[2017] **JMSC Civ. 124**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. CLAIM NO. 2011 HCV03542

BETWEEN	**ANTHONETTE PERRIER**	**CLAIMANT**
AND	**McMASTERS' MEAT MART LIMITED**	**DEFENDANT**

Ms. Danielle Archer and Ms. Talia Soares instructed by Daly, Thwaites & Company for the claimant.

Mr. Patrick Bailey instructed by Bailey, Terrelonge & Allen for the defendant.

Heard: May 24, 2017 and September 18, 2017

Negligence –Personal injury– Duty of Employer- Occupier's Liability Act

WINT-BLAIR,J(AG.)

[1] I have been assisted greatly by the written submissions prepared by counsel appearing in this matter. In this judgment I will reference the evidence and submissions only to the extent necessary to explain my findings and decision made on a balance of probabilities. The parties may rest assured that in order to arrive at my decision I have considered all the evidence and all the submissions made by counsel.

The Claim

[2] The claimant claims in negligence and for breach of statutory duty pursuant to section 3 of the Occupiers Liability Act. By way of an amended claim form filed

on June 23, 2015 the claimant claimed damages, special damages, interest and costs as an employee and lawful visitor to the defendant's business. The claimant claimed that on March 1, 2011 upon exiting the defendant's meat cutting room, while carrying out her duties, she slipped and fell on the slippery floor which had been left in that state by the defendant, its servants and/or agents. The claimant relies on the particulars of negligence as filed to ground both causes of action.

Claimant's case

[3] The claimant was a 38 year old employee of the defendant company. She had been hired as a cashier to work along with other cashiers in the front of the shop. There are other employees who cut meat in the rear of the shop and servers who take the orders for meat back and forth between customer and meat cutter. All the employees engaged in serving and meat cutting are required to wear safety gear to include water boots.

[4] The material date was the1st day of March, 2011. On that date, the claimant was still on probation. She said there were 2 meat servers instead of 4. One server was at lunch and another was in the meat room completing an order. There were also many customers waiting to be cashed and served. She took the orders of two customers and went to the meat room to fill them. On returning from the rear of the shop she slipped on the concrete slope which led to the front of the store and fell sustaining injury. She argued that the area was wet and slippery with water from defrosted meat which led to her fall. She said in cross-examination, that she had been told by Pauline to help out as there were many customers and they were short-staffed. This would have been the second such occasion. The boss was not there that day, referring to Mrs. Lisa McMaster-Phipps. She said she did what she saw other cashiers do, namely, serving meat to the customers.

[5] The parties disagree on the job description given to the claimant when she was hired. The claimant submitted that as a part of her duties the defendant required her to serve customers on the shop floor. She gave evidence that there were 12

servers who were employed to take the meat from the meat room. In cross examination, she denied that the meat servers were required to wear gloves. She said she had to wear gloves sometimes but did not elaborate on the reason for this. She also admitted knowing that every morning meat was taken from the freezer for defrosting it which meant there was water on the floor of the meat room. She had never seen the floor being washed or mopped, the workers would only use a broom on the floor.

[6] The claimant in cross-examination said on March 1, 2011 she went into the meat cutting room to collect the order of two customers as she had been instructed to do so by the supervisor. She knew that meat had been taken from the freezer as usual to thaw. She saw water on the floor of the meat room from thawed meat. This was the state the meat room had been in since November 2010 when she was hired and on March 1, 2011 it had not changed. She wore slippers every day and on that date her slippers had a leather sole. She took a chance to help. She was in a hurry as customers were angry that they were not being served. She did not stop to look at the meat room floor. To exit the meat room she had to walk on a downward slope which led to the shop floor. She put the welfare of her customers and boss's money before herself. All the other cashiers were at their registers. This slope was slippery. She fell sustaining an olecranon frature and wrist fracture of the right wrist. Her arm was fractured at both the elbow and wrist.

Defendant's case

[7] The defendant's case was that the claimant was on probation on March 1, 2011. The area where meats are cut to order is always wet, as it is washed up to fifteen times a day to sanitize the area. The workers who come in contact with meats are given gloves, water boots, hair nets and aprons to wear. They are not expected to come in contact with money as they handle meat for customers. Conversely, cashiers have no duties which involve going into the meat room and are employed to collect money, provide change to customers and balance their

till at day's end. They are not given any uniforms or special gear. The defendant gave evidence that there were four servers in March 2011 and that the policy of the company was to ensure sanitary conditions for service to their customers.

[8] The defendant denies liability in negligence and any breach of statutory duty as alleged. They argue that the claimant was on a frolic of her own when she decided to go into the meat room. She is the author of her own misfortune. Alternatively, the defendant if found liable should be made to pay damages consistent with the a reduction in the award by 75% as the claimant's contribution to the accident. The defendant argued further that volenti non fit injuria applied.

[9] The defendant gave evidence through one witness Lisa McMaster-Phipps, Director of the company. She and her husband have operated the company since 2005. There are six full time staff members. She worked as a cashier in the business and there are five servers. In 2011, cashiers were employed to weigh meats on a digital scale, collect money and hand customers their orders. Cashiers also bagged other orders. They were not responsible for packaging meats, they were not employed to go into the meat room and bring orders to the register as it would be unsanitary for them to handle both money and meat. They were only trained to cash goods. The business also employed meat servers who were trained to weigh and package orders. The meat servers were to wear gloves, hairnets, aprons, long pants, uniform shirt and water boots. The cashiers worked at the front of the store, behind them was a shelf with grocery items for sale. At the back there is an upward slope used for moving the meat cart in and out of the storage area. There is also a step which leads to the meat room.

[10] The employees wash the area which may have drained meats fifteen times a day and dry the area with a mop. This is to maintain sanitary conditions. The defendant's witness admitted that she could not refute the factual situation as she was not there when the incident occurred and only learnt of it afterwards.

[11] It was unchallenged that Mrs. Mc-Master Phipps worked in the store as a full time cashier and that it was she who primarily supervised the claimant. In cross-

examination Mrs. McMaster-Phipps admitted that she had spoken to the claimant maybe once as it was the supervisors who dealt with the cashiers. She had never seen the claimant or any other cashier go into the meat room. Her evidence was that she would not have had to tell the claimant not to go into the meat room as that was not part of the job description the claimant would have been given on being hired. Mrs. Mc-Master Phipps agreed that it was Pauline who interviewed the claimant and who would have outlined the job description of a cashier. She herself could not say what job description would have been given to the claimant. The servers are supervised by herself and, Pauline. Servers cannot serve until they have changed from their street clothes into their safety gear. There was a sign on the cold room door which said "Authorized persons only" in respect of entry into the meat room.

[12] Both sides agreed that when Pauline wasn't there Beverly would be in charge, the claimant said that on the material date, she received instructions to take meat orders from the supervisor.

[13] The system for handling meat as described by the defendant's witness was that meat would be taken from the freezer and placed on a cutting table in the cutting area for defrosting. Water could not escape from the table to the floor as there was a drainage system in place under the cutting table. There is a slope to the front of the store some 7 feet 5 inches from the cutting table. The meat room is washed some 15 times a day and a broom is used to scrub the floor. Employees fill a bucket with water from a full sink in the room, when the water pressure is low, from the buckets they throw water onto the floor. Otherwise, a hose is used. They also take water out to the serving area and repeat this exercise. The area would be dried after. There is a drainage system by the serving area.

[14] This is done to keep the area clean and hygenic. Sanitizer is used as directed by the public health department. Pauline or Beverly ensures that this is done. The witness was there almost every day to ensure that the supervisors comply. She disagreed that there was no system in place to prevent cashiers from entering

the cutting room or proper supervision of cashiers. The system employed was that she, Mrs. McMaster-Phipps, was there each day, coupled with the job descriptions which had been given to each cashier. There is no evidence of a drainage system being in the meat room in the witness statement of Mrs. McMaster-Phipps.

Discussion

[15] The claimant said in evidence that she had been told to serve meat to customers who had placed orders, the evidence set out in her witness statement was that she had been given this instruction in December 2011. The claimant averred in paragraph 2 of her witness statement filed on May 2, 2016 that:

> *"In December 2010, the supervisor at McMaster's Meat Mart Limited, Pauline, instructed me to help to serve the customers at McMasters Meat Mart Limited by providing them with the goods that they had purchased upon cashing. The said supervisor instructed me to do this because they were short staffed."*

[16] In cross-examination, the claimant said that she had again been told by Pauline to help out on the material date as they were short-staffed. This evidence is absent from her witness statement. It was suggested to her in cross-examination, that Pauline's normal day-off is on a Tuesday and the claimant agreed with that. The incident happened on a Tuesday, a day when Pauline would not have been at work, to which the witness agreed. She went on to agree that Pauline had given her no such instructions. She did point out that the instructions came from a supervisor.

[17] The claimant in re-examination said she had received instructions from Beverly on the day of her accident. These instructions are not in evidence. Both sides agree that in Pauline's absence, Beverly would have been the supervisor on that day.

[18] The claimant's evidence was that she had observed that the business was short-staffed and was told that she should help. The claimant's evidence was that she had received instructions from Beverly. The claimant based on those instructions entered the meat room to place as well as retrieve and carry out the orders of two customers.

[19] This is apparent from paragraph four of her witness statement which states:

> *"There would have been approximately four (4) persons serving at the counter, however, on or about March 1, 2011, one of the workers was at lunch and another worker was in the meat room completing an order at approximately 4:00pm in the afternoon. There were only two (2) young men serving meat and there were many customers waiting to be cashed and served."*

[20] The Claimant then took the following actions based on Beverly's instructions:

a. She rose from her cashier station.

b. She took the orders of two customers.

c. She went herself to the meat room to place the orders.

d. She received the meat.

e. She brought the meat back.

f. She had agreed in cross examination that the meat had been placed in big bags. She carried those big bags by herself at the same time.

[21] The claimant's description of the layout of the establishment was that there was an upward slope to the meat room which she would have had to walk down in order to return to the front of the store. This slope had no rails along it. The floor on the slope was made of concrete.

[22] The amended particulars of claim filed on June 23, 2015 alleged at paragraph 5 that the claimant was serving two customers orders of 20 lbs of chicken, 31 lbs of mutton, 2 lbs of mutton and 2 lbs of pork respectively. This is 55lbs of meat which was put in big bags.

[23] It was open on the facts to infer that the claimant should have been using both hands to carry these heavy bags. The presence or absence of a rail would then have become immaterial as she would not have been able to hold onto it. This decision to take all the meat at one time would also indicate that she assessed the risk and nevertheless went on to take it. She did not abandon the pursuit in favour of a meat server or attempt to carry only one bag at a time. It was the decision of the claimant in all these aspects which lead to the submission that the Claimant did not give due regard to her own safety. She said as much when it was put to her that she had put the welfare of the customers and her boss's money ahead of her own safety, a suggestion with which she agreed.

[24] The claimant admitted to wearing slippers on the material date. It is undisputed that workers in the meat room and servers were required to wear water boots, aprons, hairnets and gloves. The claimant was not given any particular clothing or uniform as her job did not entail any contact with unpackaged meats. There was a sign which said "authorized persons only" but no way to deter or prevent cashiers from entering the meat room. The claimant was also never told that she should not enter the meat room based on the evidence from the defendant's only witness.

[25] The claimant again, assessed the risk, she knew the layout of the shop, she knew that the floor of the meat room was usually wet, she knew she was clad in slippers which was not the footwear which was allowed in the meat room. I find that she went in on the instructions of her then supervisor Beverly.

The submissions

[26] The claimant filed her claim in negligence as well as under section 3 of the Occupiers Liability Act. Counsel Ms. Archer relied on **Marie Anatra v Ciboney Hotel limited and Ciboney Ocho Rios Limited** Suit No. CLA 196/1997; 31st January, 2001 a decision of Beckford, J which said:

> "*Under the Act, the common duty of care imposed by section 3(2) "is the duty to take care as in all the circumstances of the case is*

reasonable to see that the vistior will be reasonably safe in using the premises for the purposes for which he is invited or permited by the occupier to be there."

[27] Counsel for the claimant, Ms. Archer, argued that this finding meant that section 3(2) places a burden of proof on the defendant. She also relied on the dictum of McBride, J in **MacLean v Segar** (1917) 2 K.B. 325 at 329 for this proposition. She submitted that the defendant had failed to discharge this burden as well as the burden to prove that care was taken. There was a higher duty of care on the defendant as the claimant was on probation. There was a lack of constant and vigilant supervision as well as a lack of specific instructions to ensure the claimant carried out her tasks efficiently and competently. The defendant had breached their obligations under the Occupier's Liability Act.

[28] Counsel submitted that the defendant also failed in its common law duty of care and was negligent in that it did not provide a safe place of work in terms of the physical layout which contained a slippery walking surface, failed to provide a competent staff of men, adequate plant and equipment, and a safe system of working with effective supervision.

[29] Mr. Bailey for the defendant submitted that the claimant had a duty to take care for her own safety. He argued that the claimant was contributorily negligent in that she failed so to do. He further argued that spillage of water was incidental to the business of the defendant. The system was that meat was put out for defrosting and this led to water being on the floor which ran into a drainage system. However, the entire area was washed for sanitization purposes. The area would then be mopped dry. Counsel argued that both statute and common law have sought to regulate the duty owed to the occupier, as a visitor had a duty to act reasonably in all the circumstances and not to cause undue harm to him/herself.

[30] Both sides relied on **Victoria Mutual Building Society v Barbara Berry** SCCA 54/2007; July 31, 2003, per Harris, J.A. The claimant relied on this authority to argue that the visitor is required to employ reasonable care for his own safety.

Harris, J.A. stated *"the degree or want of care which would ordinarily be looked for in an invitee is only a relevant factor."*

[31] The defendant relied on **Victoria Mutual** to argue that the Court of Appeal found the appellant to be contributorily negligent to the tune of 50% for the injuries she suffered.

The Law

[32] In *Charlesworth and Percy on Negligence* the learned authors have indicated that there is a duty owed to each employee as an individual. There is also a higher duty of care owed where a workman has insufficient experience of the job in hand and is unfamiliar with its dangers, since he requires adequate supervision and guidance in order to protect him from his own incompetence: **Byers v Head Wrightson & Co. Ltd.** [1961] 1 W.L.R. 961.

> "*Where a job involves certain risks to health and safety, which are not common knowledge but of which an employer knows or ought to know and against which he cannot guard by taking any precautions, he is under a duty to inform the prospective employee of the risks, if knowledge of the risks would be likely to affect the decision of a sensible level-headed workman on whether or not to accept the job in question*: **White v Holbrook Precision Castings** [1985] I.R.L.R. 215

[33] In **Schaasa Grant v Salva Dalwood and the Jamaica Urban Transit Company Limited** 2005 HCV 03081 delivered June 16, 2008, Campbell J decided that the defendant was liable for failing in its duty to provide the proper system to ensure the use of safety equipment on its buses. The claimant was a conductress on one of its buses, she was thrown from her seat when the bus driver braked to avoid colliding with a vehicle in front of it. The learned judge said:

> *"The employer's liability, although it is derived from the general law of negligence, gives rise to a special duty owed by an employer to his employee. The duty is owed by the employer to each employee as an*

individual. Therefore each employee has an individual right of action against his employer for breach of duty. Further, the duty will vary according to the individual nature of the employee." See **Paris v Stepney Borough Council** (1951) 1 All ER 42 at 44.

"… The common law places a duty on the employer to provide a safe system of work for his employee, and further to ensure that the system is adhered to. The employer's duty is to take such precaution as a reasonably prudent employer in the similar situation… ***It is not to be assumed that even a usually reliable employee will heed directives given for the employee's own safety.***

Therefore if the claimant had been told not to enter the meat room, there would be a duty on the employer to take precautions against such unauthorized entry. In the case at bar the claimant was never told that the meat room was off limits.

[34] In **General Cleaning Contractors Limited v Christmas** [1952] 2 All ER 1110 the respondent, was employed as a window cleaner by the appellants to clean the windows of a club. He was standing on the sill of one of the windows to clean the outside window, holding one sash of the window for support. This was the practice usually adopted by employees of the appellants. The sash came down on his fingers and he let go. He fell to the ground suffering injury.

The House of Lords held that:

"*The appellants were under a duty to ensure that the system that was adopted was as safe as it could be made and that their employees were instructed as to the steps to be taken to avoid accidents; the appellants had not discharged their duty in this respect towards the respondent; and therefore they were liable to him in respect of his injury."*

[35] In the case at bar, the claimant was never given any directives regarding the avoidance of accidents or risks to her safety. The case of **Speed v Thomas**

Swift and Company Ltd (1943) L.B. 557 at 567 stands for the proposition that an employer's duty to provide a safe system of work includes proper supervision.

Who is an occupier

[36] The person responsible for the condition of the premises is he who is in actual occupation or possession of them for the time being, whether he is the owner of them or not. This is not in issue. The defendant company is the occupier.

What is "premises"

[37] The premises were known as McMaster's Meat Mart, situate at 1C Heywood Street, Kingston.

The Occupiers' Liability Act

[38] Section 2(1) of the Occupiers' Liability Act, 1969 ("the Act") of Jamaica is identical to the English Occupiers' Liability Act of 1957 ("The UK Act".)

Section 2(1) of the Act provides:

> *"2.-(1) The rules enacted by sections 3 and 4 shall have effect, in place of the rules of the common law, to regulate law the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them."*

Who is a visitor

[39] The Occupiers' Liability Act replaced the common law duties owed to lawful visitors. Sections 2 and 3 expressly replaced the common law and narrowed the category of invitee, licensee and trespasser to visitor and trespasser, abolishing the distinction between the duty owed to invitees and that owed to licensees.[1]

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[1] Section 2 and 3 of the Occupiers Liability Act, (Jamaica)

The duty now owed to visitors is the common duty of care in respect of the premises or to things done or omitted to be done on them.[2]

Who is an occupier

[40] The person responsible for the condition of the premises is he who is in actual occupation or possession of them for the time being, whether he is in the owner of them or not. This is not in issue. The defendant company is the occupier.

Section 3(2) of the Act provides:

> "***(****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*.

The learned authors of *Charlesworth and Percy on Negligence* posit that:

> *"the words "things done or omitted to be done on" the premises must also be read in conjunction with section 1(2)*[3] *which states that the rules enacted in sections 2 and 3 shall not alter the rules of the common law as to the persons to whom a duty is owed. This means that the occupier is liable to his visitor for his negligent acts or omissions done on the premises by himself and others for whose conduct he is under a common law liability."*

[41] The British equivalent [4]of section 3(2) of the Act has been interpreted in **Roles v Nathan** [1963] 1 WLR 1117 at 1122 to mean that it is the visitor who has to be made safe and not the premises. The common duty of care is owed only to a visitor who is using the premises for the purposes for which he is invited or permitted to be there. If a visitor exceeds the area of invitation or permission he

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[2] Charlesworth and Percy on Negligence, p. 385
[3] Section 2(1) of the Occupiers Liability Act (Jamaica)
[4] Section 2(2) of the Occupiers Liability Act. (Ulc)

becomes a trespasser, and is owed a lesser duty. It is a question of fact whether in all circumstances of the case the occupier has taken reasonable steps to warn his visitor of the existence and scope of the prohibited area. For if a person has entered on an area to which he was clearly invited, and if he has strayed from that area, the question is not so much whether he has been invited to stray but whether there was anything to delimit the area of invitation. (See **Stone v. Taffe** [1974] 1 W.L.R. 1575 at 1580.)

[42] In respect of the common law, the court may take into consideration, matters relevant under the common law in determining whether an occupier has fulfilled the common duty of care. Such relevant considerations are the purpose of the visit, conduct to be expected of the visitor, the nature of the danger, whether the danger was obvious, what warnings if any should be given, what guarding, lighting and precautions should be taken, the state of knowledge of the occupier and the age of the visitor. These considerations are applicable to section 3(4) and 3(5) of the Act which provide:

> (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."*

[43] The common law principle that a danger if known to a visitor may no longer be a danger is a question of fact in all the circumstances of the case. Whether this relieves the occupier of liability is also a question of fact.

[44] The Act preserved the defence of volenti non fit injuria. Section 3(7) provides:

"(7) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."

[45] An occupier of premises owes the same common duty of care to all lawful visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors "*by agreement or otherwise.*"[5] These exceptions also include an exemption from liability where the visitor has knowledge of the danger pursuant to section 3(7). This may happen in three ways:

1. The Claimant must have approached the risk of his/her own free will.

2. The claimant must have had full knowledge of the nature and extent of the risk.

3. The Claimant consented to waiving his right of action. (see **Martin v Bucknor and Jamaica Public Service. Co. Ltd.** [2010] JMSC Civ. 186, Anderson, J.)

[46] In *Salmond & Heuston on the Law of Torts*[6], the learned authors state that for Section 2(5)[7] of the UK Act to be pleaded in aid by the defendant one of three instances had to arise on the evidence:

1. Section 2(5) of the Act,[8] provides that the common law duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor. The question is whether a risk was so accepted is to be decided on the same principles as in other cases in which one person owes a duty of care to another. Knowledge by the plaintiff is not to be treated

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[5] Section 2(1) of the UK Act.
[6] 1987, 19th ed. p. 300.
[7] Section 3(7) of the Act (Jamaica)
[8] Section 3(5) of the Act (Jamaica)

without more as absolving the occupier from liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe.

2. *The Act recognizes the common law principle that a danger may cease to be a danger to those who know of it. But in each case it is to be a question of fact whether the visitor's knowledge of the danger relieves the occupier from liability, for section 2(4) [9]provides that 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, so that (for example), where damage is caused to a visitor by a danger of which he has been warned by the occupier, the warning is not to be treated without more as absolving the occupier unless in all the circumstances it was enough to enable the visitor to be reasonably safe.*

3. *Knowledge of a danger may be evidence of contributory negligence on the part of a person injured by it.[10]*

[47] The Act does not expressly provide for contributory negligence, however section 3(3) of the Act provides for the apportionment of blame in the appropriate case by the use of the words "*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."*

Section 3(3) provides:

> *"(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-*

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[9] Section 3(4) of the Act (Jamaica)
[10] Salmond & Heuston on the Law of Torts, 1987, 19th ed. p. 300, 301.

(a) an occupier must be prepared for children to be less careful than adults;

(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."

Common law duty of care

[48] An employer is under a common law duty to ensure the safety of his employees. The usual heads are:

1. A safe place of work;
2. A safe means of access to the place of work;
3. A safe system of work;
4. Providing safe plant and equipment;
5. Employing competent employees
6. Protecting employees from unnecessary risk of injury.

[49] In addition, the employer also owes statutory duties such as those set out in the Occupiers Liability Act. The duty to ensure safety is not absolute, an accident does not confer automatic liability on the employer. The court will look at all the circumstances surrounding the accident to determine the reasonableness of the employer's actions. If the employer is found to have failed in his duty to his employees then he will be liable.

[50] A safe place of work may become unsafe. In this case, the floor was slippery due to the presence of water. The employer's liability will depend on the whether the reasonable employer would in the particular circumstances have taken measures to avoid the accident or different measures from those in fact taken. What is reasonable will vary according to the facts of the case. The court will look at how long the water had been in the area, the frequency with which that area was wet, had it been there all day or had it just become wet.

[51] It is open on facts to find that the defendant failed to supervise the claimant with greater vigilance then the other workers as she was on probation. The defendant's only witness gave evidence of being a full time cashier in the business and that she supervised the claimant, yet she relied on the supervisors to speak to the claimant and did not know what they were telling the claimant to do. The claimant was not told she should not go into the meat room by Mrs. McMaster-Phipps or any other supervisor. In fact, I find that the claimant was told to serve meat even though she was hired as a cashier. She was not given specific instructions to ensure that she avoided accidents in the defendant's specific work environment.

[52] For the defendant, Mrs. McMaster-Phipps gave no evidence to contradict the claimant's evidence that she saw other cashiers serving meat. Similarly, there was no evidence to contradict the claimant's evidence that the floor was wet and slippery on the material date. While there was evidence of a system for sanitization of the meat room which included drying the floor with a mop, there was no evidence of the operation of that system on the day of the accident.

[53] Likewise, there was no evidence of what oversight the defendant would have given to its supervisors. It is unclear from the defendant's case whether Beverly could have and did in fact modify the claimant's job description as asserted by the claimant. There was no evidence of any safeguards against the supervisors giving instructions for the efficient running of the business as they saw fit or for authorizing entry into the meat room of prohibited personnel.

[54] The defendant's operation appeared to have been run by the supervisors as regards instructions given to the claimant, there is no evidence to the contrary and it is open on the facts to find that this was supported by the evidence of Mrs. McMaster-Phipps herself as she could not say what instructions had been given to the claimant by Beverly on the material date as the running of the business in respect of the claimant had been left up to the then supervisor.

[55] The evidence disclosed that the claimant was never told not to enter the meat room, nor was she given any directives regarding her safety. I find that there was a paucity of adequate supervision in respect of the claimant an employee on probation. In all the circumstances, Section 3(7) of the Act does not avail the defendant.

[56] In the absence of evidence from Mrs. McMaster – Phipps on the point, I am unable to find a clear system of work laid down for the claimant to follow. I find that the system of work as described was capable of being altered by the supervisors without reference to Mrs. McMaster-Phipps. So much so, that she did not know to what degree this was being done.

[57] Most striking is that Mrs. McMaster-Phipps herself had not spoken to the claimant more than once during her period of employment. This is further evidence of her heavy reliance on the supervisors to monitor and supervise the staff. This court finds that while there were supervisors employed to the defendant company, they were not themselves being supervised. This is in the context of a small company with six full-time staff members where Mrs. McMaster Phipps said she worked as a full-time cashier and was at the defendant company daily.

[58] I find that the defendant company operated a system in which the claimant was called upon to perform duties which were outside of her job description. These instructions were being given to the claimant by the supervisors and the evidence from the defendant's witness supports this. There was no evidence of any instructions being given to her for the wearing of safety gear or whether safety gear was provided for her for those instances when the business was short-staffed and she was instructed to help out.

[59] The defendant also raised contributory negligence. In my view, contributory negligence, may appear to arise on one view of the facts, however when the facts are considered in totality, I find that the defendant is solely liable to the claimant in negligence. The claimant knew that the floor was wet and possibly

slippery when she was instructed to help out with the meat orders. Though the meat servers were properly clad in safety shoes, she was not, nor was she given the appropriate safety apparel and footwear. She entered the meat room and carried out 55lbs of meat at one time walking in leather-soled slippers on the wet surface. No one assisted her. The slippery, wet surface was attendant upon the nature of the business being carried on and this did not mean that there was no safe system of work in terms of the physical layout. The cashiers had no business in the meat room. It was Beverly, the supervisor who gave the claimant instructions which led to her moving from her station. Those instructions led to the claimant entering the meat room where she ought not to have been. Ought the claimant reasonably to have foreseen the likelihood of injury to herself if she fell while carrying out the meat order and if so did she take reasonable care to avoid falling?

[60] In my view, the defendant provided safety gear and water boots to those members of staff engaged in work in the wet areas of the premises. This is an indication that there was a risk to health and safety of those employees, which the defendant sought to reduce. The mere fact that the claimant was not provided with such gear meant that she ought not, have been exposed to the same level of risk as those employees. In instructing her to serve meat without the appropriate safety gear, the risk of an accident was foreseeable on both sides. While this may have been the fault of two supervisor, it is unfortunately, attributable to the Defendant.

[61] There would have been an obvious difficulty if the claimant had refused to comply with her supervisor's instructions. The claimant in obeying her supervisor advanced the defendant's business and maintained her employment status. This was not an unreasonable position for an employee on probation to take in all the circumstances of the case. The claimant ought to have known of the existence of the the risk, however, mere knowledge did not in this case mean that she assented or accepted the danger to her safety. She may not have foreseen the extent of the damage she in fact suffered, but this is immaterial.

[62] The court awards judgment to the claimant with costs to be taxed if not agreed.

General damages

[63] The claimant's medical evidence was unchallenged and disclosed that she sustained the following injuries:

1. Olecranon fracture
2. Wrist fracture
3. 49% upper extremity impairment equivalent to 29% whole person impairment.

Handicap on the labour market

[64] Ms Archer submitted that the appropriate award should be $2,000,000. This sum has been unchallenged. The claimant was dismissed by the defendant company and has not worked since the accident. Her income when she was employed to the defendant company is unknown. She would have been capable of earning the minimum wage then. Her low pain threshold required considerable management, this would be a factor in her ability to seek and maintain employment.

Pain and suffering

[65] The claimant suffered a fracture of her right arm in two places. She was in extreme pain for several years and had undergone one major surgery. She suffered from significant pain and swelling when her plaster cast was removed and was referred to the Kingston Public Hospital Pain Clinic. She was there diagnosed as having Chronic Regional Pain Syndrome Type I. She was treated with oral medication and interventional blocks which included Stellate Ganglion blocks. The side effects of the blocks led to increased disability with headaches, hemi-facial pain, right eye pain, photophobia and incereased lacrimation. The side effects of the oral medication were drowsiness, nausea and vomiting. She was afraid to remove her right arm from its sling and feared her arm being touched by her examining physicians.

[66] On a neuropsychological evaluation, it was found that the claimant experienced consistent pain with no evidence of malingering or somatoform disorder. She was experiencing major depressive disorder and symptoms of cognitive impairment. She was again diagnosed with Complex Regional Pain Syndrome. Cognitive behavioural therapy would be effective in relieving her depressive and post traumatic stress symptoms. She was then being managed by the Pain Clinic.

Ms. Archer cited several cases in support of her submissions on the award under this head. I will only refer to that which I have used to decide the sum of the award.

[67] I accept the most appropriate case as that of **Vivolyn Taylor v Richard Sinclair** 2005 HCV 1256 in which Sinclair-Haynes, J extensively reviewed similar authorities and awarded damages for pain and suffering in the sum of $4,400,000. Vivolyn Taylor was found to have had a 27% permanent partial disability of the hand which was equivalent to 14% of the whole person. The instant claimant has been diagnosed with a greater whole person disability and suffered from impairment to her upper extremity at 49% with a whole person disability of 29%. In this regard, as the whole person disability is 15% higher in the case of the instant claimant than that of Vivolyn Taylor, I would increase the updated award for pain and suffering by 15% which updates to $8,556,730.77 increased by 15% to $9,840,240.38.

[68] Special damages are also not in dispute, the sum claimed is $24,000. There was no evidence to support the claims for future medical expenses nor for future transportation expenses.

In light of the foregoing the court makes the following awards:

[69] <u>General damages</u>

Pain and suffering: $9,840,240.38 with interest at 3% from the March 1, 2011 to May 24, 2017.

Handicap on the labour market: $1,000,000.

Special damages: $14,000 with interest at 3% from the date of service to May 24, 2017.

Costs to the claimant to be taxed if not agreed.