IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2001/M-130

BETWEEN	SANDRA MORGAN	CLAIMANT
A N D	WAYNE ANN HOLDINGS LIMITED (t/a Super Plus Food Store Ltd.)	DEFENDANT

Appearances

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

Mr. W. Clark Cousins for the Defendant.

Claimant injured through slipping on Floor – Negligence and/or breach of Occupiers Liability Act- Breach of Statutory duty and/or Breach of Contract.

Heard: September 17th & 18th, 2008 and May 29, 2009

P.A. Williams, J.

Background

Sandra Morgan, the claimant, was employed to Wayne Ann Holdings Ltd, T/A Super Plus Food Stores Ltd., the defendant, at their Christiana branch in Manchester.

She was employed as a cashier, however on the 26th of August, 2000 she was assisting in pricing salt-fish. She was walking along the shop floor when she slipped and fell. She slipped in a substance that had spilled from a bottle which it is generally accepted could have been fabric softener. She sustained injuries and was seen by a doctor. She was eventually relieved of her position due to her alleged inability to

perform her duties and her employer's perception that she was unwilling to continue in their employ.

She now claims to recover damages for negligence and/or breach of the Occupier Liability Act and/or breach of contract. The defendant, while accepting that she fell and may well have been injured, denies any liability for her injuries.

The circumstances of the fall

The claimant maintained that she was in the process of going to retrieve a pricing gun to price some salt-fish. She had rounded one aisle and was about to enter another, where detergents were kept, when she felt herself sliding. She tried to hold on to a trolley using her right hand but the trolley slid away and she fell to the ground. Her left side made contact with the floor first.

Under cross-examination she admitted seeing a co-worker Dannette Daley, a witness for the defence. Daley was working in an aisle – the second one away from the one she had been working in. She also admitted seeing a trolley which she said Daley was using as it contained items Daley was pricing and packing on the shelf. This, however, was not the trolley she had referred to as the one she tried to use to break her fall.

Daley and her trolley were to the left whilst the trolley used to attempt to break her fall was to the right. She was unable to say which one was further down.

She explained that it was as she entered the aisle and had taken two (2) steps that she started her slide. Up to this time she had not seen Daley. It was after she had landed on the floor, that she became aware of Daley up on a stool, still packing.

It is useful and pertinent to note that Dannette Daley is hearing and speech impaired.

The claimant maintained that it was some man who assisted her from the floor and then got Daley's attention.

She said the liquid on the floor was pink and not blue as was suggested to her. This liquid was spilt all over the area and most of the contents of the bottle had spilled.

The defendant had Miss Dannette Daley give their version of what they alleged happened. Through an interpreter, Miss Daley said she actually saw the claimant fall and had tried to prevent it.

In their defence, the explanation proffered for the liquid being on the floor was that the spillage had just occurred when a bottle of fabric softener fell from a customer who had been taking same off the shelf. They also asserted that a co-worker, presumably Miss Daley; observed the spillage and took preventative steps by blocking off the aisle to prevent entry. This co-worker had also signaled the claimant not to enter the area, pending same being cleaned up.

In her witness statement/examination-in-chief Miss Daley who has been employed as tagger with the defendant since 1999 explained that she was duly tagging products on the fateful day. She explained that it was while so engaged she took down a bottle of fabric softener and put it in a shopping cart. It was this that spilled to the floor – she surmised that it had not been properly closed because a customer may have opened it to smell it.

Upon looking around she saw the claimant and waved to her while pointing to the spill. The claimant smiled at her but she walked on, stepped into the softener, slipped and fell. Miss Daley says it was she who helped the claimant from the floor.

She estimated the softener had been on the floor for approximately two (2) minutes but she could not have left it there and would have had to stay with it and ask someone to clean it up.

Under cross-examination Miss Daley said she had not in fact been tagging – she had been cleaning the shelf. Further she did not touch the bottle before it fell. She did not take it down, she did not put it in a shopping cart and she had not seen when anyone opened it.

She now claimed that she had climbed up on a stool to clean the shelf and the bottle fell – without her touching or interfering with it. She did not actually see it turn over and spill unto the ground.

Aspects of her witness statement which were clearly inconsistent with her viva voce evidence were put to her but she denied ever saying what was in the statement.

When questioned about attempts to block off the entrance to the aisle she said there had been none – she did not do so neither did she see anyone doing so.

She denied having a shopping cart using, but admitted that one was there which the claimant had held on to with her right hand while falling.

She insisted she did wave to the claimant while on the stool resulting in the claimant looking at and smiling with her. She however conceded that she did not know if the claimant had understood the attempts to warn her. She agreed the claimant would have been looking up at her as she waved.

In her submissions for the claimant, Miss Hudson highlighted the inconsistencies in the defence case, the fact that Miss Daley's evidence was contradictory and conflicted with the defence stated.

Hence Miss Hudson urged that the defence must fail.

Mr. Cousins for the defendant agreed that there were some issues of inconsistencies and credibility with both the claimant and Miss Daley. He however submitted that their differences on crucial points do not affect the outcome of the case. He also opined that given Miss Daley's disability and the difficulties which may have arisen with respect to translation, it would be prudent to rely on her own physical depiction of the facts wherever possible.

The fact is that Miss Daley was impressively clear in her effort to depict what she said took place. This cannot therefore be said to explain the inconsistent accounts presented by the defence.

I am guided by the words of Lawton L.J. in **Ward v. Tesco Stores Ltd. [1976] 1 All ER 219** at page 221.

> "If an accident does happen because the floors are covered with spillage, then in my judgment some explanation should be forth coming 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"

The irreconcilable inconsistencies in the defence's attempt to explain the spillage causes the sincerity of the defence to be questioned.

The only person, other that the claimant, who it is agreed was present has not been able to convince the court that she saw how the spillage occurred. There is no believable evidence as to how long the spillage was on the floor. The assertion that an attempt was made to block off the aisle has been refuted by the evidence. Further Miss Daley's insistence that she tried to warn the claimant is defeated by the fact that she admitted she doesn't know if she was understood. In any event her demonstration of what she said she did, could have more likely distracted the claimant from the possible danger; hence her alleged response - she looked up and smiled.

The evidence of the claimant was significantly more consistent and more credible, hence her account is accepted as to the circumstances of her fall.

The issue of liability

In her submission for the claimant Miss Hudson stated that (1) the defendant failed to discharge their common law duty of care owed to the claimant and (2) the claimant being an invitee/visitor to the premises the defendant failed pursuant to the Occupier's Liability Act in ensuring that the premises was reasonable safe for the claimant.

For the defendant Mr. Cousins acknowledge that the claim properly falls to be considered on the common law tort of negligence and the statutory obligations contained in the Occupier's Liability Act. However, he contends in the defence stated, that there had been no breach of the common law duty of care and that the degree of care that was reasonably practicable, given all the circumstances, was exercised.

It is their assertion that the claimant was clearly the author of her own misfortune and that judgment should properly be entered for the defendant.

In ultimately deciding this matter the provision of the Occupiers Liability Act is to be borne in mind.

Section 3 (2) states:-

> "The common law duty of care is the duty to take such care as in all the circumstance of the case is reasonable to see that the the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there"

In a decision from our Court of Appeal **Victoria Mutual Building Society v. Barbara Berry SCCA 54/2007 Del. July 31, 2008**. Harris J.A. at paragraph 7 reminded-

> "The statutorily regulated duty of care is essentially similar to that of the common law. However, at common law a visitor is required to employ reasonable care for his own safety. Under the statute, the degree or want of care which would ordinarily be looked for in an invitee is only a relevant factor"

She went on to refer to the opinion of Kelly C.B. in **Indemaur v..Davies (1867) L.R. 2 CP 311-**

> ".....with respect to such a visitor at least we consider it settled law that he using reasonable care on his part for his own safety is entitled to expect that the occupier shall on his

> part use reasonable care to prevent damage from unusual danger, which he knows or ought to know and that when there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether such contributory negligence in the sufferer must be determined by a jury as a matter of fact."

It is of course recognized that without a jury it remains a question of fact for the judge to determine.

Mr. Wayne Chen as Managing Director of the defendant gave evidence as to the system which existed to deal with the inevitable spillages that may occur in the course of business.

Records kept of these spillages indicated fourteen (14) reported in the Super Plus locations over a five (5) year period.

Mr. Chen explained how they have been careful to keep the floor clean. Further he explained that staff members are trained to be on constant look out for spills and debris on the shop floor. The necessary preventative and remedial actions are then to be taken. While he spoke to the practice which should exist, he recognized that he could not speak to what actually obtained on the day of the incident.

Much of the challenge to Mr. Chen's evidence concerned the adequacy of using Miss Daley to warn them of spillages. Also, he admitted that there weren't any caution signs used in the Christiana store.

The fact 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.

It is accepted that Miss Daley can provide warnings when she becomes aware of a spillage. The fact that she has a disability does not prevent her being able to do so.

However, as stated above her versions as to what happened are rejected, hence I find the claimant was not warned, there is no credible evidence as to how long the spillage remained on the floor nor was it proven that there were steps taken to block off the spillage.

Mr. Cousins submitted that in any event the claimant was not a customer but an employee and that she was obliged both by law and by virtue of her contract of employment to exercise a higher standard of care than a customer with respect to spillages on the shop floor.

Miss Hudson in response queried whether the defendant is suggesting that the employer in carrying out their tasks are to be so pre-occupied with the condition of the floor so that at all material times they should be looking down on the floor for spills. This she submitted would be tantamount to the defendant delegating the duty of care owed to the claimant and that of an occupier/visitor to the premises. She claimed that the principle adumbrated in **Doherty v. London Co-operative Society Ltd. 1950 10 Solicitor Law Journal page 94** is applicable. This case re-affirms that no reasonable occupier of a shop ought to expect a customer to keep her eyes down in the expectation that there might be something she had to step over or steer around. Miss Hudson adopted the general principle and opined that even though the claimant as an employee may be

more vigilant in observing spills, the fact that she did not see same does not inexorably follow that she had no regard or failed to have regard for her own safety.

Mr. Cousins referred to several authorities which he opined would provide useful applications of the relevant principles on facts not dis-similar to those of the instant case.

There were two that proved particularly useful.

In **Peter James Hughes v. Midnight Theatre Company, The Old Bull Arts Association 1998 LTL 01/04/1998** the claimant was employed to the defendant as a production and stage manager. He was injured while carrying out one of his tasks.

Lord Justice Auld referred to sec. 2 (2) and (3) of their Occupier Liability Act 1957 which is largely similar to our legislation. He stated:-

> ".....the question which was essentially one of primary impression for the judge, was whether the premises were reasonably safe for a person doing the sort of work the plaintiff was doing, having regard to the care that such a person would ordinarily be expected to take for his own safety."

He concluded

> "In my view the judge was entitled to find on the evidence before him that the arrangement was not an unreasonable hazard or risk to the plaintiff in the circumstances in which he was working there, and that it was a special risk ordinarily incident to his calling."

It is perhaps useful to bear in mind the relevant provisions of our Occupier's Liability Act (sec. 3 (2) was previously referred to)

Sec. 3 (3) The circumstance relevant for the present purpose include the degree of care and 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 risk ordinarily incident to it, so far the occupier leaves him free to do so."

The case of **Minogue v. London Residuary Body 1994 EWJ No. 1842** also involved a case which arose out of an accident at work. The plaintiff case was found to have been made as essentially one "where there was an accident, water had accumulated on the floor, it should not have been allowed to and that was the cause of her accident." She was employed to work in the kitchen, in particular to wash up after the school meals. It was found that the spillage of water was inevitable in that working environment. However the water was to have been mopped up as soon as possible, the Court found that the plaintiff had been instructed about mopping up water as it spilled on the floor. It was also found that the defendant had provided the claimant with non-slip shoes.

The Court of Appeal could not find negligence on the part of the defendant and these employers were not considered blameworthy in the event.

Sir Francis Purchas at paragraph 32 said:-

> "The duty on the employer is to provide a reasonable system of carrying out his operations not one that could possibly be improved. Certainly a defendant does not have to establish against a claim setting out the occurrence of an accident that

> it would not have been possible to provide another safer way of work, merely because there has been an accident."

In concluding this examination of relevant and instructive cases in this area, the general principle as outlined in the case of **Ward v. Teso 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 breached their duty of care to her as an invitee.

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 safety.

The claimant as a member of staff would have been entrusted with the task of ensuring the floor was clean and thus ensure the safety of the customers. There is that unchallenged evidence that staff was trained to be on constant look-out for spills and debris. The care the claimant was expected to take as a member of staff would undoubtedly ensure to her benefit as well. The presence of another employee in the aisle with the spillage is 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 failed in their duty to the claimant.

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 and hence the defendant cannot be held to have been wholly responsible. The substance, whether pink of blue, seemed to have been over a substantial area and was not made invisible because of the colour of the floor. It however was apparently near to the entrance of the aisle and this may have contributed to the claimant's failure to see it.

I find that the claimant was injured partly due to her own negligence and is 40% responsible for her injury.

The Injuries

- As described by the claimant

Immediately after her fall on 26/08/2000, the claimant said she was in severe pains in her shoulder, neck and her feet. She explained that it was her left side she had hit.

She was seen by a Dr. Kharl Wright, received medication and advised to take two (2) days sick leave but upon her return to work, she was unable to resume duties. She said she had severe pains and discomfort in her neck and left shoulder and was unable to use her left hand. She wore a cervical collar thereafter for five (5) months.

Since then she says her left hand keeps swelling; sometimes three (3) fingers of her left hand are unable to make a fist. As a result she is unable to fully use the hand - not able to wash clothes or comb hair. She has been forced to rely on the assistance of family members and friends and has had to pay someone to assist with her washing.

She complains of there being an obvious bulge and swelling to her neck and in the shoulder region. When it is swollen, turning her neck was painful and uncomfortable.

She also complains of experiencing burning sensations, cramps and numbness in her hand and shoulder. She is unable to sleep well at nights due to the nagging pain. In the mornings she has to spend time stretching out the whole left side from neck down to fingers due to t a very stiff, heavy and numb feeling.

She says she is unable to carry weights or lift heavy objects with her left hand.

She described as constant the numbness and heaviness from the shoulder right down.

The pain, she says gets worst when it gets cold which is most of the time in Christiana.

She says she is not as active as she was prior to the accident. She no longer feels independent since she is unable to do basic things. She even claims to have difficulty bathing herself. She ceased to enjoy having sex due to the discomfort she feels during the act. This has caused her relationship to "break up".

In one of her visits to a doctor she also told of her fingers of her left hand feeling constantly cold and she gets an unpleasant painful sensation whenever anything touches the left arm.

- Medical Evidence

The first medical report is from Dr. Kharl Wright who speaks of seeing her on the 30th of August, 2000. At the time she complained of pain to her left shoulder radiating to fingers of the left hand associated with numbness of the left upper limb. She was assessed by this doctor as having a brachial plexus lesion (incompleted). She was referred to a physiotherapist. There was no improvement after six (6) sessions and was referred to an orthopedic surgeon but she said she was unable to afford the fees.

At the time he last saw her, Dr. Wright found her condition remained unsatisfactory with severe pain and numbness from left side of neck to fingers of her left hand. She was unable to extend or flex her fourth and fifth fingers.

In May 2001 she was seen by Dr. G.G. Dundas a consultant orthopedic surgeon. She complained then, of pain in the left shoulder and cramps in the finger of her left hand for eight (8) months.

Examinations done had the following significant findings:-

(i) in the upper extremities she had left trapezius spasm with tenderness but full range of motion was executed from the shoulder when she was distracted.

(ii) Tenderness in the left brachial plexus.

The diagnoses entertained were:-

1. Carpel tunnel syndrome
2. Shoulder contusion
3. (Query) Whiplash injury

The doctor expressed the opinion that the "overwhelming picture is that of a carpel tunnel syndrome which seemed to be consistent with her fall."

The doctor later benefited from results of a nerve conduction test which led him to conclude there was no carpel tunnel syndrome but all "the sympotomatology be assigned to the effect of her whiplash injury". He assigned a percentage disability amounting to five percent (5%) of the whole person. This report was dated 26/6/01.

She was then seen by Dr. Daniel Graham a consultant neurologist in July 2001. This doctor found that "neurological examination was significant for a moderate limitation of the range of all movements of the neck – flexion extension, lateral rotation and flexion presumably due to pain".

Various tests were carried out but the doctor concluded that "the cause of the patient's persistent complaints remains undetermined"

It was now recommended that a cervical spine MRI be performed.

The claimant was re-examined by Dr. Dundas in September 2005. Examination revealed the following:-

1. She was tender in the left supra-calvicular fossa especially at the brachial plexus roots.
2. Pains radiated to the lateral aspect of the left arm and extends to the hand.
3. She was weak in all resisted exercises of her muscles of the left upper extremity.
4. There was mild but distinct ulnar claw of the left hand and accompanying intrinsic wasting.
5. There was ulnar sensory blunting.

He now concluded she suffers a brachial plexus injury which had progressed since evaluated in 2002.

He found that the residues of the combined motor and sensory impairment amounts to 20% of the affected extremity or 12% of the whole person.

Some fifteen (15) days before the trial commenced, the claimant was seen by Dr. Mark Minnott another consultant orthopedic surgeon.

It should be noted that in February of 2006 an order had been made at a pre-trial review, for the claimant to make herself available for examination by Dr. Minnott prior to the end of February 2007. An order was also made for the defendant's attorney to obtain and serve a copy of Dr. Minnott's report on the claimant's attorney within seven (7) days of her examination.

Various reasons led to this examination not being done before September 3, 2008. A report was prepared dated September 17, 2008. Permission was given for Dr. Minnott to attend and give evidence thereby subjecting him to cross-examination by Ms. Hudson. His report was allowed to stand despite it lateness.

At the time of his examination Dr. Minnott had received medical reports of Dr. G. Dundas, Dr. D. Graham and MRI reports from Dr. Trevor Golding and reports of the consultations by Dr. Graham with his neuro-diagnostic examination.

He found no evidence of swelling in her upper limb or root of the neck. There was no evidence of neurological deficit either clinically or electrophysiologically. He recognized that she did have some pain in the neck associated with mild tenderness in her trapezius muscles which affected the range of motion in her neck.

There was no injury to her spinal cord or any mass lexion in her neck.

The doctor concluded she had sustained an injury to her neck of only mild severity. Her overall permanent impairment was assessed at 5% of the whole person.

Under cross-examination Dr Minnott explained that the injury was a whip-lash type injury. He acknowledged that the claimant complaints were consistent with her injury involving spasms. The period a person plateau between these spasms varies dependent on the severity of the injury and also the course of treatment.

If it was a mild injury with proper treatment including physiotherapy recovery would be expected within six (6) months to a year. He acknowledged that while physiotherapy may assist it was not necessarily a panacea for whiplash injury. He also acknowledged such an injury may affect a person's daily living and may be aggravated by certain employment or activity involving neck activity. Generally it may also affect doing household chores.

Assessing the damages

- Special damages

Firstly the claimant specially pleaded and proved her out-of-pocket expenses incurred from visits to the various doctors. Receipts in respect of her expenditure at Orthopedic Associates, Neurodiagnostics Ltd. and Medical MRI Services were accordingly admitted into evidence. These proved to be the extent of her documentary evidence touching her actual losses. It should be noted that the amount calculated for cost to Dr. Graham was $35,000.00.

In the particulars of claim filed the 2nd of March, 2007 she also included a claim for $8,690.00 as her cost for a Dr. Knight. Since there is no evidence she visited a Dr. Knight it is assumed that is a typographical error and it is actually Dr. K. Wright to whom it refers.

In her viva voce evidence, the claimant spoke of "getting back" money she had paid to see this doctor from the defendant. She said she seen him three (3) times and owed him $900 on the last time. However, she agreed she received at least $2400 to settle her bill with him. Her evidence in this area was unclear, there is no documentary evidence as to her spending over $8,000.00 in regard to Dr. Wright. Given this uncertainty and the lack of sufficient evidence I am forced to decline from making an award for this claim, especially since she was given money already from the defendant for these visits.

Her claim for the cost of x-ray will be allowed although there is no documentary proof of this expenditure. There is exhibited an x-ray report from the Mandeville Regional Hospital and $4,000.00 for such an x-ray seems reasonable.

The claim for $10,000.00 for traveling expenses to see Dr. Dundas and Dr. Graham will also be allowed despite the absence of receipts as the amount seems reasonable.

The claimant seeks loss of earnings of $2,500.00 per week from 26th August, 2000 to 16th January, 2004. She was not challenged as to the fact that this was what she earned. In her witness statement she said she received her pay up to 13th November, 2000 after which she was fired.

Mr. Cousins argued that there was no certainty she would have continued to earn the pre-accident earnings and said she was terminated because of her attitude to work. It can however be argued that her attitude to work was caused by the pain she may have been experiencing as a result of her injury.

An award under this heading seems appropriate at the pre-trial amount claimed but from 13th November, 2000 to 16th January, 2004.

The claim for extra help will be awarded as on the totality of her evidence it appears there was a need initially for the claimant to employ someone to assist her. The amount claimed seems reasonable.

General damages

- Pain and suffering

In her submission Miss Hudson has urged the court in making an assessment to embrace both the clinical and objective findings and the subjective findings. Only the claimant can be expected to adequately describe how she feels and how she is affected by her fall.

The medical evidence over the years have indicated a difficulty in locating the actual cause of the claimant's reported pain and discomfort. This of course does not mean she has not been and does not continue to experience pain.

Mr. Cousins had urged that there has been gross exaggeration unsupported by medical evidence in the claimant's story. He opined that her witness statement was not only untrue but contained deliberate falsehood. He pointed to the fact that her "daily agony" did not stop her from enjoying chicken farming which is a more strenuous activity than that of a cashier.

What is however significant is the fact that after eight (8) years the most recent report indicated she had an injury to her neck of only mild severity with impairment assessed at 5% of the whole body. It is also significant that in 2001 this was the assessment Dr. Dundas had initially given and this would have been within months of the injury. It is accepted that her condition improved over the years.

As I watched the claimant give evidence especially as she responded while being cross-examined, I was forced to consider whether or not she was exaggerating some of her discomfort.

It appeared to me that she was, but this does not distract from the fact that she has been experiencing some pain since the accident.

The cases provided by both counsel touching awards made for similar injuries were of much assistance to the court.

Miss Hudson urges that an award of at least $2.5 million is appropriate.

Mr. Cousins feels an award of $750,000.00 would be more reasonable.

The cases I found most useful were:-

(1) **Dawnette Walker v. Henley Pink C.L. W-123/2000 delivered 7/12/2001** where an award, when updated using the relevant CPI, of $1,449,500.00 was made.

(2) **Lora Hinds v. Robert Edwards and Anor.** Khan 3rd Edition, page 100 where an award, updated, of $1,578,433.00 was made.

However the claimant in the instant case seemed to have experienced a slightly greater degree of pain than the claimants in the above cases.

Thus under this heading for pain and suffering and loss of amenities an award of $2 million will be made.

Loss of future earning/handicap on the labour market

This claim is made due to the claimant current disability and recurrent pain which may reduce her eligibility on the labour market.

The claimant asserted that she has not been able to resume her pre-accident status either as a cashier and/or as a domestic help. She was trained as a cashier while employed to the defendant from 16th April, 2000, some four (4) months before her fall.

Miss Hudson has argued that given her disability she is now less competitive and will suffer and/or experience diminution of earning. A recommendation is made for an award using the minimum wage with a multiplier of 8 as the appropriate measure and a total of $1,331,200.00 is asked for. In the alternate a lump sum of $750,000.00 for handicap on the labour market is suggested.

Mr. Cousins submitted that given her ability to earn from her chicken farm, this claim is questionable. He recommended an award of $250,000.00 as reasonable in any event.

It is useful to remember that it is established that an award under this heading arises only where there is a real or substantial risk a claimant will loose his present job at sometime before the estimated end of his working life and has to seek alternative employment while less able to vie on the open labour market because of his disability.

Under the heading Halsbury's Laws of England 4th Edition Volume 12 (1) at page 890 states that the court will take into account the following:-

(1) whether there is a real risk that the plaintiff will be forced onto the labour market before retirement age

(2) the extent of his injury or disability

(3) how long it would take him to find alternative employment if forced unto the labour market

(4) the reduction in salary which he would suffer thereby

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 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. However

an assessment based on this pre-accident earning does not seem to be appropriate. A lump sum to compensate the claimant for a loss of earning capacity is more appropriate.

Miss Hudson has suggested an award of $750,000.00 and this suggestion seems reasonable and this award will be made.

Future household help

The Claimant here seeks to recover damages for future household help in completing her household chores and carrying out other domestic chores due to recurrent pains and discomfort in the hand which are of a permanent nature.

After assessing the evidence of Dr. Minnott and assessing the claimant herself, I am satisfied that this award is necessary. I accept the submission made by Miss Hudson in this regard and will make an award at $2,000.00 per week using a multiplier of 8 years – a total of $832,000.00.

Conclusion

Judgment for the claimant who is contributorily negligent and 40% responsible for her injuries.

Damages assessed as follows:

Special damages –

Medical expenses	$111,500.00
Travelling expenses	10,000.00
Loss of earnings	$412,500.00
Cost for extra help	$326,400.00
	$860,400.00

Award to claimant 60% - $516,240.00 with interest @ 3% from 26/8/2000 to 21/6/06 and @ 6% from 22/6/06 to todays date.

General damages

Pain and suffering & loss of amenities		$2,000,000.00
Award to claimant – 60%		$1,200,000.00 with interest @ 3% from 7/8/2001 - 21/6/06 and @ 6% from 22/6/06 to todays date.
Loss of future earning capacity	-	$750,000.00
Award to claimant - 60%	-	$450,000.00
Future extra help	-	$832,000.00
Award to claimant - 60%	-	$499,200.00