[2011] JMCA Civ 44

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 73/2009

BEFORE: **THE HON MR JUSTICE HARRISON JA**
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA

BETWEEN	**WAYNE ANN HOLDINGS LIMITED (T/A SUPERPLUS FOOD STORES)**	**APPELLANT**
AND	**SANDRA MORGAN**	**RESPONDENT**

W Clark Cousins for the appellant

Miss Christine Hudson instructed by K. Churchill Neita & Co for the respondent

30 June 2010 and 2 December 2011

HARRISON JA

[1] I have read in draft the judgment of my sister Harris JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

HARRIS JA

[2] This is an appeal against the decision of P.A. Williams J, wherein she found that the appellant had been in breach of the duty of care which it owed to the respondent under the Occupiers' Liability Act. She ordered as follows:

> "(a) Judgment for the Claimant on the issue of liability apportioned. 60% responsibility as to the Defendant and 40% responsibility as to the Claimant;
>
> (b) Special Damages
>
> | | |
> |---|---|
> | Medical expenses | $111,500.00 |
> | Travelling expenses | 10,000.00 |
> | Loss of earnings | 412,500.00 |
> | Cost of extra help | 326,400.00 |
> | Total | $860,400.00 |
> | Award at 60% thereof with interest @ 3% from 26/08/2000 to 21/06/06 and 6% from 22/06/06 to 29/05/09 | 516,240.00 |
>
> (c) General Damages
>
> | | |
> |---|---|
> | Pain & suffering & loss of amenities | $2,000,000.00 |
> | Award to Claimant 60% with interest @ 3% from 07/08/01 to 21/06/06 and @ 6% from 22/06/06 to 29/05/09 | $1,200,000.00 |
> | Loss of future earning capacity | 750,000.00 |
> | Award to the Claimant 60% | 450,000.00 |

Future extra help	832,000.00
Award to Claimant	499,300.00"

[3] The appellant is a supermarket food chain operating in Jamaica. At all material times, the respondent was employed at the appellant's branch located in Christiana in the parish of Manchester. On or about 26 August 2000, she slipped in liquid which had been spilled on the floor while walking in the supermarket. This caused her to fall and sustain injuries.

[4] She was seen on 30 August 2000 by Dr Kharl Wright, a general practitioner. At that time, she complained of pain in her left shoulder radiating to the fingers of her left hand associated with numbness of the left upper limb. He observed that she had weakness in the fingers of her left hand. She was assessed as having brachial plexus lesion and was referred to a physiotherapist. After six sessions of physiotherapy, her condition remained unsatisfactory. She further complained of severe pain and numbness from the left side of her neck to the fingers of her left hand. The doctor expressed the view that she was considered to be disabled at that point. She was then referred to an orthopaedic surgeon.

[5] In May 2001, she was seen by Dr G.G. Dundas, an orthopaedic surgeon who examined her and found that she had left trapezius spasm in her upper extremities with tenderness but "full range of motion was executed" from the shoulder when she was distracted, and that there was tenderness in the left brachial plexus. His diagnosis then was carpel tunnel syndrome and shoulder contusion. He posed a query as to whiplash injury. After a nerve conduction test was done, he concluded that the "symptomatology

be assigned to the effect of her whiplash injury" and assessed her as having 5% disability of the whole person. On 30 October 2002 she saw Dr Daniel Graham, a neurologist, who after conducting a number of tests, concluded that "the cause of the patient's persistent complaints remains undetermined".

[6] On 16 September 2005, she was re-examined by Dr Dundas who observed that she had pains in the left arm extending to the hand and that she was weak in "all resisted" muscular exercises of the left upper extremity. He found that she had a mild ulnar claw of the left hand and intrinsic ulnar wasting as well as a sensory ulna blunting**.** He opined that she was suffering from a brachial plexus injury. At that time, he assessed her disability as 12% of the whole person.

[7] On 17 September 2008, she was seen by Dr Mark Minott, an orthopaedic consultant, apparently at the appellant's request. He found that there was a reduced range of motion in her cervical spine due to spasm to the trapezius and paraspinal muscles of her neck, but that the spinal cord seemed normal. He diagnosed that the injury to the neck was only of mild severity. After taking into account a number of variables, he assessed her as having 5% permanent partial disability of the whole person. During cross-examination, he stated that where an injury of this type (whiplash injury) is sustained, with proper treatment including physiotherapy, recovery is expected after six months to a year. He, however, admitted that physiotherapy is not a panacea for whiplash injury and this type of injury could affect the respondent's daily living.

[8] On 17 July 2001 the respondent brought an action against the appellant claiming damages for negligence and/or breach of statutory duty under section 3 of the Occupiers' Liability Act 1969. The particulars of negligence and/or breach of statutory duty were couched in the following terms:

> "i.) Failing to institute and/or ensure the operation of a system of inspection and reporting of spillages by their staff and prompt cleaning of any spillage
> ii.) Failing to detect and clear the spillage
>
> iii.) Failing to warn the Plaintiff and other lawful users of the Supermarket of the presence of the detergent and/or slippery substance on the floor by the cosmetic area
>
> iv.) In the circumstances exposing the Plaintiff to a risk of injury of which they knew or ought to have known."

[9] In her witness statement, she related that her duties included cashiering and pricing goods and that on the day in question, she had just finished pricing a box of saltfish and had started placing it on the shelf when one of her co-workers borrowed her pricing gun. After completing her task, she left in search of the co-worker to recover the pricing gun. She stated that on reaching a corner, before entering the aisle where the detergents were kept, as she "was about to turn to go in between the aisle", she felt herself sliding and tried to balance on a trolley which was to the right. After she fell, she said, she saw Dannette Daley, a co-worker of hers who was mute, stamping prices onto goods and packing a shelf in the aisle. She stated that before the fall, she saw a damaged bottle of liquid soap on the floor and that after falling, Miss Daley used

cornmeal to spread over the area. She also stated that because of her injuries, she had to get paid help to assist with her household chores. She was dismissed by the appellant in November 2000 but did not seek further employment because of her injuries. She, however, started to rear chickens for sale which would yield income between six to seven weeks after the stock was purchased. Her injuries, she asserted, resulted in her having to pay for assistance in that venture, which reduced the income she gained from it.

[10] The appellant filed a defence in which it denied that it was negligent or in breach of its statutory duty and averred that the injury and loss suffered by the respondent had been wholly or contributorily due to her own negligence. It was further averred that the spillage had occurred when a bottle of fabric softener had fallen from a customer while it was being taken from the shelf and that Miss Daley, who had been present at the time, took preventative steps pending the spillage being cleaned up. The particulars of negligence alleged in paragraph 5 of the defence were stated as follows:

> "(a) Failing to observe that the end of the aisle in which the spillage had occurred was blocked off to prevent entry.
>
> (b) Failing to look where she was going and observe the presence of the spillage on the floor.
>
> (c) Failing to heed the signal of her co-worker warning her of the presence of the liquid on the floor.
>
> (d) Walking into the liquid despite the signal of her co-worker not to enter the area.

(e) Failing to exercise due care with respect to a risk that was obvious and of which she ought to have known given her shop floor experience."

[11] Miss Daley was called as a witness for the defence. In her witness statement, she related that she had been tagging products in one of the aisles. Having climbed on a stool, she took down a bottle of fabric softener and put it in a shopping cart without realizing that it had not been properly closed. The bottle overturned and spilled on the floor where the liquid remained for about two minutes. She stated that she saw the respondent walking towards her and would have gotten something to clean up the spillage, if the respondent had not been approaching. She waved to the respondent, pointed down to the softener and "flagged her to stop". The respondent, she said, looked at her and smiled. During cross-examination, she denied that she had said that she had taken down the bottle but instead said that it had fallen when she had climbed on the stool. In cross-examination, she also denied touching the bottle before it fell but further said that she grabbed it quickly before it fell. Later, however, she said that the respondent entered and fell before she picked up the bottle. She also denied blocking off the entrance to the aisle or seeing anyone do so.

[12] In support of its defence, the appellant also relied on the evidence of Mr Wayne Chen, its managing director. In his witness statement, he stated that the appellant had 38 locations across Jamaica at the time of the incident and related that over a period of six years, there had been 14 reported incidents of slippage caused by spillages. During the course of a day, all the staff members and janitors would clean the store on an on-

going basis. In all stores, the staff members were trained to be on constant lookout for spillages and debris on the floor. Due to the frequency of spillages, employees were constantly being told by supervisors and managers of the need to deal with them expeditiously. According to him, the procedure for dealing with a spill was that when one was seen, a staff member would stand near it to ensure that no one slipped. That staff member would then "call for someone to come with a mop and whatever is necessary to clean it up". This was the practice at the branch in Christiana at the time of the accident. He said that when the accident occurred, the spillage was on the floor for less than two minutes. During cross-examination, he admitted that he did not have personal knowledge that the liquid had in fact been on the floor for less than two minutes.

[13] The appellant relied on the following grounds:

> "(a) The learned trial Judge failed to give proper weight to the obligation imposed by law on the Claimant with respect to a special risk ordinarily incident [sic] to her occupation as a supermarket employee.
>
> (b) The learned trial Judge failed to give proper weight to the fact that the spillage on the floor of the Defendant's workplace was not a latent but an obvious risk ordinarily incident [sic] to her occupation which she was obliged to be on the lookout for and to remove.
>
> (c) The learned trial Judge failed to appreciate that there may be circumstances where, as in the instant case, the relatively short duration of time between the spillage and the slip was such that no system for the detection and

clearing of same, however efficient, could prevent an accident.

(d) The learned trial Judge erred in finding that there was no credible or believable evidence as to the length of time the liquid was on the floor of the Defendant's supermarket.

(e) The learned trial Judge erred in finding that the Claimant was not warned; alternatively even if there was a warning but same was deficient, this did not relieve the Claimant from or reduce her own duty of care.

(f) The learned trial Judge erred in failing to appreciate that the Appellant's duty of care was not enlarged by the Respondent's neglect with respect to her own duty of care

(g) The learned trial Judge failed to properly address the inconsistencies in the evidence of both Ms Daley and the Claimant in assessing their credibility.

(h) The learned trial Judge failed to give sufficient weight to the unchallenged evidence of Mr Wayne Chen of the reasonably effective system for the detection and cleaning of spillages at the Defendant's workplace and imposed a standard of care which was unreasonable and/or practically unattainable having regard to all the circumstances.

(i) The learned trial Judge failed to correctly evaluate the evidence in relation to the Claimant's allegations in relation to pain and suffering and loss of amenities and in particular the independent medical evidence of Dr Minott.

(j) The award of general damages:

(i) for pain and suffering was inordinately high and outside the range of awards in

relation to that applicable in similar cases.

(ii) for future earning capacity, [sic] future extra help were not justified on the evidence

(k) The awards of special damages with respect to loss of earnings and cost of extra help were not justified on the evidence."

[14] It is convenient to begin with the statutory provisions which are relevant for the purpose of the appeal. They are contained in section 3(1) **-** (5) of the Occupiers' Liability Act. The Act imposes a duty of care on a occupier to see to the reasonable safety of visitors to his property. Section 3(1) – (5) reads:

"3 --(1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.

(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3)The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing –

(a) …

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so

> far as the occupier leaves him free to do so.
>
> (4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.
>
> (5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe."

[15] The law in respect of the liability of an occupier is subsumed in the general principles governing the law of negligence. In ***Donoghue v Stevenson*** [1932] AC 562 Lord Atkin stated that there is proximity between an occupier and such persons who enter his premises, they being his "neighbour". This imposes on an occupier a duty to take such reasonable care to avoid acts or omissions which are reasonably foreseeable and would injure his neighbour. The greater the risk of injury is, the greater the duty of care. Where the occupier knew or ought to have known that there is an inherent danger in doing a particular act which might result in injury, the greater the onus is on him to take reasonable care. What is reasonable is dependent upon the nature and degree of the danger. The standard of care is that which is reasonably expected of an occupier in his particular circumstances - see ***Goldman v Hargrave*** [1967] 1 AC 645.

[16] In this case contributory negligence was raised as a defence. When such a defense is raised, it is only necessary for a defendant to show a want of care on the

part of the claimant for his own safety in contributing to his injury. In ***Nance v British Columbia Electric Rly*** [1951] AC 601, at page 611, Lord Simon said:

> "…When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove…. that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

Issues as to whether an occupier has exercised reasonable care for his visitor's safety and whether a visitor was contributorily negligent are questions of fact - see ***Indemaur v Davies*** (1867) LR 2 CP 311.

[17] In a negligence action, a legal burden is cast on a claimant to prove his case on the balance of probabilities and this burden remains throughout. If he establishes proof of negligence on the part of a defendant the burden then shifts to the defendant to give an explanation as to how the accident happened. In the case of ***Ng Chun Pui and Ng Wang King v Lee Chuen Tat and Another*** Privy Council Appeal No 1/1988, delivered on 24 May 1988, although it was a case before the Board concerned with the application of the doctrine of *res ipsa loquitur*, the following dicta of Lord Griffiths, who delivered the judgment of the Board, eminently pronounces the general state of the law as to the burden of proof of negligence. At page 3 he said:

> "The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has

> suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred…
>
> So in an appropriate case the plaintiff establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. Loosely speaking this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a prima facie case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the prima facie case…; it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established."

The foregoing aptly demonstrates that a legal burden is placed on a claimant to prove negligence and not on a defendant to disprove it. If facts are proved which raise a prima facie inference that an accident resulted from the failure of a defendant to exercise reasonable care, then the claimant's action will succeed unless the defendant proffers an explanation which is sufficient to displace the prima facie inference that he had failed to take reasonable care.

Liability

[18] Mr Cousins submitted that in discharging the legal burden placed on her, the respondent was required to prove facts which show a greater likelihood that the injury was caused by the appellant's negligence than her own and if she established facts which were equally consistent with the accident being the result of her own negligence she would not have proved her case on a balance of probabilities. The appellant was not obliged to disprove negligence, he argued, as, it was only required to provide an explanation for the accident which was plausible or capable of belief.

[19] It was further submitted by him that the learned judge erred in finding that the inconsistencies cast doubt on the sincerity of the defence and that the defence had been unable to convince the court as to how the spillage occurred as these findings suggested that she was of the view that it was for the appellant to prove how the spillage occurred. The issue, he argued, was not whether the bottle of softener fell from a shelf or had overturned in a shopping cart but whether, "given the fact of the spillage, what was a correct approach to [the] balancing [of] the duties and responsibilities of the parties for the accident which occurred". The appellant relied on ***Victoria Mutual Building Society v Berry*** SCCA No. 54/2007 delivered 31 July 2008, as demonstrative of the balancing of the rights and obligations of occupiers and visitors and signaling clearly to "potential claimants in slip and fall cases that they have an obligation to exercise reasonable care for their safety having regard to all the circumstances".

[20] Mr Cousins also challenged the judge's finding that there was no believable evidence as to how long the spillage was on the floor, submitting that on the appellant's case, there was the unchallenged evidence of Miss Daley that the liquid had been on the floor for two minutes and it was a reasonable inference from the appellant's case that it had been there a short time. He also submitted that there was no evidence to support the judge's findings that the respondent had not been warned by the efforts of Miss Daley or that the location of the spillage had contributed to the respondent's failure to see it. It was further submitted that the judge also erred in finding that the appellant had not proved that steps were taken to block off the area where the spillage occurred. There was no burden on the appellant to prove what preventative steps were taken to block off the area. It was required only to make out a prima facie case in support of those measures and the preponderance of the evidence adduced supported a conclusion that the appellant did not have time to do so, he argued.

[21] He also submitted that the case of ***Ward v Tesco Stores*** [1976] 1 All ER 219 on which the learned judge relied was distinguishable from this case. In ***Ward v Tesco Stores***, the claimant was a customer whereas in this case, the respondent was an employee whose duties required her to be on the lookout for and attend to spillages. In ***Ward v Tesco Stores,*** there was evidence that the spillage had been unattended for a quarter of an hour or more, he argued. In this case, the spillage was not hidden or latent; it was obvious and the respondent ought therefore to have observed and removed it. ***Ward v Tesco Stores,*** it was submitted, had imposed too high a duty of

care akin to strict liability in that it required that spillages should be dealt with as soon as they occur and this was not consistent with the language of the statute.

[22] On the question of liability, Miss Hudson, in her written submissions, submitted that the respondent had established a prima facie case as there had been a spill of liquid, in one of the aisles, in which the respondent slipped and fell, thereby suffering injuries. She submitted that there was no evidence elicited in cross-examination which suggested or could support a finding that the respondent's fall was caused by any reason other than the negligence of the appellant in allowing the spill to remain on the floor, especially considering that another employee was present in the aisle. It was also submitted that the appellant had not adduced sufficient evidence to contradict the claim. Having asserted an affirmative defence that the respondent's injury was caused by or contributed to by the respondent's own negligence, the onus was on the appellant to lead evidence in support of its allegations, it was argued. The differences in the versions contained in the defence, the witness statement of Miss Daley and the evidence of Miss Daley at trial were inconsistencies that went to the heart of the case, she argued. The contradictions, she contended, served to severely undermine the credibility of the witness Miss Daley and it was therefore open to the learned judge to reject her evidence, and to find that there was no believable evidence as to how long the spillage was on the floor.

[23] It was further submitted by Miss Hudson that the respondent presented an account which remained consistent from the commencement of the claim through to its

determination and therefore it was open to the learned judge to opine that the evidence of the respondent was significantly more credible and accept her account as to the circumstances of the fall. Based on the respondent's account, there was no attempt by Miss Daley to warn her of the spill, she submitted, and there was no evidence to support the appellant's assertion that the spillage had just occurred before the respondent slipped in it and fell. The respondent had admitted under cross-examination that it did not take her long to put the saltfish on the shelf but, it was argued, there was nothing to raise the inference that the spillage had occurred between the time the respondent's pricing gun was borrowed and when she went to retrieve it.

[24] It was also submitted that even though the Occupiers' Liability Act provides that persons with particular training and experience are expected to appreciate and guard against special risks, it was relevant to consider the level of the respondent's experience. There had been only 14 accidents reported as occurring at the chain of supermarkets, the respondent had only been working there for four months and there was no indication of any spillages occurring during her period of employment. Further, the location of the spillage would have contributed to the respondent failing to see the impending danger, it was submitted.

[25] It is well established that where the challenge in an appeal is to the findings of fact of a trial judge, an appellate court is loathe to interfere unless it is shown that the judge exercised his discretion wrongly, or has been shown to be plainly wrong on the facts or that he applied the wrong principles or misdirected himself on the law - see

Watt v Thomas [1947] 1 All ER 582; ***Industrial Chemical Company (Jamaica) Limited v Ellis*** (1986) 35 WIR 303; ***Clarke v Edwards*** (1979) 12 JLR 133, and ***Victoria Mutual Building Society v Berry***.

[26] The learned judge, in approaching the question of liability, stated that she was guided by the following dictum of Lawton LJ in **Ward v Tesco Stores**:

> "If an accident does happen because the floors are covered with spillage, then in my judgment some explanation should be forthcoming from the defendants to show that the accident did not arise from any want of care on their part, and in the absence of any explanation, the judge may give judgment for the plaintiff. Such burden of proof as there is on the defendant in such circumstances is evidential and not probative."

She found that the irreconcilable inconsistencies in the appellant's attempt to explain the spillage had cast some doubt on the sincerity of the defence, she being of the view that Miss Daley lacked credibility and her evidence as to how the spillage occurred and how long it had been on the floor could not be accepted. She noted that the evidence "that there were systems generally in place to ensure that the floor was kept as clean as possible as well as to ensure that spillages were expeditiously dealt with" was largely unchallenged. She found that the respondent had not been warned. After reviewing certain authorities which were referred to her, she said:

> "…the general principle as outlined in the case of ***Ward v Tesco Stores Ltd***. (supra) as gleaned from the headnotes should be borne in mind.
>
> > 'It was the duty of the defendants and their servants to see that floors were kept clean and from spillages so that accidents

> did not occur. Since the plaintiff's accident was not one which in the ordinary course of things would have happened if the floor had been kept clean and spillages dealt with as soon as they occurred, it was for the defendants to give some explanation to show that the accident had not arisen from any want of care on their part. Since the probabilities were that by the time of the accident the spillage had been on the floor long enough for it to have been cleaned up by a member of the defendant's staff, the judge was in the absence of any explanation by the defendants, entitled to conclude that the accident had occurred because the defendants had failed to take reasonable care.'
>
> Applying the law reviewed to the circumstances of the claimant's fall as found, it seems that the defendant's failure to account for the spillage raises the presumption that they [sic] breached their [sic] duty of care to her as an invitee."

[27] She later said:

> "However, the assertion of Mr Cousins that she being an employee and not merely a customer must mean that she had a duty too, is not without merit. Equally worthy of consideration is Miss Hudson's submission that this and the fact that she did not see the spill does not inexorably follow that she had no regard and or failed to have due regard for the [sic] safety."

She went on to say:

> "The presence of another employee in the aisle with the spillage was significant. It is arguable that this employee would have been equally expected to take steps to clean up the spillage to prevent the type of accident that occurred. Having found that she did not, this increases

> the presumption that the defendants [sic] failed in their [sic] duty to the claimant."

[28] Reference will first be made to Mr Cousin's complaint that the cause of the accident was known and the respondent had not relied on the maxim of *res ipsa loquitor*, yet the learned judge, in arriving at her decision, relied on aspects of the maxim. There can be no doubt that the learned judge had in fact adopted the approach employed by Lawton LJ in ***Ward v Tesco* Stores** which was obviously in keeping with the maxim. It is true that *res ipsa loquitor* had not been pleaded. The term *res ipsa loquitor* "is no more that (sic) an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited to any technical rules, to the assessment of the effect of evidence in certain circumstances" (per Megaw LJ in ***Lloyde v West Midlands Gas Board*** [1971] 1 WLR 749 at 755). There was evidence from the respondent of the presence of the spillage on the floor which caused her to fall and sustain injuries. This had not been challenged. In the circumstances, only minimal evidence of negligence on the appellant's part would be required from the respondent before a factual onus would have shifted to the appellant. There was evidence from the respondent that when she was about to enter the aisle where detergents were kept she slipped, fell to the floor after unsuccessfully trying to break her fall and she had not been warned about the spillage. This evidence was before the learned judge which she would not have ignored.

[29] Mr Chen indicated in his witness statement that "customers breaking bottles of liquid or opening and spilling bottles of liquid" was the most frequent occurrence and

indeed, he outlined a list of the products which were the most frequent causes of spillages on the floors of the appellant's establishment, naming detergents among others. It is not unreasonable to infer from this evidence that spillages were not an uncommon occurrence. Mr Chen indicated that the Christiana store had about 16,000 customer transactions weekly. There was, it could be said, a great number of people traversing the floor on a weekly basis and this would have greatly increased the risk of spillages and the attendant slipping accidents. These facts, in my view, made it imperative that spills be dealt with in an expeditious manner so as to prevent accidents, which necessitated dealing with them as soon as they occurred. Regardless of the nature of the system in place for dealing with spillages, on the day in question, there was a spill on the floor in circumstances where Miss Daley, in the process of pricing goods, admitted to seeing the spill but gave no credible evidence as to how long it had been there or what steps were taken to deal with it prior to the accident. It is my view that an inference could reasonably be drawn that the respondent's slippage would not have occurred without want of care on the part of the appellant. The learned judge was therefore entitled to proceed on the basis that a prima facie case had been made out on these facts. I think it would be unreasonable to place a burden on the respondent to adduce evidence as to how long the spillage had been on the floor in these circumstances, particularly as this information would have been within the knowledge of the appellant only. The learned trial judge's reliance on the principles in ***Ward v Tesco Stores*** would have in no way done violence to her conclusion in this case.

[30] A prima facie case having been made out against the appellant, it is now necessary to turn my attention to the question as to whether the appellant had given a credible explanation as to how the accident occurred by showing that it did not arise from the want of care on its part. As a consequence, the appellant is only required to adduce sufficient evidence to show that the accident could have been equally consistent with fault on its part as it could have been on that of the respondent. The evidence adduced by the appellant was to the effect that there was an effective system for keeping the supermarket clean and for dealing with spillages. The staff was trained to be on the constant lookout for spills and debris. There was also evidence that the spillage had just occurred when the appellant entered the aisle and had been on the floor for two minutes. Miss Daley, who had been in the aisle near to the spill, said that she had warned the respondent by signaling her that the liquid was on the floor.

[31] Being in the unique position of observing Miss Daley as she gave evidence, the learned judge was faced with glaring inconsistencies in her evidence. These inconsistencies were material to the issues in the case. The learned judge rightly rejected the evidence as to how long the spillage had occurred and that the respondent had been warned, she having found that Miss Daley was not a witness of truth.

[32] The learned judge reminded herself of section 3(2) and 3(3) of the Occupiers' Liability Act. She referred to the cases of ***Peter James Hughes v Midnight Theatre Company, The Old Bull Arts Association*** 1998 LTL 01/04/1998 and ***Minogue v London Residuary Body*** 1994 EWJ No 1842, cited by Mr Cousins, which she said she

found useful. In my opinion, these cases would have offered no assistance as they are distinguishable from the case under review.

[33] I will at this juncture examine these cases. ***Hughes and Minogue*** are cases in which it was found that the occupier had not been in breach of its duty of care because certain hazards which caused the accidents were incidental to the occupation of the plaintiffs. In ***Minogue*** the English Court of Appeal found that the spillage of water was inevitable in an environment where the plaintiff was hired to wash dishes. The evidence on behalf of the occupiers was that the plaintiff had been provided with non-slip shoes. Buckets and mops were also provided and anyone working in the kitchen who had found that too much water had accumulated around the washing up sinks was told to and was expected to mop it up. The court was of the view that in those circumstances the occupiers had established a system, which on the face of it was an appropriate one for this fairly common occurrence.

[34] In the case of ***Hughes v Midnight Theatre Company***, the plaintiff was a production stage manager employed by the first defendant who managed a touring group of actors. Part of his job was to set up the scenery and lighting at each theatre. While he was setting up for a performance, he stumbled on a step arrangement and injured himself. It was held that the step constituted an irregularity that a person of the plaintiff's calling would have expected to find in a theatre and was therefore a risk incidental to the plaintiff's calling.

[35] It seems to me that these cases demonstrate that a risk which is regarded as incidental to one's calling is one which naturally arises or is inevitable to the performance of one's occupation. It could not be said that this proposition is applicable to the case under review. In the instant case, the respondent was employed to carry out duties in relation to cashiering and tagging products which would be regarded as her usual task. On the day in question, she was engaged in the task of pricing products which required her to traverse the floor of the supermarket from time to time. There was nothing to cast doubt on the evidence that the staff was trained to be on the constant lookout for spills and that spillages were not infrequent. In the light of this evidence, it is my view that she would have been aware of the possibility of encountering a spill. I doubt, however, that this would be sufficient to regard the spillage as a risk incidental to her occupation or naturally arising from it. A spillage was not something that she would have always expected to see, although it was an occurrence that she knew was possible. Further, she did not carry out her occupation in an environment and in the circumstances which existed in ***Minogue***. Her activities were largely concerned with being at the checkout counter and to a lesser extent at the shelves.

[36] After referring to the foregoing cases, the learned judge took into consideration the law, which would have been in keeping with the statutory requirements of the Occupier's Liability Act. She also considered certain relevant factors contained in the dictum of Lawton LJ in ***Ward v T*esco Stores** as to the question of the exercise of reasonable care by a defendant. Curiously, having rejected the appellant's evidence as

to the length of time the spillage was on the floor and having found that the respondent had not been warned, the learned judge went on to conclude that the appellant's failure to account for the spillage raised the presumption that it was in breach of its duty of care. However, it was not open to her, at that stage, to have arrived at such conclusion before appraising all the evidence adduced by the appellant to ascertain whether a reasonable inference of negligence on the appellant's part could have been drawn. The question as to how the spillage occurred was not central to a resolution of the case at this point in light of the acceptance that the alleged breach consisted of the appellant allowing the spilled liquid to remain on the floor and the respondent had slipped in it.

[37] The evidence relating to the existence of the system for dealing with spills and the sensitization of the staff to the possibility of spillages was also available for further consideration. Mr Chen said that the system ensured that "spillages were expeditiously dealt with". It seems to me, however, that merely making such an assertion is not sufficient to rebut the presumption of negligence. If this were to be accepted, this would mean that an occupier would be able to escape liability by making such assertion. In my view, the question is whether this statement is borne out or contradicted by other evidence. The learned judge recognized that while Mr Chen spoke to the practice which he said existed, he could not speak to what occurred on the day of the accident. As a consequence, the evidence concerning the existence of the system of which Mr Chen spoke would have had to be viewed in the light of the rejection of Miss Daley's evidence as to the length of the time that the spillage was on the floor and the fact that she was present in the aisle carrying out her duties while the spillage was

on the floor and she had taken no steps to clean it up. This would have had the effect of casting doubt as to whether an effective system was actually in operation.

[38] Despite the fact that the learned judge prematurely imposed liability on the appellant, she went on to consider the implications of the evidence of the staff being trained to be on the constant lookout for spills. It would, however, have been proper for her to have considered all the evidence adduced by the defence simultaneously. However, her conclusion in relation to the appellant's liability cannot be said to have been an unreasonable one. So far as the respondent is concerned, the learned judge did not fail to consider that her risk to take care was an obvious one. She took into account the fact that the respondent was an employee and would have been entrusted with the responsibility of ensuring that the floor was kept clean, the staff being trained for constant surveillance for spills and debris and that the respondent as an employee, was expected to take care for her own safety. She went on to find that "The claimant herself did not keep a proper look-out. She ought to have recognized that she should have taken care for her own safety." In all the circumstances, it could not be said that the learned judge was plainly wrong when she found the appellant negligent and the respondent to be 40% contributorily negligent.

Damages

Award for pain and suffering and loss of amenities

[39] The learned judge, in dealing with this head of damages, was of the view that the medical evidence showed that there was some difficulty in the diagnosis of the

respondent's pain and discomfort as reported by her. She, however, acknowledged that the respondent continued to experience pain. She found that eight years after the injury, the most recent report (that is the report of Dr Minott) showed that her condition improved, she being assessed at a 5% partial disability of the whole body. She found that in observing the respondent, she appeared to have exaggerated some of her discomfort.

[40] In making an award for pain and suffering the learned judge relied on ***Dawnett Walker v Hensley Pink*** SCCA No 158/2001, delivered 12 June 2003 and ***Lora Hinds v Robert Edwards and Anor*** Khan 3rd edn at page 100. In arriving at the award, she found that the updated awards were $1,449,500.00 and $1,578,433.00 respectively. However, being of the view that the respondent had experienced a slightly greater degree of pain than the claimants in ***Walker*** and ***Pink,*** she awarded $2,000,000.00 for pain and suffering.

[41] Counsel for the appellant submitted that the award of $2,000,000.00 for general damages was excessive. The respondent, he contended, had made the injury out to be far more serious than it really was. The learned judge, he argued, had accepted that the respondent's condition improved over the years and that she had exaggerated her discomfort. Merely making repeated assertions of pain, unsupported by evidentiary material or otherwise to substantiate same, ought not to have been accepted as the basis for increasing the award given in other cases, in respect of injuries in this case

that were less serious, he argued, and an award of $1,200,000.00 would have been appropriate.

[42] In relation to the quantum of damages, Miss Hudson argued that despite the striking similarity between the respondent's assessed disability and that of the claimant in ***Dawnett Walker***, the learned judge was correct in finding that the respondent suffered a greater degree of pain. She submitted that over a protracted period of eight years after the injury, the respondent was still experiencing painful symptoms associated with the whiplash injury. Therefore, although the judge had found that the respondent had exaggerated the effects of her injury, this did not detract from the fact that she had been experiencing pain.

[43] Initially, the respondent complained of pain to her left shoulder radiating to the fingers of her left hand associated with numbness of the left upper limb. Dr Minott found that in the cervical spine there was a reduced range of motion due to some spasms to the trapezius and paraspinal muscles of her neck, but the spinal cord seemed normal. Despite her complaint of swelling in the neck and numbness in the shoulder right down to the fingers, eight years after the accident, he found that there was no abnormal swelling in the neck or upper limb nor was there any mass lesion in the neck. He found that she had sustained an injury to the neck of only mild severity and assigned a disability of 5% to take into account the pain she was still experiencing.

[44] In ***Dawnett Walker,*** the claimant sustained a whiplash injury. She suffered from extreme pain to the neck, shoulder, upper back and right arm and numbness to

the fingers of the right arm. An MRI of the cervical spine indicated that although there was no injury to the spinal cord, there was an invertebral disk that was bulging. With physiotherapy the condition improved but the prognosis was that she would experience 'intermittent episodes of neck and shoulder pain particularly at times of heavy exertions". She was assessed as having a permanent partial disability of 5% of the whole person. An award of $650,000.00 was made for pain and suffering. This would have amounted to $1,171,191.30 at the time of trial.

[45] In ***Lora Hinds***, the claimant suffered injuries to the right hand and experienced pain in the right elbow. She was assessed as having a permanent disability of 6% of the whole person. The award when updated at the date of the trial was $1,578,433.00. The information in relation to the claimant's course of treatment and recovery in ***Lora Hinds*** is quite sparse. The judge, however, accepted that the injuries suffered by the respondent and the claimants in both cases were similar but concluded that the respondent suffered more pain.

[46] The learned judge found that the respondent overemphasized her discomfort and as rightly submitted by Mr Cousins, the respondent simply repeating that she continues to suffer pain would not be sufficient reason for her to have increased the award. The fact that the respondent suffered more pain than Walker would be an insufficient criterion to justify an award of $2,000,000.00. I would regard this award as excessive. A sum of $1,500,000.00 would be an adequate compensatory award under this head.

Loss of earnings

[47] Mr Cousins submitted that there ought not to have been an award made in respect of loss of earnings. It could not be reasonably said, he argued, that the evidence supported the conclusion that the respondent had lost her job because of the accident and that but for the accident she would have continued to earn the pre-accident earnings. In the alternative, he argued, even if it could be said that the evidence supported such an award being made, the respondent had failed to produce evidentiary material in support of her claim the learned judge had failed to take into account the income that she had earned from raising chickens. As a result, an appropriate award would be $250,000.00.

[48] In relation to the amount awarded by the learned judge for loss of earnings, Miss Hudson conceded that the judge ought to have taken into account the period the respondent spent rearing chickens. Consequently, she suggested that an appropriate award would be $350,000.00.

[49] It was common ground that the learned judge failed to have taken into account the income which the respondent earned from poultry rearing. No documentary evidence had been submitted in relation to this activity. However, no challenge had been raised in this regard**.** Mr Chen said that the respondent was offered lighter duties but she appeared unwilling to continue in the appellant's employ. He gave no evidence as to what these duties would have entailed. The learned judge inferred that the respondent's pain could have accounted for her seeming unwillingness to continue

working. This finding could not be regarded as unreasonable. Some regard must be had to the respondent's evidence that she was unemployed after the accident. She ought to be allowed compensation for the loss of income after the termination of her employment. She, however, began poultry rearing in June 2003 and from this venture she earned $5000.00 every six or eight weeks. Her loss of earnings was computed at $412,500.00. However, a deduction ought to have been made for her income from the poultry rearing which is assessed at $162,000.00. The award must be adjusted accordingly. The net award, consequent on the relevant deduction being made, should have been $250,000.00.

Handicap on the labour market

[50] It was submitted by Mr Cousins that there was no medical evidence to support the award for handicap on the labour market. In the alternative, it was argued, even if it could be said that there was evidence to support the award, the judge had not taken into account the relevant considerations. In answering these submissions, Miss Hudson argued that in the case of **Dawnett Walker**, there was no evidence that her pain would have affected her ability to carry out her duties. The claimant, in that case, had still been employed in her pre-accident occupation and there was no risk that she would have been thrown on the labour market. In the present case, the real and substantial risk of the respondent losing her employment and being thrown on the labour market had materialized by virtue of the fact that the respondent was terminated because she was not able to perform her duties, she argued. There was medical evidence, from Dr Minott who indicated that whiplash injury could affect work, in support of the fact that

there was a risk that the respondent could be thrown on the job market. Further, given the nature of the respondent's trade as a cashier, and other activities in which she had been involved, such as farming, all of which involved work of a manual or semi-manual nature, and the respondent's viva voce evidence that her capacity to earn in these areas was affected, the court was entitled to find that the continuing painful symptoms associated with the whiplash injury would affect her ability to earn, she further argued.

[51] A claim for loss of the ability to earn by being handicapped on the labour market may be sustained whether or not a claimant is employed at the time of trial - see ***Moeliker v A. Reyrolle & Co. Limited*** [1977] 1 WLR 132 and ***Cook v Consolidated Fisheries Ltd*** [1977] ICR 635. It is well recognised that a partial disability may not affect a claimant's income immediately but may do so at some time in the future. Accordingly, a disability places him at a disadvantage in the labour market as opposed to a fit person. Where appropriate, the court should make an award for this head of damage to compensate him for the physical handicap produced by the injury. In ***Foster v Tyne & Wear County Council*** [1986] 1 All ER 567, it was said:

> **"...**when it comes to establishing loss of earning capacity, there is no such thing as a conventional approach; there is no rule of thumb which can be applied….In each case the trial judge has to do his best to assess the plaintiff's handicap, as an existing disability, by reference to what may happen in the future….The very fact that the approach must necessarily be so speculative means, of course, that the occasions on which this court will feel justified in interfering with a judge's assessment will be few and far between, for there is no established range or standard against which to measure the judge's award."

[52] However, to succeed there must be evidence of a substantial risk as opposed to a minimal risk that a claimant will be placed on the job market. In its appraisal, the court must first consider the prospect of a substantial risk of a claimant being thrown on the job market. If such a risk is found, the court should then assess and quantify it. In ***Moeliker,*** at page 142, Brown LJ in speaking to the foregoing proposition, said:

> "I do not think one can say more by way of principle than this. The consideration of this head of damages should be made in two stages. 1. Is there a `substantial' or `real' risk that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise) the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job."

Medical evidence must be adduced to support the award**.** Once it can be inferred from the medical evidence that the injury will affect a claimant in such a manner as to make it difficult or impossible for him to perform in his pre-accident occupation, then, inferentially, it is possible to assess whether the risk of losing his employment, or not being employed, or being employed in a similar position, is real or substantial. The learned judge, in making an award under this head, said:

> "In the instant case, the claimant had already lost her job and had already been forced unto the labour market. She had sought and found an alternative source of income. She said she would be unable to function in a job similar to the one pre-accident so

> she had successfully taken up chicken farming. She, however, has to employ assistance whether through her children or otherwise, to do this rearing of chicken.
>
> Given that the claimant is now self employed but apparently earning less that [sic] she would have but for her injury and the fact that she is at a disadvantage when seeking other employment due to this injury, an award under this heading is necessary."

[53] The critical questions therefore, are whether it could be said that in light of Dr Minott's evidence, the respondent, not having been in the same employment as at the time of the accident, there was a real risk that she would be less likely to or be at a disadvantage in obtaining employment in her pre-accident occupation and whether if she obtained employment it would be at a reduced salary due to her disability. Dr Minott did not explicitly state that the injuries would affect the respondent's prospects of employment, but under cross-examination he agreed that a whiplash injury may be aggravated by employment or occupation involving neck activity, for example, bending. The respondent's evidence was that she did not think she would physically be able to manage the activities she was required to do in her pre-accident employment. It cannot be said that the learned judge, in awarding the sum of $450,000.00, being 60% of the full award of $750,000.00 had plainly erred in making an award under this head.

Extra Help

[54] It was contended by Mr Cousins that there was no evidence to support the award for extra help. He argued that the respondent claimed $1200.00 weekly and continuing but the learned judge stated that "it appears that there was a need initially

for the claimant to employ someone to assist her" following which she added "the amount claimed seems reasonable". These statements are inconsistent, he argued.

[55] Miss Hudson, in response, submitted that the awards for extra help and future help were justified based on the medical evidence. The respondent, it was argued, had given unchallenged viva voce evidence of the difficulty she had in carrying out her domestic chores and that she had had to rely on paid assistance to get her laundry done. Further, she submitted, Dr Minott's medical evidence was to the effect that the nature of a whiplash injury is of such that it could compromise the affected person's ability to carry out domestic chores and it was open to the learned judge to find that the pain that the respondent was experiencing was of such that she would require extra help.

[56] The respondent claimed $1200.00 weekly from September 2000 to 16 January 2004 and continuing for extra help. An award of $326,400.00 was made in respect of the claim. The respondent was seen by Dr Dundas in September 2005. He made certain diagnoses which were at variance with Dr Minott's, but he also found that the respondent was still experiencing pain at that time and that it affected the muscles in her left upper extremity. There was medical evidence from Dr Minott that a whiplash injury may affect a person's daily activity or living. He also indicated that the injury may affect household chores and activities such as bending.

[57] However, as an item of special damages, the sum claimed is subject to the requirement that it be proven. This, in my opinion, should be viewed flexibly and in

accordance with the circumstances of the particular case. Logic dictates that the incurring of some expenditure is more capable of proof than others and so to insist on a strict adherence of proof would result in injustice in some cases. In this case, it is reasonable to infer that the nature of the arrangement between the respondent and the person she paid to assist her may have been so informal that receipts were not requested or given. In my view, the award made by the learned judge was reasonable.

Future help

[58] It was Mr Cousin's contention that there was no evidence to support the award under this head as the medical evidence speaks to the injury to the respondent's neck as being of mild severity.

[59] Miss Hudson submitted that in light of the medical evidence it was open to the learned judge to find that the pain which the respondent was experiencing would mean that she would require extra help in the future. She went on to submit that in light of the respondent's age, a multiplier of 8, used by the learned judge to compute the loss of future extra help, was not unreasonable and the multiplicand of $2000.00 was not unreasonable, the minimum wage being $4,500.00 at the time of trial.

[60] The whiplash injury was found to be mild and there was no evidence of the intensity or frequency of the pain**.** At the time of trial the learned judge was not convinced that the pain of which the respondent complained was excruciating as the respondent would have wanted her to believe. She indicated that it appeared that the respondent was in need of extra help initially and left open the question of whether

such help was needed later. However, having not made an express finding as to whether future extra help was needed, she went on to make an award. In computing the award, she used a sum of $2000.00 as the multiplicand for a weekly wage without there being any supporting evidence. In my view, the learned judge was clearly wrong in making an award under this head. As a consequence, I would disallow an award for future help.

[61] I would therefore dismiss the appeal as to liability and would allow the appeal in part in relation to damages. The awards that I would make are as follows:

General damages

Pain & suffering & loss of amenities - $1,500,000.00		
60% with interest @ 3% from 7/8/01 to 21/6/06 & 6% from 22/6/06 - 29/05/09	-	$900,000.00
Loss of future earnings capacity - $750,000.00		
60% with interest @3% from 7/8/01 to 21/6/06 & 6% from 22/6/06 to 29/10/09	-	$450,000.00
Special damages		
Medical expenses	- $111,500.00	
Travelling expenses	- 10,000.00	
Loss of earnings	- 250,000.00	
Cost of extra help	- 326,400.00	
	Total $697,900.00	
60% of $697,900.00 with interest thereon at 3% from 26/8/00 to 21/6/06 and 6% from 22/6/06 to 29/5/09		$418,740.00

50% of the costs of the appeal are awarded to the respondent.

MORRISON JA

[62] I too have read in draft the judgment of Harris JA. I agree with her reasoning and conclusion.

HARRISON JA

ORDER

Appeal dismissed as to liability. Appeal allowed in part in relation to damages. The following awards are made:

General damages

Pain & suffering & loss of amenities - $1,500,000.00		
60% with interest @ 3% from 7/8/01 to 21/6/06 & 6% from 22/6/06 - 29/05/09	-	$900,000.00
Loss of future earnings capacity - $750,000.00		
60% with interest @3% from 7/8/01 to 21/6/06 & 6% from 22/6/06 to 29/10/09	-	$450,000.00

Special damages

Medical expenses	-	$111,500.00
Travelling expenses	-	10,000.00
Loss of earnings	-	250,000.00
Cost of extra help	-	326,400.00
	Total	$697,900.00
60% of $697,900.00 with interest thereon at 3% from 26/8/00 to 21/6/06 and 6% from 22/6/06 to 29/5/09		$418,740.00

50% of the costs of the appeal are awarded to the respondent.