BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

No: 949 of 1999

BETWEEN:

JUANN LAYNE **PLAINTIFF**

AND

THE ATTORNEY GENERAL **DEFENDANT**

Before The Honourable Mr. Justice William J. Chandler, Judge of the High Court

2006: March 23, 24
2007: June 26
2008: March 13, 14; May 28
2010: May 4

Mr. Patterson K.H Cheltenham, Q.C. and Ms. Leisel Weekes for the Plaintiff.

Mr. Wayne Clarke and Ms. Anika Jackson for the Defendant.

DECISION

Nature of the application

Introduction

[1] This is an action based in negligence by the Plaintiff against the Defendant representing the Crown in right of its government of Barbados arising out of an accident at Plaintiff's workplace at the Queen Elizabeth Hospital ("Q.E.H.") on the 10th day of March 1998. The Plaintiff claims damages for personal injuries, loss and damage due to the negligence of the Defendant, its servants or agents.

Pleadings

[2] On 19 May 1999 the Plaintiff filed a specially endorsed Writ of Summons setting out the particulars of negligence alleged namely:

1. Failing to take any or any reasonable care to see that the Plaintiff would be reasonably safe in using the premises in the course of her duties;
2. Causing or permitting the floor to be or to become or to remain a danger to persons lawfully walking on it;
3. Permitting the Plaintiff to walk on the floor when the Defendant knew or ought to have known that it was unsafe and dangerous for her to do so;

4. Failing to give the Plaintiff any or any adequate or effective warning of the slippery state of the floor;

5. Exposing the Plaintiff, while in the course of her duties, to a risk of damage or injury from the slippery floor of which the Defendant knew or ought to have known.

Background

[3] The Plaintiff was employed as a Medical Technologist by the University of the West Indies and assigned to the Department of Histology at the Q.E.H.

[4] On 10 March 1998, whilst in the course of her duties at the pathology laboratory in the department of histology, she slipped and fell sustaining injuries to the left side of her neck, head, shoulder, chest, buttocks and pelvis. On the day of the accident she was examined in the Accident and Emergency Department of the Q.E.H. and was treated with anti-inflammatories and muscle relaxants.

[5] The Plaintiff returned to work on the 16 March 1998 but was unable to perform her tasks and returned home. She was referred for physiotherapy. Thereafter she was under the care of Mr. Hadley Clarke.

[6] The Plaintiff's claims –

1. General Damages for pain, suffering and loss of amenities.

2. General Damages for domestic services.

3. Special Damages in the sum of $3,887.79 and continuing.

4. Costs.

5. Interest pursuant to **section 35 (1)** of the **Supreme Court of Judicature Act CAP 117A**.

Particulars of special damages

1.	Medical services rendered by Dr. Clarke -	$3,000.00
2.	Medication from Knight's Pharmacy -	$ 123.38
3.	Medication from Crayton's Pharmacy -	$ 101.00
4.	Medical services rendered by MRI (Trinidad & Tobago) Limited (TT $ 737.00) -	$ 250.42
5.	Accommodation at Kapok Hotel (TT $1,215.40) -	$ 412.99

[7] The Plaintiff was treated by Mr. Hadley Clarke, neurosurgeon, and was first seen by him on 23 March 1998. His evidence was that she presented with recurrent pain and stiffness in the neck, strange sensations in the left upper extremity and soreness in the lower back. Examination of the neck revealed moderate reduction of all neck movement, generalised muscle spasms and soreness on palpation of the spinous processes. Examination of the lumbo-sacral spine revealed normal back mobility, no evidence of muscle spasm, no local tenderness and normal straight leg raising.

[8] She returned to Mr. Clarke on 26 March 1998, 6 April, 20 April, 11 May 1998 and 25 June 1998. Over this period there was some improvement in her symptoms but intermittent neck pain, numbness and fatigue in the muscles of her left hand and stiffness in the left shoulder continued. Her treatment included bed rest, Feldene and Tegretol and she was advised to continue with physiotherapy.

[9] On 5 October 1998, she was discharged from Mr. Clarke's care and reported that the numbness and tingling in the left upper extremity had not dissipated. Mr. Clarke's diagnosis was that of neck strain, back discomfort and blunt trauma to the left shoulder, hand, chest, buttock and pelvis. The doctor did not anticipate any sequaelae or complications in the future.

[10] The Plaintiff's symptoms continued to linger and Mr. Clarke referred her to MRI (Trinidad and Tobago) Limited where an MRI scan of the cervical spine was performed. The findings are contained in a report dated 24 February 1999. No significant cervical spinal abnormality was detected.

[11] The Plaintiff was given sick leave and upon her return to work she was assigned to lighter duties. She experienced difficulty in using some of the machinery in the laboratory due to the tingling and numbness in her left hand. In addition, prolonged sitting triggered her pain and she was

forced to curtail her use of the computer. She was unable to perform household chores including washing, scrubbing, mopping, and sweeping as they triggered pain in her neck, shoulder and left hand. She received assistance with these chores from her mother.

Defence

[12] The defence filed on 17 March 2000 denies that the Defendant or any of its servants and/or agents were guilty of the alleged or any negligence or breach of duty as alleged in the Statement of Claim or at all or that any loss or damage which the Plaintiff suffered or sustained was caused thereby as alleged or at all. It was also pleaded further or in the alternative that the accident was caused wholly or in part by the negligence of the Plaintiff in that she:

(a) failed to keep any or any proper look out or to have sufficient regard for her safety by observing the state of the floor prior to her use of the premises;

(b) failed to take reasonable care in her use of the premises.

Evidence

[13] The Court heard the oral testimony of three (3) witnesses who were presented in support of the Plaintiff's case. These were the Plaintiff, Mr. Hadley Clarke and Mr. Bernard Best.

[14] The Plaintiff testified that she was a married lady and had worked at the

Q.E.H., as a medical technician, since 1990. She held a certificate in medical laboratory technology and was currently pursuing a PhD graduate programme.

[15] She described the location of the laboratory about 50 yards along a corridor going towards the dispensary of the hospital. The histology department, where she worked, is located at the back of the laboratory and had a concrete floor which, at the time of the accident, was covered with vinyl tile. The vinyl tile was common to the entire laboratory.

[16] In her experience working at the Q.E.H. the housekeeping department of the Q.E.H., is responsible for cleaning the lab. There is also a maid who cleans 3 times a week; she cleans the bathrooms and certain areas.

[17] The Plaintiff's work hours were from 8:15 a.m. until 4:30p.m. However, usually she arrived at 7:30 a.m. and left around 5:00 or 5:30p.m. She was normally the first person to get into the laboratory on mornings.

[18] She gave evidence of her daily routine, that as soon as she got into the histology lab she would normally place her bag in her locker, change from the shoes she wore to work into flat safety shoes, which she kept in her locker, and put on her white lab coat over her work clothes. This was a special uniform she was required to wear at work. From the time she was trained she was told to wear flat safety shoes and she always adhered to that practice.

[19] She recalled that on 10 March 1998 she arrived at work at 7:30 am. After putting on her safety shoes, which have a non-skid grip at the bottom, and her lab coat, she proceeded to start to work. First, she took up her knife, a steel blade which was very sharp for cutting tissues and proceeded towards the knife sharpener, to sharpen the knife. She was about 20 feet from the sharpener and had the knife in her right hand. When she reached approximately 8 feet she started to slide. She slid in a forward direction at a rapid rate and was unable to control herself. The knife was still in her hand all this time. When she reached a bit further her body twisted to the left. She fell on she left side, the knife came crashing down and she knocked over two stools and proceeded to slide over to the wall by the corner. The wall brought her to a halt.

[20] When she was on the floor a gentleman at work, Mr. Watts, came running to assist her but she pulled herself up before he reached her. She got up, sat and waited for her supervisor, Ms. Bailey, to get to work. Ms. Bailey arrived around 8:30 a.m. and she proceeded to tell her what had happened. Ms. Bailey told her to fill out an accident form and then she would have to go with her to the staff clinic to see the doctor.

[21] Ms. Bailey questioned her about how the accident occurred and to the best of her knowledge Ms. Bailey wrote what she said on the form.

[22] She said that she slid because there was polish on the floor and they

work with wax which is used to imbed the tissue. It is normal on a daily basis to have bits of wax on the floor. However, there were no bits of wax on the floor when she got to work that morning. The floor was polished in conjunction with all of the other areas in the lab.

[23] On the Monday, the day before the accident, it was observed that the floor had been polished during the weekend before and everyone was cautious. She noted that the terms waxed and polished are used interchangeably. She spoke to Ms. Bailey about the slippery condition of the floor on the Monday before the accident. Ms. Bailey responded by saying that she saw that too.

[24] She said that housekeeping had been advised against the waxing or polishing of the floor in histology, before the accident. The rationale was that working with wax, having small bits dropping on the floor from time to time created a slippery condition to the floor. It was felt that further waxing or polishing of the floor compounds the problem. However the staff would show up and find that the floor was polished anyway along with the entire lab floor. It was advised that the floor just be stripped of dirt and grime and not polished. If it was polished it would be very slippery. One survived, she noted, by walking very gingerly and sometimes by holding onto the wall.

[25] When she had arrived at work on the 10 March she realised that the floor

of the entire laboratory including histology department had been polished because it was extremely greasy.

[26] The Plaintiff also gave evidence about the systems which were in place at the hospital to deal with issues affecting matters of safety. She said that there was an ad hoc safety committee within the lab of which she was a member. The purpose of the committee was mainly to look at safety hazards or problems within the entire department and to make recommendation for improvement.

[27] A number of issues engage its attention including the question of waxing or polishing. There was a lot of discussion about the slippery condition in the Histology Department and of the daily use of wax with which they worked.

[28] At the time of the accident Edmund Blades, a medical lab technologist, was in charge of the ad hoc safety committee. She filled out a safety hazard injury report form. She filled out part and Mr. Blades filled out the rest. They both signed the form dated 14 April 1998. She did not know what became of the report. It did not feature in the committee discussions but the accident did.

[29] Since the accident, the advice on polishing the histology section of the lab has been adhered to and some safety rubber mats were ordered. All of the waxed areas in the histology department were covered by the

rubber mats. This was done within a year of the accident and during the interim period the floor of the histology department was not waxed or polished.

[30] She was involved in a road traffic accident, which was settled. She received about $5,000.00 and was paid for the aggravation of her injury and not for the injury itself.

[31] In relation to loss of amenity, the Plaintiff gave evidence that she used to play badminton, her principal hobby, competitively and was a member of the Pioneers Club. She did not continue to play after the fall because she had difficulty reaching up and holding her hand upward to serve the shuttle cock. She planned to resume the sport but still has difficulty with her neck.

[32] She also enjoyed going to the gym, which she also gave up. She is unable to hand wash and has problems with mopping and sweeping. In terms of cleaning it is difficult to scrub the bath.

[33] She has problems lifting at work and using some of the machines. At present this work is assigned to someone else but it causes problems because some people at work think she is shirking.

[34] She is unable to carry weight in her left hand and has to use her right hand which causes problems after carrying too much weight.

[35] At one point in time her supervisor told her that if she could not

function at the lab she would have to be transferred to another job at Cave Hill.

[36] Her husband is tolerant about the situation but at times he would make comments like "I don't know how to touch you, if I touch you on this side, it is a problem, if I touch you that side, it is a problem." He feels restricted where she is concerned and this makes her feel bad.

[37] She permanently favours the left side. In order to see something on her left she has to turn her whole body in that direction, she cannot simply turn her neck. (Demonstrated this for the Court).

[38] She continues to experience pain on her left side but has learned to live with it. She has resigned herself to live with her pain and discomfort and to cope as well as she could. At times it is difficult and frustrating but she has to live.

Cross-examination

[39] Under cross-examination, she said that, based on her qualifications and time assigned at the Q.E.H. she would consider herself to be an experienced lab technologist. She confirmed that the lab had been waxed/polished and that she had spoken to the cleaner the day before the accident and on the day of the accident and had asked if the floor had been waxed/polished that weekend and she was told that it had been. She did not confirm this with the head of the department but had

taken his word for it.

[40] She said further that wax was used daily in the lab and that normally molten wax would go into the processor for impregnation of the tissue. Molten wax would also be used to imbed tissue and she gave evidence of the procedure which they followed. She was shown a copy of Exhibit "J.L.7", her accident form, and she agreed that it was a summary of the accident. She stated that it was a summary of what she had reported to Ms. Bailey and that when she had read it over she had been satisfied in summary with the form and that when she had signed it she had adopted the contents of the form.

[41] She was shown a copy of Exhibit "J.L.8" which she identified as an occupational health and safety form. She stated that she had filled out the form approximately one month after the accident, when she returned to work from sick leave. She had completed the form herself and signed it at the bottom.

[42] She agreed that some of the statement in Exhibit "J.L.7" were different from those found in Exhibit "J.L.8".

[43] She was shown a copy of Exhibit "J.L.10." She identified her signature at the bottom of the form; stated that this form was filled out approximately one month after her accident and agreed that it was much more detailed than Exhibit "J.L.7" and Exhibit "J.L.8".

[44] It was suggested to her, that she fell, not because the floor was polished but due to her own carelessness, she totally disagreed with this suggestion.

[45] She stated that to date she is still unable to mop, scrub the bath and hand-wash. She can sweep but her ability is limited.

[46] The Plaintiff was unequivocal in giving her testimony. She was clear in her assertion that her fall was due to the slippery state of the floor caused by the waxing which had been done earlier. The defence made much ado about her use of the terms waxing and polishing, which she said she used interchangeably, however, the court is of opinion that this is more a matter of semantics than substance. The Plaintiff was not shaken in cross-examination and I accept her evidence as the truth of what transpired on the date in question. I will briefly return to this when I come to look at the defence case.

[47] Having accepted her evidence as true, I find that the Plaintiff's fall was due to the slippery state of the floor in the histology department for the cleaning of which the Defendant was responsible.

[48] The third and final witness for the Plaintiff was Bernard Best, a retired employee of the Q.E.H. He testified that he was employed with the Q.E.H. from 1969 until 2003. From 1991 he was sent to the histology department as head of the department until he retired. It was his duty to

supervise the activities of the department; to set up the rotations, arrange the staff within the department and to look after the maintenance and general upkeep of the department and its equipment. With respect to the floor, it was his responsibility to have the cleaners clean on a regular basis. The housekeeping department saw after the cleaning of the hospital but the lab kept a cleaner on staff who would mop and sweep on a daily basis.

[49] He gave evidence of the system of operating at the laboratory. He said that the histology department receives tissue from patients from operating theatres, clinics and private doctors and he gave evidence of the procedure used to obtain slides from the tissue. It is unnecessary to go into the process in detail, suffice it to say that tissue is imbedded in wax blocks which are chilled on ice and then they are cut into sections approximately one cell thin, so that they can be examined under a microscope. In the process wax falls on to the floor.

[50] He said that, about every three weeks, the lab floor was cleaned by stripping it, that is, the removal of old wax (floor wax and histology wax) from the floor. Whenever the floor was stripped it would be very clean and slippery and he would have to request that housekeeping re-strip the floor and leave it without floor wax.

[51] He was unaware of whether the cleaner, who would strip and then wax

the floor, also did the de-waxing, because this was done on weekends.

[52] He normally arrived at work around 8:30 or 8:45. The lab hours were 8:30 am to 4:30 pm. The cleaner assigned to the lab got there around 6:00 am and cleaned on mornings before the other staff members arrived at work.

[53] He noted that, of all the staff in the histology laboratory, the Plaintiff was generally earlier than anyone else. He was made aware that she was injured in an accident in the lab on 10 March 1998 but was not on duty when the accident occurred. While he was on vacation his position would have remained vacant and Ms. Bailey would have been in charge.

[54] As head of the department he was never asked to write a report on the accident nor was he asked to review any reports that anyone did.

[55] From 1991 until 2003 when he retired Ms. Layne worked with him in the histology lab and as her supervisor he found her to be quite a conscientious worker. She made sure that things were done which ought to have been done, she paid attention to detail and she made sure that her duties were done properly.

[56] He was aware of a safety committee at the Q.E.H. but was unsure of the date of its establishment. He believed that it was in the interest of all staff of the lab as part of the development and improvement of the lab. He would not say that there were problems with the lab but there were

accidents from time to time and the need for its establishment was seen.

[57] Programmes for the prevention of accidents or anything like that were never brought to his attention; he only remembered a request for notification of accidents from departments to heads of committees.

[58] The floor in histology consisted of vinyl tiles and when they were stripped without wax they had a dull appearance as compared to the glossy appearance they had when they were stripped and then waxed.

[59] At the time of his retirement the vinyl tiles were covered with rubber carpeting. He had ordered the carpeting subsequent to the Plaintiff's fall.

[60] Wax would get on the floor by the process described or if someone spilt it carelessly or accidentally. If molten wax was spilt it would splatter and could be carried around the lab by shoes. In addition when strips of wax are cut they are solid but very thin and they could be blown to the floor and also be carried by shoes.

[61] Throughout his stay, before the floors were covered with non-slip carpeting, he had seen people fall, slip, support themselves on the walls. You had to be cautious he said.

[62] The net effect of this testimony is that the officials of the Q.E.H., through its staff, in particular the head of the histology department, knew that the polishing and or waxing of the floors in that department presented a real and present danger to the members of staff and that

accidents had occurred prior to the Plaintiff's fall. Further, that, in spite of reports of accidents, no corrective or preventative measures had been put in place to avoid accidents until after the Plaintiff's fall.

The Defence

[63] The Court heard the oral testimony of three (3) witnesses who were presented in support of the Defendant's case. These were Betty Boyce, George Rollins and Edmund Blades.

[64] The first witness to give evidence on behalf of the Defendant was Betty Boyce who testified that she is a housekeeper and the head of the department of housekeeping at the Q.E.H. She had been employed with them for 14 years and held the post of head of the department for the last four years. As head of the department she reports to the Director of Support Services. She testified as to the system employed at the hospital for the cleaning of the floors.

[65] The floor of the Q.E.H. is cleaned on a daily basis with soap and water and given half an hour to dry. On some occasions the floor is deodorized and sanitized with a chemical called chemfresh. Every 6 months the floor is stripped with a ZEP stripper, which removes all dust from the floor. Then a shield is used which is a polisher, its brand name is also ZEP. This is usually done on weekends when there is a little or no traffic in the department. Waxing and polishing are not the same thing.

[66] She gave evidence of the methodology of mixing the soap for cleaning the floors and said that the soap used is specifically made for hospitals. **You mix one ounce of soap to a gallon of water. If you use the mix on the floor with the wax on the floor, it would not make the floor slippery because of the ratio of the mix to the water. If the mix was wrong then the floor would be slippery. It is dependent on the worker to get the mix right, the supervisor does not check to see whether it is right. It is correct to say that a worker may not get it right (emphasis mine).**

[67] To her knowledge the process does not make the floor slippery. All areas within the Q.E.H. are cleaned by this procedure and have been cleaned this way since she started working at the Q.E.H.

[68] She was not aware of anyone falling at the Q.E.H. as a result of the polished floors however she did know that the floors of the histology lab were considered slippery. To her knowledge the reason for the slippery floors in that lab was due to the lab using a type of wax in their work. The slippery state of the floor had nothing to with the housekeeping department, they did not control that.

[69] She was not aware of any other area of the hospital which had a problem with being slippery. At present the histology lab has rubberized flooring and is the only part of the lab with rubberized flooring. The rest

of the lab area is still cleaned with the procedure mentioned. She believed that the reason the floor in histology was rubberized was because of the wax the staff members use. She did not know when it became rubberised. When she became the head of the department she found it rubberised. She enquired as to why it was rubberised and found out that the wax mainly used in histology would cause the floor to be slippery.

[70] **The witness stated that if she had been in charge before the floor in histology was rubberised she would have, as precautionary measures, asked the general worker responsible for this area not to use any type of chemical on that floor. She would not have allowed chemicals around the wax used by the laboratory staff because it would become slippery. In addition she would ask the general worker to be consistently around the area and to use a putty knife to remove the wax constantly. He would have been stationed in the lab so that he could constantly remove the wax and use a sign to say the floor is slippery.** (emphasis mine)

[71] She did not know whether the floors in the histology lab were polished every 6 months with shield before the floor was rubberized. She had never worked the lab so as far as she was aware the general cleaning method was used throughout the lab except in histology.

[72] She knew the Plaintiff but does not know where in the hospital she works. She does not of her own knowledge know of any incident with the Plaintiff which involved a fall.

[73] As a result of the large size of the Q.E.H. systems were implemented for the housekeeping department to work efficiently. Someone must report to her on events affecting her department.

[74] Before she became head of the department there were not enough supervisors to adequately cover everywhere. She implemented a new system and allocated 5 supervisors, one to each floor – A, B, C, ground and lower ground.

[75] Another deficiency with regard to the old reporting system was that any incidents, for example, of falls, were not directly reported. The system did not have a log book or a diary in which these incidents were recorded. This deficiency was corrected and the new system would capture the incidents.

[76] She is aware of persons having falls in areas of the Q.E.H. She became aware of these falls by way of rumours but was unaware of the reasons for some of the falls. Before she was head of the department she was a housekeeper and responsible for the C floor. She would often hear of events pertaining to falls due to the cleaning of the floor.

[77] She was not given any training on the use or abuse of cleaning agents

within a health care institution.

[78] With regard to the cleaning of the lab the head of the lab would liase with housekeeping if he found that they needed to come in sooner than the usual 6 month intervals. The chief lab technologist, general workers and supervisors see to the day to day cleaning of the various areas within the hospital. Unless there was a problem no one would come to her.

[79] With regard to signage, there were not many around when she took up duties but she felt they were necessary and ordered general signage.

Re-examination

[80] In re-examination, she said that when she took up the job there was no diary. On taking up the job at the Q.E.H there was a system for log books and diaries to be kept by housekeeping. When she took up duties there was no log book in relation to the specific incident in March 1998, although there were other log books that she was aware of. Log books are done by the year. To her knowledge the log book for 1998 could not be found nor could the book prior to 1998 be found. She looked to see if she could find the year and could not find it.

[81] George Rawlins, a general worker at the Q.E.H. testified that he held the position of general worker for 15 years and was attached to the laboratory the entire time he was at the Q.E.H. His duties were to clean the lab on a daily basis.

[82] On 10 March 1998 he got to work at 5:30 a.m. He swept the lab as usual and mopped the floors. Normally it would take until about to 7:00 or 7:15 a.m. once the lab was mopped for it to dry.

[83] He mopped with water, chemfresh and soap. Whilst scrubbing, he used stripper and ZEP polish. Scrubbing was not done on a daily basis but instead every 6 months, usually on a weekend. He was not aware of any other procedure for cleaning the floor nor was he aware of the floors of the Q.E.H. ever being waxed. He did not recall whether the floors of the lab were polished after stripping prior to 10 March 1998.

[84] He said he knew the Plaintifff was a lab technician and he remembered having a conversation with her about her fall in the histology lab. During this conversation he did not indicate to her that the floor had been polished. Histology is a place that always has wax on the floor. The wax is used by the histologists who work in the labs.

Cross Examination

[85] Under cross-examination, he said that he did not speak to the Plaintiff on 10 March 1998 but on a day after; he could not recall the exact date but knew it was in the morning time, in the early half of the morning soon after she got to work. They spoke in the histology lab and no one else was present at the time. He had been cleaning.

[86] He told her that he had not seen her for a while and she told him she

had had a fall inside the lab but he had not known anything about the fall and he was sorry to hear about it. On that occasion the floor of the lab was not rubberised. That was done subsequently. He did not know when it was done but believed that it was done because of her fall.

[87] He was not given instructions about cleaning the lab. He would get instructions from the housekeeping department if there was extra work that had to be done. **He did not know whether there was a certain amount of soap that had to be mixed to water. He used about a gallon of water in the mop bucket and put in two or three corkfulls of chemfresh and about a corkfull of soap. He was not taught this mix but established it on his own. It was his personal concoction for cleaning the floor. He used this same amount all the time no matter the state of the floor. (emphasis mine).** He never got any trouble about cleaning any floor area in the lab.

[88] Before the floor in histology was rubberised he walked through there like he walked through anywhere else in the lab.

[89] He gave evidence of the system he used to clean the laboratory. When there was wax on the floor he would sweep first with a broom and then mop. He would normally start as early as 5:30 with the mopping. He would also put up signs saying "caution wet floor". These signs would be located at the entrance of the lab and a little further down the corridor.

[90] He did not see the Plaintiff on the morning of 10 March 1998. If she came to work about 7:40 am that morning all of the signs would have been down. He would pick up the signs once the floor was dry, on average at approximately 7:30 am. There was no specific order in which he would remove the four signs he would normally put down.

[91] The floor was stripped, by him, the weekend before 10 March 1998 and he applied ZEP polish all over the floor in the lab. He did not work alone; there was a team of about 6 or 7 persons all from the housekeeping department. When you apply the ZEP polish the floor takes on a shiny appearance. It is a shinier floor but he did not know if it is smoother.

[92] He did not know of any reason for cleaning the floors in the histology department differently from the rest of the lab. Similarly, he did not know of any order that he should not polish the floor in the histology section of the lab. He never saw anyone slip in the vicinity of the lab.

[93] The final witness to give evidence on behalf of the Defendant was Edmund Blades, a medical lab technologist. He testified that he was a medical lab technologist with the Q.E.H. for 30 years; he knew the Plaintiff and was aware of an incident in which she fell in the histology lab. He was informed by her and other members of staff with respect to this incident.

[94] He was aware of the safety and health report which was prepared with regard to this incident. He had prepared and signed this form. It had been completed on 14 April 1998. The information contained in the form had been provided by the Plaintiff. On the form there is an area for conditions of surrounding area or equipment. It was recorded on the Plaintiff's form that the floor was usually slippery due to wax from the work however the floor was more slippery due to recent waxing and polishing.

[95] Under supplementing corrective measures it was recommended that the floor tiles be replaced with a rubberized flooring material, due to the nature of work done in the department. This was not the first time that the issue of replacing the floor tiles with rubberised tiles was raised.

[96] All of the staff in the histology department used paraffin wax. It is used to imbed tissue. When it is cut, it is cut very thin and sometimes you get spillage on the floor, on the desk tops and on staff members laps. When the wax falls to the floor it makes the floor slippery.

[97] The lab safety committee was established by him. Minutes were taken at the meetings of the committee. The Q.E.H. laboratory Management recommended that he go to Trinidad to be trained in laboratory safety. It was felt then that the issue of lab safety needed to be brought to the fore.

[98] The problem regarding the paraffin was discussed at Committee meetings. The issue of the wax constantly falling on the floor was discussed. The main complaint was that the use of the wax in histology made the floor slippery when it fell to the floor.

Cross Examination

[99] When cross-examined, he said that the committee had issues with the way the floor was cleaned in histology. The committee recommended to the housekeeping department not to polish the floor when they cleaned the lab and histology department. When you looked through the minutes this request was not honoured.

[100] The committee did not touch on the issue of pre-cleaning signage. On 10 March 1998 he did not recall what time he got to work. When the incident occurred he was not at work that day. The committee recommendations were not communicated to the Q.E.H. Director or Management.

Issues

[101] The issues which arise for determination in the instant case are:

1. Whether the Defendant is liable in negligence;
2. Whether the Plaintiff contributed to her damages;
3. Whether the defence of volenti non fit injuria is applicable;

and

4. Should the Plaintiff succeed, what would be the appropriate award of damages under the circumstances?

Plaintiff's Submissions

The Defendant's Negligence

[102] It was submitted by counsel for the Plaintiff that the question for the Court is whether on the evidence available the Defendant failed to take reasonable care to see that the Plaintiff was safe in her use of the laboratory?

[103] Counsel submitted that the evidence revealed that the nature of the work in the histology lab required the use of wax and due to the filing and shaving of this wax, as well as, the daily evaporation and condensation of same, various surfaces, including the floor of the lab, would be covered with wax. Consequently the floor became slippery and this created a danger to employees of the lab. Recommendations were made, prior to the Plaintiff's fall, asking that either the floor be rubberised or that when the floor was stripped it would not be polished thereafter. These recommendations were made to the management of the hospital, but were not acceded to.

[104] In establishing the duty of care owed by an employer to an employee counsel relied on the House of Lords decisions of **Smith v. Baker**

[1891] AC 325 and **Wilson and Clyde Coal Company v. English [1938] AC 57.**

[105] He submitted that, in the circumstances, the Defendant is liable for the injuries caused to the Plaintiff.

The Defendant's Submissions

[106] Counsel for the Defendant submitted that the Plaintiff's fall was not due to the floor being waxed but rather as a result of the use of paraffin wax within the histology department. The Lab Technicians were careless in their use of the wax and thereby created a risk not only for themselves but for the other staff members of the laboratory. The Plaintiff, at the time of the accident, had been attached to the department for eight years and was therefore an experienced worker who ought to have been aware of the danger posed by the careless use of paraffin wax. In addition, as an experienced worker a lower duty of care was owed to the Plaintiff by her employer.

[107] The Defendant's counsel, in describing the duty of care owed by an employer to an employee, also relied on **Smith v. Baker.** In determining the meaning of 'unnecessary risk' he relied on the judgment of Slade J. in **Harris v. Bright Asphalt Contractors [1953] 1 Q.B. 616** in which he stated:

"I would also take the duty not to subject the employee to any risk

> which the employer can foresee, or to put it slightly lower, not to subject the employee to any risks that the employer can reasonably foresee and which he can guard against by any measure, the convenience and expenses of which are not entirely disproportionate to the risk involved."

[108] Counsel stated that the test of reasonable foreseeability in terms of the standard of care required, takes into account the circumstances and characteristics of the persons at risk. This involves the employer having to take into account any peculiarity, weakness or special susceptibility of his employee about which he knew or ought to have known. Thus the higher duty of care is owed by an employer to his employee where he knows or ought to have known of his individual circumstances. Similarly, a higher duty of care is owed to an inexperienced employee, unfamiliar with the dangers of the job and therefore requiring supervision as opposed to a skilled and experienced employee, aware of the dangers and requiring minimum interferences: **Qualcast Ltd v. Haynes 1 WLR 1073.** Each situation therefore requires its own assessment of the likelihood of injury.

[109] Counsel also referred to the dictum of Denning L.J. in **Clifford v. Challen and Sons Ltd [1951] 1 All ER 72:**

> "Allowance must be made for the imperfections of human nature, and that people doing a routine job are often heedless of their own safety and may become careless about using precautions. It must be remembered that when young people or trainees are employed… the need for

> supervision is greater than in the case of skilled and experienced work-people."

[110] Counsel for the Defendant also submitted that the common law duty of care owed by employer to employee necessarily includes a safe place of work. However, its duty is fulfilled where the premises are maintained in as safe a condition as reasonable care by a prudent employer can make them, having regard to the nature of the place and type of work. Thus the employer's duty is not absolute.

[111] Further, if the nature of work is such that a reasonable employer would provide his employees with some protective device or clothing while doing the work, there exists the duty not only to provide such but to ensure that they are used. However, where the employer supplies the necessary protective measures and instructs employees on their use his duty is discharged.

[112] It is agreed by counsel for both sides that the relationship between the parties was one of employer and employee and that consequently the employer owed a duty of care to its employees.

Law and its application

[113] It is common ground between the parties, that the law of negligence is found in the classic formulation of the neighbour principle by Lord Atkin in **Donoghue v. Stevenson [1932] AC 562,** where it was

established that a person is under a duty to avoid acts or omissions which he ought reasonably to foresee would be likely to cause injury to his "neighbour." The answer, who then is my neighbour?, receives the reply that neighbour refers to "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

[114] The principle was further elaborated upon, in relation to employer-employee relations, in the case of **Smith v. Baker [1891] AC 325,** where Lord Herschell stated at page 362 of the judgment:

> "It is quite clear that the contract between the employer and the employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in proper condition and so to carry out on his operations as not to subject those employed by him to unnecessary risk."

[115] In **Wilson and Clyde Coal Company v. English [1938] AC 57** Lord Wright, was more specific in relation to that duty which is to take reasonable care to provide:

1. A competent staff of men;
2. Adequate material;
3. A proper system and effective supervision.

[116] One of the duties owed by the employer, as set out in **Wilson and**

Clyde Coal Company v. English, is to ensure that there is a competent staff of men. Where an employer employs someone who has had insufficient training or is inexperienced for a particular job and as a result of that person's incompetence, another employee is injured; the employer is in breach of his duty of care.

[117] The Defendant's witness, Betty Boyce, head of the Housekeeping Department at the Q.E.H. gave evidence, that if she had been in charge [of the Housekeeping Department] before the floor in histology was rubberised she would have, as a precautionary measure, asked the general worker responsible for this area not to use any type of chemical on that floor. She would not have allowed chemicals around the wax used by the laboratory staff because it would become slippery. In addition she would ask the general worker to be consistently around the area and to use a putty knife to remove the wax constantly. He would have been stationed in the lab so that he could constantly remove the wax and use a sign to say the floor is slippery. This is the system she would have employed. No such system existed on the date the Plaintiff was injured.

[118] In addition, she said during cross-examination that she had not been trained in the use or abuse of cleaning agents within a health care institution. However, when mixing the soap to clean the floors you add one ounce of soap to one gallon of water and if the mix is wrong then

the floor would be slippery.

[119] George Rawlins, another defence witness, testified that he mopped the floors in histology on a daily basis. He stated that he was not given instructions about cleaning the lab. He did not know whether there was a certain amount of soap that had to be mixed to water. He used about a gallon of water in the mop bucket and put in two or three corkfulls of chemfresh and about a corkfull of soap. He was not taught this mix but established it on his own. It was his personal concoction for cleaning the floor. He used this same amount all the time no matter the state of the floor and he never got any trouble about cleaning any floor area in the lab.

[120] It is evident that the housekeeping department staff was not adequately trained in the proper use of cleaning agents. The general workers were not given instructions as to the quantity and ratio of chemicals to water to be used to clean the surfaces within the Q.E.H. Further they were not advised on the possible consequences of the misuse of the chemicals or the appropriate chemicals to be used in relation to the various surfaces and substances that they may have encountered within the hospital.

[121] The lack of training and the unscientific method of mixing the cleaning agents, in my view, caused the floor to be slippery and hence dangerous to walk on. The Q.E.H. having the responsibility of ensuring that its

staff members are adequately trained would be responsible for any injury caused due to their lack of training. This, I hold, was responsible for the Plaintiff's fall.

[122] Another duty owed by an employer to its employees is to ensure that the premises, where its employees are required to work, are reasonably safe: **Per Hall J** in **Sturrup v. Roberts International (Bahamas) 1984 Ltd (1991) Supreme Court, No. 83 of 1985**. This duty was referred to by counsel for the Defendant, who correctly stated that the duty was not absolute but would be fulfilled once the premises were maintained in as safe a condition as reasonable care by a prudent employer could make them.

[123] Counsel for the Defendant later in his submissions stated that the floor was not slippery due to the polishing of the floor but rather from the use of paraffin wax in the laboratory. This submission is not bourne out in the evidence. The Plaintiff's un-contradicted evidence is that there was no wax on the floor the morning of the accident. Accordingly the submission fails.

[124] The evidence of both the Plaintiff's witnesses and the Defendant's witnesses is that persons had fallen before due to the slippery nature of the floor when polished. It was reasonably foreseeable that, if precautionary measures were not taken, accidents like the Plaintiff's

could occur. Whether there was wax or no wax on the floor, the duty of the employer was to provide a safe working environment; to remove the wax and clean the floors in a way that did not provide a danger to the employees. This was not done. I am of opinion, and I hold, that the premises were not maintained in as safe a condition as a prudent employer, taking reasonable care, would have made them and hence the Q.E.H. was in breach of its duty of care to the Plaintiff.

[125] Counsel for the Defendant also submitted that the duty of an employer is to provide protective devices or clothing and that, once the employer supplies the necessary protective measures and instructs the employee on their use, his duty is discharged. I agree with his submission, however, the Defendant failed to supply these. It was not enough to supply safety shoes, the rubberised mats ought to have been supplied when the Defendant was made aware of falls by other persons before this accident. Mr. Edmund Blades testified that such recommendations had been made but went unheeded.

[126] I am of the opinion that the employees who worked within the histology lab were in need of such protective measures due to the nature of the work they performed and the slippery state of the floor.

[127] The Plaintiff, in her evidence in chief, stated that at the time of the accident she was wearing her white lab coat and her non-skid safety

shoes. This was a special uniform she was required to wear at work. From the time she was trained she was told to wear flat safety shoes and she always adhered to that. She kept her safety shoes in her locker at work.

[128] There is no other evidence before the Court which specifies what is characterised as proper safety devices and clothing within the lab. If the Q.E.H. provided the Plaintiff with a lab coat and safety shoes, would these measures be enough to discharge its duty of care towards the Plaintiff? In other words, are these protective measures adequate to protect its employees under the circumstances? The evidence is that there were complaints about persons falling due to the state of the floors. Nothing had been done. The house keeper gave evidence as to the measures she would have taken to ensure the safety of the floors if she was in charge at the time. This is part of the Defendant's case. No such measures were implemented until after the fall. I am of opinion and I hold that the few measures taken by the Defendant, namely the provision of a lab coat and safety shoes, were insufficient to discharge the duty of care which lay upon them and they were in breach of that duty.

[129] Counsel for the Defendant in his submission stated that the Q.E.H. owed a lower duty of care to the Plaintiff due to the fact that she had

been attached to the histology department for eight years and would hence be categorised as an experienced worker.

[130] The cases have indicated that the employer owes a greater duty of care to those persons who are inexperienced however they do not expressly state that this equates to a lower duty of care to be given to experienced persons.

Contributory Negligence

[131] The Defendant pleaded contributory negligence on the part of the Plaintiff. Counsel submitted that the defence of contributory negligence is established where there has been some act or omission on the part of the Plaintiff, which has materially contributed to the damage caused. It means the failure by a person to use reasonable care for the safety of either herself or her property, so that she becomes blameworthy in part as an author of her own wrong. It is therefore necessary to prove that the Plaintiff did not in her own interest take reasonable care of herself and thereby contributed by her want of care, to her own injury. The essence of contributory negligence is not that the Plaintiff's carelessness was a cause of the accident but rather that it contributed to her damage; as where a person is part author of her own injury, she cannot call on the other party to compensate her in full.

[132] The standard of care for contributory negligence is the same as that for

negligence, that is, exercising reasonable care in the circumstances. In the words of Lord Denning L.J. in **Jones v. Livox Quarries Ltd. [1952] 2 Q.B. 608 at 625:**

> "Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought to have reasonably foreseen that, if he did not act as a reasonable prudent man, he might hurt himself; and in his reckonings he must take into account the possibility of others being careless."

[133] Knowledge of an existing danger is an important element determining whether a person has been contributorily negligent. A person must therefore act reasonably with regard to the dangers, which he knew or ought to have known, existed. Thus a person's duty to take reasonable care for himself is enhanced by his knowledge of the risks involved.

[134] Counsel for the Plaintiff submitted that the evidence in this case does not bear out particulars of contributory negligence pleaded by the Defendant.

[135] Alternatively, counsel submitted that the Plaintiff did not fail to observe the state of the premises prior to her use thereof. He further submitted that:

1. the Plaintiff was not informed of the state of the premises prior to her entry thereon and could only properly be apprised of the state of the floor upon entry and use of the laboratory;

and

2. upon entry into the laboratory there were no signs or warnings alerting the Plaintiff to the state of the premises and the need for special care to be taken in her use thereof on that particular day.

[136] The Defendant, in its defence, pleaded that the Plaintiff was contributorily negligent in so far as she failed to keep any or any proper look out or to have sufficient regard for her safety by observing the state of the floor prior to her use of the premises and failed to take reasonable care in her use of the premises. However counsel for the Defendant did not tender any evidence to support this claim. It is a well known principle of law that he who asserts must prove: **Joseph, Constantine Steamship Line (1942) AC 154.**

[137] Despite the foregoing I will address the Plaintiff's submissions and the question as to whether there was any evidence before the Court which indicated that the Plaintiff was in any way negligent.

[138] The definition of contributory negligence is found at **section 3** of the **Contributory Negligence Act, Cap 195** of the Laws of Barbados, and states**:**

> **3.** "Subject to this section, where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect

> of that damage shall not be defeated by reason of the fault of the persons suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

[139] The submission of the Plaintiff's counsel contradicts the Plaintiff's evidence to some extent. He submits that she was not informed of the state of the premises before entry and could only then have properly been apprised of the state of the floor. However, the Plaintiff stated that the accident had occurred on a Tuesday and that on the Monday before, she had spoken to Ms. Bailey about the slippery condition of the floor. She had confirmed that the lab had been polished. She had spoken to the cleaner the day before the accident and on the day of the accident, and had asked if the floor had been polished that weekend and she was told that it had been.

[140] Consequently, it is my opinion that the Plaintiff, based on her own evidence, would have had knowledge of the state of the floor when she arrived at work on Tuesday 10 March 1998. Nevertheless, there is no evidence that the Plaintiff did anything that could have been classified as negligent before or during her fall to contribute to her damages. Instead it can be said that she took precautions to protect herself from possible injuries within the lab by wearing her lab coat and safety shoes. She further gave evidence that she survived by walking very gingerly and

sometimes holding onto the wall. This reinforces the fact that she took reasonable precautions for her own safety. Consequently the defence of contributory negligence fails.

[141] The Plaintiff gave evidence of the system which existed at the hospital for the making of slides involving the use of wax. This system necessarily involved the melting of wax which vaporised and left particles on areas of the lab. The slicing of the blocks also involved bits of wax being spilt on the floor. The methodology of creating tissue samples is entirely within the control of the hospital. The Plaintiff and other staff members merely execute their functions within the established system. The evidence revealed that there was concern over the wax which would be deposited through this process in the histology department. Consistent with the duty of the employer to provide a proper system and effective supervision, proper appliances and so to carry out the operation so as not to subject employees to unnecessary risk I am of the opinion that the employer failed to do so in this case. They failed to employ a system which would eliminate wax being dispersed throughout the lab and to minimise potential hazards to employees, by providing rubberised mats prior to the date of the fall of the Plaintiff.

Volenti non fit injuria

[142] The principle of volenti non fit injuria was not expressly pleaded by the Defendant in this case. However, when defence counsel submitted that the fact that the Plaintiff had pleaded that she was aware from previous experience that a 'waxed' floor constitutes a hazard to her safety, imputes knowledge of a risk or danger on her part, he raised the issue of volenti.

[143] Volenti non fit injuria may be interpreted to mean that a person cannot enforce a right which he has voluntarily waived or abandoned. In order to succeed a Defendant must prove that the Plaintiff consented to the risk of physical damage as well as gave up his right to redress if damage resulted. There are three ways in which the defence can be proved:

1. By proof of an express contract, whereby the Plaintiff agreed to exempt the Defendant from legal responsibility.
2. By proof of an express consent to run the risk.
3. Where it can be inferred or implied from the facts that the person consented to run the risk.

[144] The first two are inapplicable here. In the present case, the Plaintiff knew that the floor of the lab had been polished before she entered the lab the morning of the accident, she also knew when the floor was polished it was slippery and she entered the lab anyway and commenced her daily routine.

[145] Mere knowledge of the existence of a risk or danger is not sufficient to amount to consent to that risk or danger –the principle is volenti non fit injuria not scienti non fit injuria. See **Gooding v. Jacob (1973) High Court, St. Vincent, No. 5 of 1971.** In **Dann v. Hamilton [1934] All ER Rep 103** the Plaintiff had accepted a lift from a friend who was under the influence of drink. They had gotten into a car accident and it was held that the Plaintiff had not waived his rights to damages since "the friend's intoxication was not so extreme to make the acceptance of the lift in the car an obviously dangerous operation."

[146] In like manner, I am not of the opinion that the Plaintiff waived her rights to damages since the slippery condition of the floor was not so extreme that walking on it would have been an obvious danger. It was not a situation where there was almost a guarantee that she would fall and sustain injuries if she walked on the floor. In **Smith v. Baker [1891] AC 325** the maxim volenti non fit injuria was held not to apply in a situation in which the danger was created or enhanced by the negligence of the employer, albeit that the employee undertook and continued in his task with full knowledge and understanding of the danger. See also the dictum of Denning L.J. in **Clifford v. Challen and Sons Ltd [1951] 1 All ER 72** above referred to.

[147] For these reasons, it is my opinion that the defence of volenti non fit

injuria is not applicable to this case. The failure of the Defendant to plead this defence also disentitles the defence from relying on it.

Signage

[148] The defendant's counsel submitted, without more, that, on the evidence, it is undisputed that signage is used by the housekeeping department and was used on the date of the accident. He does not link it to any of the defences pleaded. The suggestion is that the Plaintiff failed to heed the signs and so contributed to her own fall. Mr. Cheltenham submits that the Defendant failed to post adequate signage warning employees (including the Plaintiff) that the floor was recently polished and slippery and a potential hazard. Further that this emphasises the Defendant's breach of the duty to ensure protection of its employees from unnecessary risks.

[149] The evidence is that Mr. Rawlins, the cleaner, posted signs to warn persons that the floor was being cleaned. He removed those signs about half hour after polishing since the floor would be dry. This would be about 7:30 a.m. The Plaintiff's evidence shows that by the time she arrived at work, there were no signs (they would have been removed by Mr. Rawlins). There is no contrary evidence.

Finding of Fact

[150] Having regard to the evidence adduced by both the Plaintiff and the

Defendant, I find that the Defendant, through his servants and/or agents was negligent. The Plaintiff has established the particulars of negligence pleaded in her Statement of Claim. The defences raised fail for the reasons before advanced

Amending Pleadings

[151] Counsel for the Defendant submitted that based on the evidence it is an undisputed fact that the Hospital floors were never waxed; that the Plaintiff conceded to this fact and therefore failed to prove the Particulars to satisfy her cause of action. He submitted further that the evidence led failed to support the Plaintiff's case as pleaded. The Plaintiff, in her further and better particulars, specifically pleaded that the floor of the Laboratory at the Q.E.H. was waxed, that the floor is covered with vinyl tiles which become very slippery when waxed; that she was aware from previous experience that a waxed floor constitutes a hazard to her safety, a decision was taken that the floor should be cleaned but not waxed.

[152] Counsel for the Defendant highlighted the fact that the Plaintiff testified that the words, 'waxed' and 'polished' are used interchangeably at work but submitted that this was never corroborated.

[153] Counsel further submitted that the general rule is that a party may not plead inconsistent allegations of material facts, unless they are pleaded in

the alternative. Where a party wishes to raise a new ground which is inconsistent with his previous pleading and which is in the alternative, he must seek the leave of the court to amend his previous pleading.

[154] Counsel relied on **Order 18 rule 10 of the Rules of the Supreme Court,** and **The Supreme Court Practice 1997, Vol 1:**

> **Order 18**
>
> **10. (1)** A party shall not in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his."

The Supreme Court Practice

> "This rule means that a party's second pleading must not contradict his first; and the effect of the rule is to prevent a plaintiff from setting up in his reply a new claim which is inconsistent with the cause of action alleged in the statement of claim."

[155] In the evidence before the court, Betty Boyce and George Rawlins both stated that the floors were polished with a ZEP polisher after they were stripped but that they were never waxed.

[156] Bernard Best stated that, 'whenever the floor was stripped it would be very clean and slippery and he would have to request that housekeeping re-strip the floor and leave it without floor wax.' Mr. Best also gave evidence that the floors were waxed. The Plaintiff throughout her evidence referred to the floor as being waxed and/or polished.

[157] It is the Defendant's submission that the evidence before the court does not support the Plaintiff's allegations that the floor was waxed and hence does not support her pleadings. This fails to take into account Mr. Best's testimony which supports the Plaintiff's contention that the floors were waxed.

[158] I am of the opinion that there is no significant inconsistency in what was pleaded and the evidence in support. It is not unreasonable to accept as fact the Plaintiff's use of the terms 'waxed' and 'polished' interchangeably to describe the same process. Whatever process was used was within the knowledge of the Defendant, his servants and/or agents. If I am wrong in this finding that the terms cannot be used interchangeably and that the Plaintiff incorrectly pleaded in her Further and Better Particulars that the floor was waxed, whether or not the process used by the Defendant created a dangerous situation in which the employer would have been liable for negligence for breach of the duty to the Plaintiff, would still have been a live issue which was crucial to the case.

[159] In **Slater v. Buckinghamshire County Council [2004] EWCA Civ 1478 LTL 10/11/2004** it was held that if a factual issue has been adequately dealt with at trial and is clearly regarded by all parties as a live issue which is crucial to the case, the judge is entitled to make a finding

of fact, even if the issue was not raised in the statement of case, which could have been amended during the trial.

Damages

Pain suffering and loss of amenities

[160] The Plaintiff gave evidence of the pain and suffering she endures as a result of her accident. Her evidence in relation to loss of amenity has also been adverted to. Mr. Hadley Clarke, her attending physician was accepted as an expert in neurosurgery having regard to his qualifications and experience.

[161] He testified that the Plaintiff was his patient from 23 March 1998 when she attended his clinic at Bay Street. She complained of recurrent pain and stiffness of her neck and strained sensation in her left upper extremity. Basically there was tingling, numbness and weakness in her left upper limb (extremity) and soreness in her lower back which worsened during standing.

[162] The complaints were consistent with the history that she gave. She denied any history of back or neck pain prior to the fall. His diagnosis was neck sprain and lower back pain. The lower back pain was secondary to the soft tissue injury. He recommended anti-inflammatories, tegretol and amitriptyline, which are designed to relieve pain.

[163] She returned on 26 March 1998 and complained of side effects to the

amitriptyline, which was discontinued. The clinical examination was unchanged. It was found that there was generalized muscle spasm and moderate reduction of neck movement. Physiotherapy was advised and she was referred to Mr. Warner (a physiotherapist).

[164] On 6 April 1998, she returned to the clinic and reported an improvement in her condition, though she continued to experience intermittent pain, tenderness and numbness in her left upper limb. There was moderate restriction of neck movement on clinical examination and moderate reduction of neck mobility. There was also an absence of muscle tenderness and spasms.

[165] On 20 April 1998 she once again returned to the clinic and informed him that she had returned to work on the 14 April. She continued to feel the original symptoms but they were less intense. On examination, her neck movement had improved though there was mild restriction of spinal mobility. He continued the regime of anti-inflammatory medication.

[166] On 11 May 1998 the Plaintiff reported that lifting caused numbness in her left hand. This was consistent with an injury to the brachial plexus muscles. In addition the Plaintiff experienced intermittent pain of the left trapezius muscle (i.e. from nape of neck to shoulder). He gave her a gel to rub on the hand and advised her to continue physiotherapy. He

then discharged her as he felt that she was on the mend.

[167] On 25 June 1998 the Plaintiff complained of numbness in her hand which she explained was very tired. She also mentioned stiffness in her left shoulder. The examination was normal and there was normal spinal mobility. There was no evidence of tenderness in her lower back and there were no persistent or trigger areas.

[168] The Plaintiff was examined again on 20 July 1999, 17 August and 5 October. He wrote 4 reports dated 16 May 1998, 16 June 1998, 18 August 1999 and 21 April 2005 from notes taken from the Plaintiff when she was treated by him. He explained that a patient could have a normal exam but still be suffering severe pain. He stated that as a result of the Plaintiff's numbness her capacity to function at work would be compromised. In her job, as a laboratory technician, she would have problems with using knives or sharp instruments because the sensation in the tips of her fingers was impaired. It was possible that she might cut herself without realizing it, while trying to cut the tissue.

[169] He explained that once he is presented with legal medical issues he has to look for malingering. Usually when a patient is malingering the patient requests a lot of sick leave. He did not believe that the Plaintiff had been malingering and instead was impressed with her eagerness to return to work. He explained that when distraction techniques are performed you

would find evidence of malingering. There was no evidence of such in relation to the Plaintiff. He saw her MRI Report and it was unremarkable.

[170] In August 1999 he referred the Plaintiff to Dr. Corbin. In Dr. Corbin's report, dated 16 September 1999, Dr. Corbin identified a trigger point in the left trapezius muscle. Which meant that there was an acutely sensitive area in the muscle. As a result, touch or pressure would cause exaggerated responses. If the area was touched it would be painful to the patient. Consequently, one could reproduce the pain syndrome by touching the patient.

[171] He mentioned a lifting accident which occurred on 30 September 1999, while the Plaintiff was still in his care. The accident exacerbated her neck and shoulder pain. He was of the opinion that chronic pain had set in prior to the lifting accident.

[172] The Plaintiff suffered from chronic pain syndrome. Some experts believe that any pain syndrome that lasts for over 3-6 months can fall into the category of chronic pain syndrome whereas other experts say anything over a year.

[173] He opined that the Plaintiff would have had problems with washing, laundry and pressing but this would have been limited.

[174] He saw the Plaintiff in April 2005 to get an update for the hearing of

the matter. In terms of severity he indicated that on a scale of 1 to 10 the Plaintiff's pain was a 2 or 3. However, during exacerbation the pain was more intense. He could not say whether constant pain had now become a part of her daily routine but she did still experience pain. She still had stiffness in her neck, which was not surprising. He explained that if a patient exacerbates a neck injury and pain syndrome is prolonged it is possible that he/she may not be able to move his/her neck fully. There is a tendency to guard or protect one's neck.

[175] He observed that the Plaintiff's earlier complaints had improved. However, there was still tiredness in her left hand and she reported a strange sensation in her left leg, which was a new complaint. He stated that it was difficult to say whether this new sensation was due to the accident since she first experienced it long after the fall.

[176] Under this head of damages the Plaintiff is claiming BDS$41,000.00 and relied on the following cases in support: **Collin v. Whipp (1997) Kemp & Kemp Vol 3 E2-043.2,** where £8,500.00 (Bds $36,890.00) was awarded, **Re Santos (1995) Kemp & Kemp Vol 3 E2-038** where £9,000.00 (Bds $41,580.00) was awarded and **Fisher v. Bandwidth Vehicles Rental (1995) Kemp & Kemp Vol. 3 E2-044** where £8,500.00 (Bds $39,270.00) was awarded.

[177] Counsel for the Defendant submitted that the cases of **Fryer v. Hirst**

F1-027 Kemp &Kemp Vol. 3 2006 and **Fallon v. Bateman F1-060 Kemp & Kemp Vol.3 2006** are more instructive.

[178] The Plaintiff in our present case suffered from neck sprain and lower back pain following her fall. The lower back pain was secondary to the soft tissue injury. In addition she experienced generalized muscle spasm, moderate reduction of neck movement, intermittent pain and tenderness and numbness in her left upper limb. The intensity of the pain gradually decreased but the Plaintiff was diagnosed with having chronic pain syndrome.

[179] In 2005 she indicated that she continued to feel stiffness in her neck and the pain was felt at a level of 2 or 3 on a scale from 1 to 10. However, during exacerbation the pain was more intense.

[180] It was pointed out by counsel for the Defendant that in **Collins v. Whipp** there was a whiplash injury to cervical spine, thoraco-lumbar spine injury, bruises and contusions, bilateral shoulder injury, lower back pain, shock, headaches and neck and shoulder pain. As a result the claimant suffered problems in bending over, kneeling, lifting heavy weights, carrying out DIY activities, gardening, doing heavy household tasks, driving in particular reversing, swimming and in other sporting activities. She had one half to two thirds the normal range of cervical movement. Spinal extension caused exacerbation of her lower back

discomfort. Straight leg raising was 60/70% in each leg although she did have a full range of bi-lateral shoulder movement. Continuing pain was persistent and unlikely to improve significantly. There was a 20% chance that further investigative operation would be necessary within the next ten years which could demonstrate surgery would be required to improve her condition. The claimant was held to have suffered significant residual disability in view of invasion of daily life by pain.

[181] Counsel also submitted that in **Fryer v. Hirst** the claimant sustained a whiplash injury. She suffered a constant ache in her neck, lower skull, and across her shoulder. Sitting, looking downward, for 30 minutes or more or driving for about an hour could lead to an aggravation of the problem. The evidence at trial was that the ache was permanent. It affected her every day and certain activities would aggravate the injury. She was awarded 7,000.00 pounds.

[182] Further, in **Fallon v. Bateman** the claimant sustained a whiplash injury to the neck and soft tissue injury to the groin. 18 months post accident, the claimant was experiencing twinges of pain and muscle spasm in the neck radiating down in the back. She also felt discomfort in the upper arm and tingling in the hands. She began to experience pain daily. At trial her symptoms were persisting and such residual symptoms were expected to be permanent. She was unable to pursue her pre-accident

hobbies of swimming, cycling and aerobics. She was awarded 5,000.00 pounds.

[183] It was noted by counsel for the Defendant that in **Fallon v. Bateman** the symptoms are not only permanent but they are also constant; while in the present case the Plaintiff's symptoms appear to have always been occasional or intermittent. Consequently, the award of Bds $26,250.00 (5,000 x 3.5 x 1.5) would be more appropriate in relation to this head of damages.

[184] It is my opinion that the Plaintiff in **Collins v. Whipp** suffered from a greater range of injuries and was limited in her range of movement to a greater degree than that suffered by the Plaintiff in the present case. The Plaintiff, in the present case, was also not expected to need surgery as was the case in **Collins v. Whipp**.

[185] The injuries suffered by the Plaintiff in the present case were more in accordance with the injuries suffered by the Plaintiffs in **Fryer v. Hirst** and **Fallon v. Bateman**. The main difference between these cases and the present one was that the Plaintiffs' injuries in these cases were believed to be permanent whereas there is no such diagnosis in the present case. Consequently it is my opinion that an award of damages within the range of that awarded in these two cases would be appropriate under the circumstances. On the other hand, cognisance

must be taken of the loss of amenity suffered by the Plaintiff in this case. No two cases are the same. I am of the opinion that an award of $34.000.00 is reasonable.

Domestic Assistance

[186] Under this head, the Plaintiff claims BDS$8,520.00 for domestic assistance provided by her mother. In the skeleton arguments, Mr. Cheltenham suggests that she was off for a period of 9 weeks from work and was assisted by her mother when her pain syndrome was at its highest. She required assistance as frequently as five days per week. He suggested that a claim was justified for a further period of 16 months, from May 1998 to July 1999, when the pain was less intense. In her written submission, Ms. Weekes itemised the claim at 3 days per week for 14 months. The period is really 15 months.

[187] Mr. Clarke submits that no evidence has been provided, documentary or otherwise, in support of the period of time the Plaintiff was on sick leave, that there is no evidence that she required assistance with the simple activities of daily living from her mother or anyone else. He suggests that she did not require assistance since her evidence was that she carried out household activities on a weekly basis.

[188] He submits that, in the absence of evidence, it is impossible to quantify any damages under this head. The Plaintiff did not give evidence as to

the length of time she was on sick leave or as to the extent of the domestic assistance rendered to her by her mother. In the notice of accident or dangerous occurrence form (JL "8") which was entered into evidence in paragraph 10, it is stated that she was on sick leave from 10 March 1998 to 13 April 1998, a period of roughly five weeks. This accords with Mr. Hadley Clarke's reports which have her returning to work around the 14th of April 1998. However in his report of 22 May 1998, he said he saw her on 23 March 1998, she had returned to work on the 16 March 1998, was unable to function and returned home. Dr. David O.C. Corbin, in his report dated 16 September 1999, noted that she had been off work for three or four months. There is uncertainty in the period during which she was on sick leave, what is documented, however, for is the period from 10 March 1998 to 13 April 1998.

[189] It is true that the Plaintiff agreed that she did household duties on a weekly basis but she was asked if she does them now, her answer was mopping no, scrubbing of the bath no, hand washing no, sweeping was very limited. This was elicited in cross-examination by Ms. Jackson. In evidence in chief, she said she was unable to hand wash, had problems with mopping and pulling the broom for sweeping. She has difficulty scrubbing the bath. She went on to say that her mother is now forced to take up her slack.

[190] It is clear that the verifiable period of sick leave is five weeks. The medical evidence details a history of persistent pain and inability to lift objects. Mr. Gerry Warner, the physiotherapist, opined that she remained in painful distress, even some 16 months post event. Her pain is always exacerbated by her work station, which is not of the best ergonomic design. In view of the pattern established over the past year, he said, it is reasonable to extrapolate that Ms. Layne's symptoms will continue for a prolonged period. There are also many limits to her function, as many activities of daily living result in increased pain and discomfort.

[191] I agree that there was no corroborating evidence with regard to the household assistance that the Plaintiff alleged that she received from her mother; the mother did not testify. This, however, is no bar to recovery. I have had regard to the medical evidence of Mr. Hadley Clarke which details a history of inability to perform normal household duties consequent upon the accident and the evidence of Mr. Gerry Warner. The only documented sick leave is the 5 weeks above referred to. I am of the opinion that, her injuries, would have required her to have domestic assistance. The period of time the assistance was required is approximate and not definite.

[192] Though it is difficult to assess the period for which domestic assistance was given and the frequency of it, in the absence of the said evidence,

this is no bar to the court's duty to assess the damages if allowable.

[193] The formula for the calculations of damages for gratuitously rendered domestic assistance is set out in the case of **Donnelly v. Joyce [1973] 3 All ER 475** determined by reference to the going commercial rate for such services. The going commercial rate for domestic services in the year 1998-1999 upon reference to the Labour Department was $40.00 per day.

[194] The defence submitted that the recognised rate for services under this Head of Damages is $35.00 per day as per the dictum of Mr. Justice Waterman in the local case of **Vincent Pilgrim v. Miriam White.** As for the purposes of this matter, I will employ the $35.00 per day, which was adopted by Waterman J. I will accept that at the highest period of her disability she required assistance at least 5 days per week for 5 weeks, which is $35 x 5 x 5 making a total of $875.00. For the further disability of 14 months at 3 days per week would be:

$35 x 3 = 105 x 4 = 420 per month x 14 months = $5,880.00

[195] Given the uncertainty, I will discount the claim for the extended period by 20% to take this uncertainty into consideration. I will, therefore award the sum of $875.00 + $4,704.00 or a total sum of $5,579.00 for domestic assistance.

Special Damages

[196] A claim under this head of damage is made by the Plaintiff for the sum of $9,167.02 and is broken down as follows:

Mr. Hadley	
Medical Consultations	$1,375.00
Medical Reports	$3,200.00
Mr. Gerry Warner	
Physiotherapy sessions	$2,970.00
Physiotherapy report	$ 250.00
Medication	$ 224.38
MRI	
MRI (Trinidad & Tobago) Ltd	$ 250.42
Hotel Accommodation (Trinidad)	$ 412.99
Airfare	$ 484.23
Total	$9,167.02

[197] Counsel for the Defendant submitted that with regard to special damages the sum of BDS $9,167.02 was agreed once evidence of the relevant receipts were produced and based on the final determination of the matter by the Honourable Court. To this will be added Mr. Clarke's fee for attendance at Court of $1,500.00, making a total of $10,667.02. There has been no challenge to these damages.

Disposal

[198] In the circumstances, I find on the facts, that the Defendant through his servants and/or agents owed a duty of care as alleged by the Plaintiff in her Statement of Claim and that there was a breach of that duty of care resulting in damage to the Plaintiff. Judgement is entered for the Plaintiff in the following amounts:

General Damages	
Pain and Suffering and Loss of Amenities	$34,000.00
Domestic Assistance	$5,579.00
	$39,579.00
Special Damages	$10,667.02
Total	$50 246.02

[199] Special damages, exclusive of Mr. Clarke's fee of $1,500.00 ($9,167.02) will bear interest at 4% from the date of filing of the writ until today's date and all damages will bear interest at 8% from date of judgement until payment.

[200] The Plaintiff will have her costs certified fit for two counsel to be agreed or taxed.

William J. Chandler
Judge of the High Court.