lembach*, 2016 V.I. Supreme LEXIS 7 (V.I. Mar. 14, 2016), in which the Supreme Court applied foreseeability language in a breach of duty analysis. Nonetheless, the Court believes its holding in this Opinion supplies the more faithful interpretation of Supreme Court precedent than Aubain if for no other reason than that the Supreme Court has consistently identified duty and breach as separate elements — if foreseeability of harm were the test for both duty and breach (or for liability generally), then the two elements will have collapsed into one. What the Supreme Court has separated, let not the Superior Court join together.

of material fact that should send the case to the jury.<sup>6</sup> That list includes: admissions from deponents that the benches had had loose pegs in the past, conflicting testimony from deponents concerning whether and how often benches were inspected, inconsistent testimony from Kazi employees concerning their relative locations and the timeline of events after Aubain's alleged fall, deponent testimony that the benches had not been repaired or replaced since the mid-1990s, Kazi's lack of a maintenance log or incident report, and deponent testimony that Kazi did not conduct regular maintenance.

Despite its length, the Court on close inspection cannot hold that Aubain's list constitutes "affirmative evidence" that reasonably points toward the conclusion that Kazi had actual or constructive notice of a problem with its bench. With two exceptions (which the Court will address momentarily), Aubain's proffered evidence tends merely to undercut Kazi's evidence against Aubain, not actively support Aubain's case. Yet, as the plaintiff in this case, and under *Celotex* and *Liberty Lobby*, Aubain cannot rest with showing weaknesses in Kazi's defense. To take one example that Aubain references multiple times in his filings: Vanzell Bass testified that he inspects Kazi's Pizza Hut furniture on a *weekly* basis. To undermine Bass's statement, Aubain directs the Court's attention to Edward Pemberton's statement that he has seen Bass inspect the furniture, including the benches, on a *monthly* basis. This is a facial discrepancy, and, if this case ever goes to trial, Aubain's

---

<sup>6</sup> As noted above, Aubain's Opposition presents this list as evidence of foreseeability. The Court will instead consider it as evidence of notice of a dangerous condition.



attorneys might do well to pit the inconsistent testimonies against one another to raise doubts in the jurors' minds concerning the reliability of Bass and Pemberton's testimonies. The jurors might<sup>7</sup> infer that the discrepancy means Bass, Pemberton, or both, are not reliable. But showing that Kazi employees cannot get the details of their stories straight concerning whether they inspect the furniture weekly or monthly does not reasonably permit the inference that Aubain would have the Court draw on behalf of the reasonable juror: namely, that Kazi did not inspect the furniture *at all*.<sup>8</sup> "[D]iscredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984).

Aubain faces a similar problem with most of the rest of his list in that it has identified reasons not to trust Kazi's defense but does not affirmatively provide reason to believe Aubain's own case. That Kazi employees did not keep a maintenance log to corroborate their maintenance does not allow the inference that there was no

---

<sup>7</sup> The Court is not convinced that there is a real discrepancy here, since Pemberton's testimony concerned only what he happened to have seen, not knowledge of what Bass's habits actually are. However, as explained below, even if the Court decided that a reasonable jury could infer that Pemberton's statement means that Bass's statement is not true, it would not overcome Aubain's lack of affirmative evidence.

<sup>8</sup> Of course, Pemberton's testimony might have qualified as affirmative evidence for the proposition that Kazi only inspected the furniture monthly (subject to the Court's caveat in footnote 7) instead of the proposition that Kazi never inspected the furniture at all. However, not only has Aubain not asked the Court to credit Pemberton's statement over Bass's in this fashion, but, crucially, the record lacks any evidence that would allow the jury to infer that monthly inspection is inadequate. This is similar to Thomas's statement that Kazi had not replaced its benches in the sixteen years since Hurricane Marilyn. This statement is real affirmative evidence that a jury might credit, but it is just a free-floating data point unmoored by any standard that may be inferred from the evidence in the record that would allow a jury to draw a relevant conclusion (for example, there is neither deposition testimony nor written documentation, e.g. from the bench manufacturer, stating the recommended life span of furniture similar to the bench model in question). The "mere possibility" that sixteen years is too long to keep a bench is not enough to infer that Kazi had constructive notice of a dangerous condition because it had kept benches past their usable lifespan.

maintenance. That Kazi store employees may not have written up an incident report about Aubain's injury might weaken their credibility about what happened, but does not permit the inference that something entirely different happened.<sup>9</sup>

The Court has identified only two statements in the record from Aubain's list that plausibly qualify as affirmative evidence that Kazi had constructive notice of the bench's condition, but neither of them survive scrutiny. First, Aubain points to Pemberton's statement that he was aware of a second bench that had had a loose peg ("[t]here is a peg on the bench that sometimes, it starts to move. . . . [l]oosens, somewhat.") as evidence that Kazi knew beforehand that it had a problem with the pegs in its benches.<sup>10</sup> But closer inspection of Pemberton's testimony reveals that this is not what he meant. In fact, he clarified that he was aware of only one other instance of a loose peg and that instance occurred *after* Aubain's accident.<sup>11</sup> Any problems with

---

<sup>9</sup> Inconsistencies in Kazi General Manager Jafar Djavadi's testimony about where he was facing at the time of the incident, even if they tend to discredit his story, are especially irrelevant here since his testimony concerns whether Aubain was injured at all; Kazi has already conceded that there are disputes of material fact concerning the causation and damages elements of Aubain's claim.

<sup>10</sup> Pemberton does not say Kazi employees knew about a problem with Aubain's bench. Therefore, the Court presumes that Aubain means to invoke some species of the recurring condition doctrine from *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522 (V.I. 2013) as a means of demonstrating constructive notice. Even if Pemberton had said what Aubain suggests he did, the Court is not convinced it would meet the *Perez* standard since one prior problem with another peg hardly constitutes a "regular occurrence." *Id.* at 531.

<sup>11</sup> Excerpt from pages 41-43 of Pemberton's Deposition Transcript:

Q. What has ever been wrong?

A. Okay. Sometimes there is a peg – where is the pictures? Okay, I will explain. There is a peg on the bench that sometimes, it starts to move.

Q. It comes off?

A. It don't come off, it want or move.

Q. It loosens?

A. Loosens, somewhat.

Q. And when – does that happen on all of the benches, it sometimes become loose?

A. No, I wouldn't say so.

Q. How many benches the peg has becomes loose as you have observed?

A. One or two.

the benches prior to Aubain's accident concerned wood rot and screws on a different bench at a different Kazi location, which would not permit a reasonable inference that Kazi had constructive notice of a loose peg at the waterfront Pizza Hut. Deponents do not usually speak in complete prose paragraphs, and, while a few isolated sentences in Pemberton's transcript might appear at first glance to support the idea that the pegs were a recurring problem, it is unreasonable for a finder of fact to infer that Pemberton meant that when presented with the witness's own clarification of his meaning to the contrary mere sentences later. *See Moore v. Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 576-77 (1951) ("We do not think that the isolated portion of the . . . testimony relied on by petitioner permits an inference of negligence when placed in its setting of uncontradicted and unequivocal testimony at variance with such an inference.").

---

Q. One or two. And that's one or two different from the one that Mr. Aubain had his incident on?

A. One different.

Q. A different one from that?

A. One different.

Q. Okay.

A. So, including the one.

Q. Okay. And it was the same peg that was loosened that you had to fix or was it a different thing that was wrong with the other bench?

A. No, it might be a peg but not in the same position.

Q. A peg on a different position?

A. On a different position.

Q. Okay. And on that other bench, was it before 2011 that you had to fix that one?

A. I don't remember.

Q. Was it before the incident with Mr. Aubain?

A. I think it was after.

Q. You think it was after. So, another different bench after.

...

Q. Besides the problem with the other bench and the bench that Mr. Aubain had his incident on, do you know of any other furniture that has had problems before on the premises?

A. No.

Next, Aubain points to Jacqueline Thomas's testimony as evidence that there was no inspection or maintenance of the Pizza Hut benches. Again, when the specific testimony is examined directly, the Court finds that it would not support a reasonable inference that there was no maintenance. The exact excerpt from Thomas's deposition is:

Q. You know if anyone comes in during business hours to check the benches and the chairs?

A. No, just me.

Q. You haven't seen anybody do that?

A. No.

...

Q. . . . [Y]ou've never seen any of the benches repaired?

A. No, not to say the benches repaired. We check the benches and I can't recall –

Q. You have never seen any of the benches repaired?

A. Not as far as I could recall. I don't know if when I'm not there, but –

This is not testimony to the effect that bench maintenance and inspection did not ever happen, as Aubain would have the jury infer. A reasonable finder of fact would take this for what Thomas says it is: affirmative evidence that no maintenance occurred during business hours and an absence of affirmative evidence for or against the proposition that Kazi conducted maintenance during non-business hours (when Bass testified that he and Simon in fact conduct furniture inspections and maintenance).<sup>12</sup> The move from “haven't seen anybody” check the benches during business hours and “I don't know if when I'm not there” to “no one ever checks the

---

<sup>12</sup> Thomas testified that she did not know Bass's working hours and that she neither set his schedule nor supervised him.

benches” goes beyond the limit of a reasonable inference and strays into the territory of rank speculation. Accordingly, the Court holds that Aubain has not identified affirmative evidence in the record sufficient to allow a jury to reasonably infer that Kazi breached its duty of care to Aubain.

### **Res Ipsa Loquitur**

Anticipating the possibility that the Court would come to the above conclusion, Aubain’s Opposition argues that his claim ought to survive summary judgment anyway because of the doctrine of res ipsa loquitur, which would permit a jury to infer that Kazi’s negligence caused Aubain’s harm even in the absence of the affirmative evidence usually necessary to infer a breach of duty. *Coastal Air Transport v. Royer*, 2016 V.I. Supreme LEXIS 19 (V.I. June 3, 2016). Such an inference is permitted if: 1.) Aubain’s accident “is of a kind which ordinarily does not occur in the absence of negligence;” 2.) “other responsible causes, including the conduct of [Aubain] and third persons, are sufficiently eliminated by the evidence;” and 3.) the indicated negligence is within the scope of the [Kazi’s] duty to [Aubain].” *Id.* at \*8 n. 7 (quoting the Restatement (Second) of Torts § 328D).

“It is the function of the [C]ourt to determine whether the inference may reasonably be drawn by the jury . . . .” *Id.* According to the Second Restatement, which the Supreme Court adopted in *Coastal Air*, *id.* at \*15, the Court may look to record evidence to determine whether a defendant’s negligence is more likely than not the cause of the type of accident under consideration. Restatement (Second) of Torts §

328D cmt. d. But Aubain has provided no evidence, expert or otherwise, that would support the proposition that a restaurant bench collapsing due to a loose peg is more likely than not caused in part by the restaurant's negligence. In the absence of such record evidence, it is up to the Court to decide whether there is "general knowledge" that is "common to the community" that loose pegs in benches are usually found in the presence of negligence. *Id.* The Court should do this "on much the same basis as when it takes judicial notice of facts which everyone knows." *Id.* See Fed. R. Evid. 201(b) ("The court may judicially notice a fact that is not subject to a reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned."). See also *Farrell v. People of the Virgin Islands*, 54 V.I. 600 (V.I. 2011) ("... the Superior Court may only take judicial notice of a fact if it represents general knowledge that cannot be reasonably questioned or disputed.")

A judicial notice standard may explain why *res ipsa loquitur* is usually only applied to cases that involve what the Supreme Court calls "extraordinary events." *Id.* at \*15. *Coastal Air* itself involved an airplane door bursting open mid-flight. Law students across the common law world remember the paradigm case of *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (1863), which involved barrels falling from buildings, and case law in the Virgin Islands where courts have applied the doctrine tends toward fact patterns that are not run-of-the-mill. *E.g.*, *Smith v. Katz*, 2013 U.S. Dist. LEXIS 40804 (D.V.I. March 22, 2013) (mold spores in an office building causing

respiratory illness); *Mendez v. Hovenssa*, 49 V.I. 826 (D.V.I. 2008) (tainted drinking water); *Hubschman v. Antilles Airboats*, 440 F.Supp. 828 (D.V.I. 1977) (seaplane engines dying midflight); *Todman v. Government of the Virgin Islands*, 14 V.I. 593 (V.I. Terr. Ct. 1978) (water geyser from broken water main where water pipes burst in the area frequently and there was evidence that preventative measures could have been taken).<sup>13</sup> These extraordinary occurrences are plainly “not subject to reasonable dispute because . . . it is generally known” in the Virgin Islands, even without expert or technical evidence concerning aerodynamics, civil engineering, etc., that these sorts of incidents do not happen in the absence of negligence. The causes of less extraordinary accidents are hardly beyond dispute in the same way.

And, with the possible exception of “slip-and-fall” cases, it is hard to get less extraordinary than a “sit-and-fall” case. In this case, the Court cannot take judicial notice that loose pegs in benches are usually the result of restaurant negligence; rather, in the Court’s estimation, many in the community would say that even well-maintained furniture breaks and even recently-inspected pegs come loose. This is just one of the “many types of accidents which commonly occur without the fault of anyone.” Restatement (Second) of Torts § 328D cmt. c.<sup>14</sup> The balance of probabilities of what caused Aubain’s accident would certainly “be reasonably questioned or

---

<sup>13</sup> But see *Matherin v. Moon Rise Shipping*, 2012 U.S. Dist. LEXIS 1538 (D.V.I. Jan. 5, 2012) (applying the doctrine to a broken chair under maritime law where there were no inspections of the chairs, most of the chairs had been re-welded at the joints, some with reinforcements, and there was some indication the chairs had previously been repaired).

<sup>14</sup> Although they are only advisory, the Court notes that the comments to the Restatement do not include broken benches, broken chairs, or any equivalent accidents as examples of the type of events that do not ordinarily occur unless someone has been negligent.

disputed.”<sup>15</sup> Therefore, the Court will not apply res ipsa loquitur to halt the entry of summary judgment.

### III. Conclusion

Aubain has not identified sufficient affirmative evidence to allow a reasonable jury to infer that Kazi breached its duty of reasonable care and res ipsa loquitur doctrine does not allow a jury to infer negligence from the facts as presently constituted. Therefore, the Court will grant Kazi’s motion for summary judgment. The Court will enter an Order consistent with this Opinion.

DATED: August 23, 2016

ATTEST:  
**ESTRELLA H. GEORGE**  
Acting Clerk of the Court

BY: *[Signature]*  
**LORI BOYNES-TYSON**  
Court Clerk Supervisor 8/23/2016

*[Signature]*

**Kathleen Mackay**  
Judge of the Superior Court  
of the Virgin Islands



<sup>15</sup> It is not lost on the Court that it is assessing its own sense of the community’s knowledge and understanding as the basis for determining whether jurors, who represent the community, should be allowed to use their own knowledge and understanding. But as long as “[i]t is the function of the [C]ourt to determine whether the inference [of negligence] may reasonably be drawn by the jury,” this will be unavoidable (in the absence of record evidence tending to show whether any given type of accident is usually the result of negligence).