IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Miller v. Royal Bank of Canada, 2008 NSSC 32

Date: 20080201
Docket: SN 217125
Registry: Sydney

Between:

Brenda Miller

Plaintiff

and

Royal Bank of Canada

Defendant

D E C I S I O N

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: April 30, May 1, 2, 3, 4 & 7, 2007, in Sydney, Nova Scotia

Final Written Submissions: June 15, 2007

Counsel: Mr. Hugh R. McLeod, for the plaintiff
Mr. Harvey M. McPhee and Ms. Robin Gogan, for the defendant

By the Court:

Introduction

[1] The plaintiff slipped and fell in the lobby of the Royal Bank in Sydney Mines, Nova Scotia, on October 3, 2002. She claims that the surface upon which she slipped was wet and that she suffered injury and damages as a result of the fall, for which she seeks compensation from the defendant. It is undisputed that the defendant was the occupier of the premises, as defined in the *Occupiers' Liability Act*, S.N.S. 1996, c. 27. The defendant denies liability.

[2] The plaintiff seeks compensation for injuries sustained in the fall. Mrs. Miller was not working at the time of the fall. She was receiving Canada Pension Plan disability benefits.

Amendment to pleadings

[3] The plaintiff seeks leave to amend the statement of claim, which contains several deficiencies: the date of the slip and fall is incorrect; there is no specific allegation that the defendant's negligence included the installation of substandard floor tiles; and there was no pleading of the *Occupiers' Liability Act*.

[4] The defendant cites *Gesner* v. *Ernst*, 2007 NSSC 146, where the plaintiff pleaded fraudulent misrepresentation, but suggested in submissions that the court could find negligent misrepresentation if fraud was not made out. Smith, A.C.J. held that the plaintiff was limited to the causes of action pleaded, as the defendant was entitled to know the nature of the case that is advanced. It should be noted, however, that there was no application to amend the pleadings in *Gesner*.

[5] An amendment should be allowed if it can be made without injustice to the defendant. There is no injustice if the defendant can be compensated with costs: *White* v. *Pellerine* (1988), 84 N.S.R. (2d) 341 (S.C.A.D.) at para. 3. Where the parties would not have conducted the proceeding differently, and further evidence is not required, it has been held that leave should be granted: *White* at para. 6.

[6] The defendant does not suggest that it was misled or prejudiced as a result of the deficiencies in the statement of claim. The actual date of the fall was known, as was the fact that the plaintiffs intended to challenge the appropriateness of the

floor tiles. The defendant does not strenuously oppose leave to amend, which I hereby grant.

Evidence

Robert Ramsay

[7] Robert Ramsay is a senior technician with Maritect Security. He has been with the company for about ten years. Maritect installs and maintains video equipment at the defendant's premises, specifically, a time lapse color video recorder, which records 120 hours on eight-hour cassettes. It takes a picture every second. On cross-examination he agreed that a regular VCR records 30 images per second. The only negative feature of the equipment, he thought, was the clarity of the picture.

[8] Mr. Ramsay identified the recording respecting activities occurring on October 3, 2002. At 8:55:33 someone entered the lobby. At 8:55:34 there appeared to be someone on the floor. At 8:55:35, in the middle frame, that person was still on the floor. He identified that person as the plaintiff, Mrs. Miller. She was directly in front of the ATM. From 8:55:38 to 8:55:44 Mrs. Miller was on her knees and in the process of standing up. At 8:55:46, she was standing. She then walked away from the ATM area towards the entrance door to the bank and leaned against the door, and a person exited the bank and appeared to speak to her. Eventually her husband, Mr. Miller, came into the door area. He and Mrs. Miller subsequently left the bank. He appeared to be supporting her. At 9:25:49 a.m. a person who was apparently a bank staff member placed a yellow sign on the floor at the edge of the bank entrance door. There was writing on the sign, but Mr. Ramsay could not make out what it said. Mr. Ramsay noted that the road outside appeared to be shiny, but he could not say if there was water on the floor.

[9] On a review of the video, Mr. Ramsay stated that between 8:20 a.m. and 12:40 p.m. there was no other incident involving a slip and fall. During this time the defendant did not cause the floor to be mopped. Mr. Ramsay also stated that a number of other customers of the bank entered the foyer during this time.

Brenda Miller

[10] Mrs. Miller was 43 years of age at the time of the trial. She and her husband have two boys, aged 16 and 11. She completed high school. The plaintiff said she has been a customer of the Sydney Mines branch of the Royal Bank since 1988 to 1990, and that the ATM had been there as long as she remembered. She had used it previously. She said the ATM area is always open.

[11] The plaintiff testified that on the morning of October 3, 2002 it was misty outside. She was wearing a T-shirt, nylon gym pants and “Sand-n-Sun Sport”-type flip-flop sandals when she went to the bank. She had purchased the flip-flops the previous year and said she had had no difficulty with them. She wore them around the pool and in the backyard. She had also worn them on their wooden deck and to go shopping.

[12] Mrs. Miller testified that her husband parked across the street and she got out and crossed the street without difficulty. She did not rush. She walked into the foyer of the bank, where the ATM was located. She identified the rubber mat at the entrance to the foyer. She stated that her right leg went out straight and she fell to the floor. Eventually, she got to her feet, went to the bank entrance and knocked on the door. Her husband came into the bank while she was at the interior door. She declined a chair. She noticed that her pants were wet when she went to the car. They drove home because she was anxious. When she got home she took Advil and lay down. She testified that she removed the pants she was wearing because they were wet and sticking to her.

[13] The plaintiff reviewed a series of photographs, which are duplicates of the video. She stated that at 8:55:33 her left foot was on the mat. At 8:55:34 she was leaning to the right. Her right leg slipped from underneath her and the left leg remained in the normal position. She stated that this motion was the same as if she had done the splits. She agreed that the video does not show her doing the splits. She also agreed that the video shows other people who had no difficulty with the floor. Some people came in after her, including someone with high heels, who did not slip.

The plaintiff's condition

[14] The plaintiff testified that she had previously suffered from an anxiety disorder and panic attacks. During an anxiety attack her right arm goes numb and she experiences a heaviness and general weakness, though she can still function and do very light housework. Panic attacks involve chest pain, nausea, tiredness, hyperventilation and her lips going numb. Between 1998 and 2000, she said, she would suffer anxiety attacks one to six times every week, and would have three or four panic attacks each week. For the first couple of years, she said, her physicians had trouble calibrating her medication.

[15] Mrs. Miller applied for Canada Pension Plan disability benefits in 1998, stating that she was unable to function. At that time she suffered from symptoms that included blurred vision, migraine headaches, and difficulties with memory, sleep and concentration. She was unable to drive a motor vehicle. She could not perform housework and was totally fatigued from medication. She stated at trial that once a problem with medication was resolved, she was back to normal could have gone back to work in 2000 or 2001. She did, however, still have a problem with crowds.

[16] In 2002 CPP reviewed the plaintiff's condition. In a Disability Reassessment Questionnaire she indicated that her chief complaint at the present time was panic and anxiety disorder, and that she had developed fibromyalgia. In a Reassessment Medical Report submitted to CPP, her family doctor, Dr. Peter Poulos, did not refer to fibromyalgia. According to Mrs. Miller's evidence, Dr. Poulos had suggested the possibility of fibromyalgia in July 2000. While she felt better once her medication was adjusted, she maintained that she continued to suffer symptoms. In 2002 her panic attacks and anxiety disorder were "somewhat better." Her submission to CPP in 2002 indicated that she now had fibromyalgia, although this was never confirmed by Dr. Poulos.

[17] The plaintiff said her husband Gary Miller was employed at Tesma in North Sydney during the 1998-2000 period. At that time, her mother would be at her house every day. In 2001-2002, however, she had been almost back to normal. She said she was gardening, cooking, horseback riding once or twice a week, going to bingo and shopping, taking care of birds, and was doing 85 to 90% of the housework, as her mother was ill. She had no difficulty in squatting, lifting and assisting with moving furniture. Her mother passed away in 2003.

[18] Mrs. Miller testified that in 2002 she could have had a spike in her level of panic attacks or anxiety attacks to three or four times a week, but since the accident, she said, she was anxious on a daily basis. This anxiety had receded, however, and the frequency of attacks was now not as high as before. She said her panic attacks had also become less frequent in the last couple of years, but she said she was still anxious daily.

[19] Since the accident, the plaintiff testified, her activities around the house have moderated. For the first six months after the accident she was able to do a bit of housework. However, the injury became more pronounced and her husband took it all on. She said she now suffers from chronic pain in her lower back, halfway to the bottom and inner thigh. She suffers from Reflex Sympathetic Dystrophy (RSD) in her right leg. She described the chronic pain as being a constant knot, with muscle spasms all the time, as if there were needles in her lower back, or like having teeth pulled. She described the pain as a ten on a scale of one to ten, but lesser in the morning, when it is around seven. She said she is never totally comfortable. She frequently uses a heating pad. Pain is present whether she is standing or sitting. She said there has been a progression of pain, which has become much worse than it was following the accident. She said she does not get much sleep. She has a heating pad on her foot when she is in bed. She has cramps and spasms and has to lie on her left side. Amitriptyline did not help.

[20] Mrs. Miller stated that as the result of RSD she has pain, discoloration, swelling, and her toes are cold. She also stated that there was no hair growth on her leg. Her right leg is at least two degrees colder than the left leg. She claims that she is unable to move her toes. She has a pronounced limp. She cannot place any weight on her right leg. She described her movements as jumping off her right leg as she walks. She is unable to make a full stride. On stairways, she can only go up or down one step at a time. This was confirmed by the Court's own observation of her movement on steps. She cannot wear high heels, but must wear wider and bigger shoes. There are certain flip-flops that she is unable to wear because of a lack of toe movement. She cannot squat. Raising her right hand puts a significant pressure on her back.

[21] According to the plaintiff, on the day of the accident she felt some dull pain, as if she had been shovelling. Her muscles were sore. She complained about the pain in passing but thought it was due to muscle soreness and did not tell the

doctor about the fall and the pain until a couple of weeks later. She mentioned it to him because the pain was getting more severe, with more spasms. Between the date of the accident and Christmas of that year, she did some housework. She said the pain started to get more intense a couple of months after the fall.

[22] The plaintiff said physiotherapy treatments, of which she had about 17, were of no benefit. The treatments included hot packs and cold packs, the treadmill and an elastic pull to the right side. She discontinued physiotherapy when she was told that there was no sense in returning. She saw a chiropractor, Dr. David Dunn, three or four times, but the pain was too severe and it was impossible to do machine manipulation. She also saw Dr. Harry Pollett, who introduced beta-blocks and bier blocks, as well as a number of cortisone injections. She claims that Dr. Pollett attempted a number of treatments which did not work. She had three sessions with the stimulator, but to no avail. She declined a Lidocaine drip, claiming that other patients said it made them dizzy. She said she was afraid of the effect of narcotic drugs.

[23] The plaintiff's family physician, Dr. Peter Poulos, prescribed Vioxx, which was subsequently removed from her treatment program. At the time of trial, she said, she was not taking drugs for pain. She was taking Nexium for stomach problems and Clonazepam for panic and anxiety. She said she does not take painkillers as they do not help with the pain and the side effects she gets from the pain. She said Dr. Watt prescribed a sleeping pill, Amitriptyline. She was no longer taking this medication. She does not rely on a leg brace, walker or cane. She has difficulty sleeping because of cramps and spasms in her right leg. She lies on her left side and uses a heat pad for her back and lower part of her right leg.

[24] Prior to the fall, the plaintiff said, she suffered from agoraphobia (fear of crowds), panic attacks, anxiety attacks and dizzy spells. She said Dr. Poulos suggested that she suffered from fibromyalgia, which manifested itself by generalized pain, sleep disorder, nausea, tiredness and headaches. She thought that she also had a degenerative disc disease. She has digestive and constipation problems. Mrs. Miller stated that she and her husband had a good sexual relationship prior to the accident, but that now it was nonexistent.

[25] In describing her present daily routine, the plaintiff testified that she typically rises at nine a.m., eats breakfast, showers, and does a little bit of dusting and takes a break, and she occasionally drives the children to school. In the

afternoon, she will attempt to make the bed. Mr. Miller prepares most of the meals; before the fall, she prepared some meals. She helps her youngest son with his homework. She said she spends 60 percent of her day watching television. She feels "snippy", angry and pitiful about her physical and emotional condition, although she has noticed an improvement.

[26] As to her husband's routine, Mr. Miller stated that he is on sick leave. He spends most of the day doing housework, including getting the boys up, making their breakfasts, driving them to school, doing laundry, tidying up, and washing dishes. He picks up the boys from school for lunch, and takes them back after lunch. In the afternoon he makes the beds, does the laundry and vacuums. He then picks the boys up from school and prepares supper. Mrs. Miller said it takes between six and seven hours each day for Mr. Miller to do the housework and look after the boys. She said that before he went on stress leave in 2006, he would do about the same amount. Before her fall, he was doing some of this work, but she was doing the larger share. Mrs. Miller said Mr. Miller has lost some interest in doing activities with the boys since he took stress leave.

[27] The plaintiff testified to several prior health-related incidents in the period before her fall at the bank. In 2001 she was in a motor vehicle accident, which she described as a fender bender. There were four people in the car and no one was injured and no one saw a doctor. In September 2002, while she was running in the yard, her arm caught on a guide wire, and she fell down. She required medical treatment because she partially ripped off a mole on her arm. This occurred about 11 days before the fall at the bank. She went to the doctor the next day. Around the same time she had an adverse reaction to medication due to mistakenly taking her husband's medication, as a result of which she could not function. She had headaches, blurred vision and nausea. She took this drug for four to five days before the mistake was discovered.

Cross-examination of the plaintiff

[28] On cross-examination, Mrs. Miller said she did not have fibromyalgia but that she believed she had it when she filled out the CPP forms in 2002. She was suffering from general fatigue and had painful trigger points. She had neck pain and sore joints. Dr. Poulos had suggested fibromyalgia in 2000. When he reported to CPP in connection with the 2002 review, he did not mention fibromyalgia. The

plaintiff stated that after coming off the medication she felt better, and no longer had the symptoms that suggested fibromyalgia.

[29] Between 1998 and 2000 the plaintiff had complaints about headaches, which she now attributes to the medication she was taking at the time; after it was adjusted, she said, her condition improved and she did not report general weakness. There are, however, indications in Dr. Poulos's notes that she complained of tiredness and leg pain on several occasions in 2000 and 2002.

[30] In 2002, the plaintiff said, her panic attacks were somewhat better, but she agreed that on one occasion she had been in emergency for a few hours for observation when she had a panic attack. Despite this, she said, it was not as bad as it had been in 1998. She also had chest problems, which an EKG established were not as severe as before. At trial she said that currently she is anxious every day, although panic attacks do not occur every day. Mrs. Miller did not believe her fall at the bank was caused by a panic attack. She said she did not remember falling until she was walking out. She said it was a different feeling from a panic attack, having passed out three times in the past from panic attacks. She had also passed out in the past from hyperventilation. She suggested that trauma from the fall made her unable to remember it happening.

[31] Mrs. Miller testified that until 1998 she did most of the inside work and sometimes would assist her husband with the outside work, although he did most of it. She was primarily responsible for the children and did most of the grocery shopping. Things changed on account of her anxiety and panic attacks. She worked at Zellers until July 1997. After leaving Zellers, and commencing her CPP benefits, she never went back to work.

[32] At trial Mrs. Miller said she recalled her pants being wet on the left side after she fell. At discovery, on April 20, 2005, she said her pants were wet, but she could not remember exactly where they were wet. She also said there was water on the floor, but she had no recollection of how much water, as she was looking at the ATM, not the floor. When asked if there were puddles on the floor, she answered "[o]bviously there must have been" but added that she could not be one hundred percent sure. She said, however, that he had to change her pants because they were wet. At trial she said she did not know why she remembers now, and did not remember at discovery, specifically where the pants were wet.

[33] On discovery it was put to the plaintiff that she had provided a statement to an adjuster, Pauline Singer, on April 22, 2003. She recalled giving this statement. There was also reference to a subsequent letter from the plaintiff's then counsel, Mora MacLennan, to Ms. Singer, in response to an inquiry, in which Ms. MacLennan reported that she had consulted with Mrs. Miller and her husband and that their recollection was that "there were no puddles of water on the floor but the floor was wet with footprints." The plaintiff did not recall telling Ms. MacLennan that there were footprints on the floor, but agreed that she must have said it.

[34] In the statement to the adjuster the plaintiff did not mention having water on her pants. At trial, she suggested that this omission was due to nervousness and anxiousness to get the statement finished. She agreed that her memory would have been better when she gave the statement, and said she thought this information was irrelevant at the time. She added that she did not say on prior occasions that there were puddles, or did not remember saying so; she agreed, however, that she could have said this.

[35] The plaintiff stated that in the process of falling, her right foot slipped and her left foot stayed on the mat, as if she were doing the splits. When this occurred, she said, her left leg was still on the entrance mat. She did not remember what happened until she saw the video at discovery. She claimed that between 8:55:33 and 8:55:34 she did the splits. She agreed that when she fell to the floor, she was on her knees, not on her buttocks. She also agreed that the video shows her leaning on her left side, with her left hip touching the floor, at 8:55:36 and 8:55:37.

[36] Mrs. Miller stated that her husband currently does 80 percent of the housework. In 2001 and 2002 (before the fall), she said, she did 80 percent of the housework, despite her medical problems. She could drive the children to school, and, in fact, claimed she did so more frequently than anyone else did. She was also able to do grocery shopping, at night. In April 2005, on examination for discovery, she said that after the fall she was driving the children to school 80 percent of the time. She could also get groceries, go to the mall and clean the bathtub, as well as load the dishwasher. In 2004 and 2005 she was able to make small meals, dust, get boys up, vacuum, do a bit of gardening, tidy up after the boys. On discovery in 2006 she said she was unable to vacuum. At the time of trial, she said, she could only load the top shelf and, and could not unload at all. She could dust with a Swiffer, do light dishes and light housekeeping, such as hanging up clothes. She

was now unable to clean the bathtub. Since 2005, she said, her condition had been getting worse.

[37] The plaintiff saw Dr. Poulos 13 days after the fall. His notes do not mention the fall. She said she did not think it was important at the time, although she described the fall as traumatic and said she had to go home and lie down, unable to function. She began to limp five to six weeks later. She said she must have been mistaken when she told Dr. Collicutt that she was limping within two weeks.

[38] The plaintiff acknowledged that she had an argument with Dr. Poulos regarding her request for a disabled parking permit. Dr. Poulos stated that she did not qualify. She also acknowledged that she was unwilling to take a Lidocaine drip and Neurontin as recommended by Dr. Pollett, stating that she was nervous of the effects of these drugs. She took some of the medication prescribed at the Sydney Pain Clinic, but stopped because of the side effects. Mrs. Miller did not remember Dr. Watt suggesting that she attend at the Halifax Pain Clinic.

[39] In discussing the RSD in her right lower leg, Mrs. Miller said the leg is now getting colder above the knee. It started at the foot, but subsequently moved upward, halfway to the knee. She was told by Dr. Collicutt that it would not get worse. She has no complaint regarding a possible degenerative disc disorder, which is asymptomatic.

[40] Mrs. Miller missed 15 appointments with the psychologist Joan Hanley between 2002 and 2006, but said her attendance is now much improved. She is scheduled to meet monthly with Ms. Hanley. Ms. Hanley and Dr. Poulos recommended that Mrs. Miller do some volunteer work in order to address her emotional and mental condition. She sought a volunteer position at a garden centre, but it was filled.

[41] The plaintiff said she currently does some exercise on the treadmill and a bit of housework. She said she also swims. She is not under active treatment for sleep problems.

Gary James Miller

[42] Mr. Miller, the plaintiff's husband, was 49 years of age at the time of trial. He is employed by Tesma. He had been on sick leave due to stress and depression since August 2006.

[43] Mr. Miller testified that on the day of Mrs. Miller's fall there was a heavy drizzle. He parked across the street from the bank. He could see the foyer. Mrs. Miller crossed the street and the next time he noticed her she was on the floor. She appeared to be on her knees. He got out of the vehicle, crossed the street and went into the bank. He said the floor was shiny from wet footprints and that he could see the water. He saw footprints on the tiles. He said he looked at the floor twice, once on the way in and once on the way out. The surface in front of the ATM was wet. There were no puddles. They banged on the glass door and a woman from the bank came and asked Mrs. Miller if she wanted a chair. She declined and they left to go home. He took her home, where she lay down on the sofa, applied ice and took Advil. She said her leg was sore. He noticed wetness on the lower part of her pant leg. She did not seek immediate medical attention, waiting about three weeks. She was only sore, and did not think it was serious.

[44] Mr. Miller stated that between 1988 and 1998, when his wife was working outside the home, they shared responsibility for the household and the two boys. Mrs. Miller was primarily responsible for the children and groceries, while he was responsible for outside work. She engaged in activities such as swimming, walking, horseback riding, and raising birds. Things changed when Mrs. Miller was forced to leave her employment due to panic attacks and anxiety disorder. Mr. Miller stated that between 1998 until part way through 2000 his mother-in-law was performing all of the household duties that his wife would ordinarily have done, due to Mrs. Miller's panic attacks and anxiety disorder. Mr. Miller said he also assumed additional responsibilities at this time. Mrs. Miller's mother passed away in 2003.

[45] Mr. Miller said his wife's medication was properly regulated in 2000 or 2001, and she started to do more housework, although her mother continued to help. In 2002, he said, she was still suffering from panic attacks and anxiety. That year she met her biological mother and was emotional about it. Prior to the accident, she was vacuuming, making meals and making beds. Mr. Miller said that since the fall, her ability to do housework has declined significantly. Currently, Mr. Miller said, he does all of the housework. She tries to clean but cannot do it. The more she is on her feet, the more swelling occurs. She can vacuum a bit, but not

for long. Normally, he gets up around 7:30 a.m., makes the boys' breakfast, gets them ready for school and drives them to school. Between 9:30 and 11:30 he does laundry and dishes. At 11:30 he retrieves the kids from school for lunch, makes lunch, and drives them back to school. Between 3:30 and 5:00 he gets supper ready. They usually eat between 5 and 6 p.m.. He said he spends between four and five hours each day doing housework. He said that in 2003, 2004 and 2005, he did housework, but did not know how it compared to his present workload.

[46] At Tesma, Mr. Miller said, he worked three eight-hour shifts (7:00, 3:00 and 11:00). While working the 7:00 a.m. shift, he would take a shower, get some sleep, and get the children ready, if Mrs. Miller had not done it. After supper he would do the dishes and make the beds. He would arrive home at 3:15 p.m. and between then and 5 p.m. he would do the laundry and prepare supper. In the evening he would complete the cleaning and do outside work. If he was working the 3 p.m. shift he would get up at 7:30 a.m., get the boys ready, take them to school, return home and do housework, sometimes with help from Mrs. Miller. He would pick up the boys and bring them home for lunch, then take them back to school. He would work eight hours at Tesma and four hours at home. On August 26, 2006, he took leave due to stress from having to do both housework and work. He said he burned out. He takes medication for depression.

[47] Mr. Miller said he had seen no improvement lately in his wife's condition. He said she can make a sandwich, clean the floor with a sweeper, and can drive when she has to. After the accident, they moved to a bungalow. They had previously lived in a two-storey home.

Glen Burton

[48] The plaintiff sought to call Glen Peter Burton as an expert in the field of ceramic tiles, their placement and maintenance and their relative slipperiness under different conditions. He was not qualified as an expert in this field, but was permitted to testify about the placement and maintenance of tiles and the rendering of tiles slippery under wet conditions. He was restricted from testifying as to coefficiency of friction, but was permitted to testify as an experienced tile retailer and installer and to testify that certain tiles have a slippery factor and, more so, if the surface of the tile is wet.

[49] Mr. Burton is a carpenter by trade. Since 1988, he said, he has installed approximately 20,000 square feet of floor and wall tiles. His retail business is across the street from the defendant's premises. He also said he had been a customer at the branch.

[50] Mr. Burton testified that on October 3, 2002, at approximately 8:45 a.m., he was at work and was looking out the front window across from the defendant's building. It was raining lightly and the street was wet. He saw Mrs. Miller enter the bank. She took two or three steps, her feet went out from under her and she fell to her right. She got up quickly and went to the inner bank door. After Mr. and Mrs. Miller left the branch he noticed that a yellow sign was placed in the entrance. Mr. Burton testified that on previous nights he had seen cleaning personnel sweep and mop the foyer once, but had not seen them do a second rinse. He also suggested that the placement of the mat would encourage people not to place both feet on it.

[51] Mr. Burton stocks natural, porcelain, and ceramic tiles in his store. He said the defendant has 12 by 12 porcelain tiles in the entrance, manufactured by Flaviker. He installed the tiles in the bank approximately one-and-a-half years before Mrs. Miller's fall. He said the bank wanted a matte polish finish. Mr. Burton said he spoke to Joe Pyke, the Branch manager, and was told that the tiles were specified by the architect. He said he told Mr. Pyke that the tiles could be slippery when wet. Mr. Pyke was not interested in changing the tiles from what had been specified. Mr. Burton said the Flaviker tile is slippery when wet, and considerably so, because the water has no place to sit except on top of the tile. Mr. Burton said he did not need a rating of coefficient of friction to conclude that a surface is slippery, because he has sufficient experience to say if water will make a particular tile slippery. He said the Flaviker tile in question was more slippery when wet as compared with when it is dry. He said he had seen people slip on a Flaviker tile in a McDonald's restaurant, on account of water. He also stated that there were different tiles available which he claimed were less slippery such as anti-slip tile which were installed in a few establishments and a textured tile which allows water to sit in the voids.

[52] On cross-examination, Mr. Burton said he knew the Millers before the accident. He agreed that he had a dispute with the bank when he signed for his brother as a guarantor and was required to pay off a debt to the bank. He agreed that he was testifying to support Mrs. Miller's claim.

[53] Mr. Burton confirmed that he saw the plaintiff fall. He said her feet came out from under her and she fell to the right, not to the left. He said she did not trip over the entrance mat, as it is flush with the tile. He said that when he saw her one or two weeks after her fall she appeared to have a limp. He denied suggesting she sue the defendant, but said he simply asked her if she was doing so. She said she was not, but a couple of days later she called indicating that she was going to bring an action against the defendant. He claims that he simply asked the question, but made no recommendation. He agreed that he gave a statement to Pauline Singer, the adjuster, regarding the circumstances of the fall, about six or seven months after it happened. He agreed that his memory was better then (May 2003) than it was at trial. In the statement he said he might have tipped the plaintiff off about getting a lawyer.

[54] Mr Burton said he installed the tile as required by the specifications. He agreed that he could have refused to install the tile, but said the defendant would have gone to someone else. He did not speak to the architect or to more senior personnel in the bank, or contact Olympia Tiles for coefficiency factors. He was satisfied that the bank was aware of his concerns prior to the installation of the tiles, and that they failed to heed his warnings. He agreed that the tile is used extensively in restaurants and banks, but not in malls. He maintained that Permastick would make it less slippery. He agreed that the age, size, gait and speed of the walker are factors to be considered in determining the slipperiness of the tile. He also said hydroplaning is possible if water remains on top of the tile.

[55] Mr. Burton maintained that a recent claim for indemnification against him by the defendant was commenced out of spite and in an attempt to silence him. On redirect, Mr. Burton said he had no grudge against the bank and has been a member of the bank for 16 years. In fact, he said, he moved his investments to the bank and he had no reason to colour his testimony. The originating notice issued against him was identified by Mr. Burton and entered as an exhibit.

Geraldine Hudson

[56] Geraldine Marie Hudson was employed by the Royal Bank from 1995 to 2005. She worked at the Sydney Mines branch from 1995 to 2002. On October 3, 2002, she was acting as a customer assistance officer.

[57] Ms. Hudson testified that her desk was adjacent to the entrance, facing the lobby. The foyer and the main part of the branch are divided by a wall consisting of two glass doors and a glass wall. The tellers were behind her. She could see Glen Burton's store across the street, but could not see inside it, from her location. She said the bank premises were cleaned each night by independent contractors. Items on the floor, such as garbage, envelopes and other debris in the lobby, were picked up.

[58] On the day of Mrs. Miller's accident, Ms. Hudson arrived between 8:30 a.m. and 9:00 a.m. She did a scan of the interior of the bank and locked the door behind her as she entered. She checked the bathrooms, storage room and furnace room, shut off the alarm and, eventually, removed the double lock. She said the foyer was open 24 hours per day, while the branch itself was open from 10 a.m to 5 p.m. The foyer would be mopped if the floor was wet, and spills would be mopped up. No specific person was responsible for cleanup. There was no signage in place, but a "slippery when wet' sign was available. There was no schedule for mopping the foyer, and no record kept of when it was mopped. There was no one designated to watch over the foyer for water. She did not dispute that people track water into the ATM area.

[59] Ms. Hudson said it was misty outside on the day the plaintiff fell. She was standing by her desk shortly before 9 a.m. and saw Mrs. Miller on her knees in the lobby. She asked another staff member, Florence Hardy, to go to the door. Mrs. Miller got up and leaned on the door and Ms. Hardy went out. Ms. Hudson examined the floor and saw wet shoe prints. There was no debris on the floor. The tiles were not damaged. She did not mop the floor. It was necessary to report this incident to Joe Pyke, the manager, who was not on site at the time.

[60] Ms. Hudson said renovations were done to the bank lobby three years before Mrs. Miller's fall, and the lobby has remained in the same state. She confirmed that the tiles were placed by Glen Burton. She did not know what type of tile was used, but said it appeared to have a textured top. She said approximately 200 to 600 people would go through the lobby on a daily basis and that there had been no previous complaints about the floor or any slips or falls on the floor.

[61] On cross-examination Ms. Hudson said she placed a "slippery when wet" sign in the foyer after Mrs. Miller fell, and before the branch opened. She said the street looked shiny and some people were wearing rain coats. She agreed that it

was wet outside, although on redirect she said that it was not raining when she arrived that morning. She said the floor was not wet when she checked earlier. She acknowledged that the video showed her putting out the sign at 9:25 a.m., just before the bank opened. She confirmed that the purpose of the sign was to alert people that it could be dangerous.

[62] Mrs. Hudson said the purpose of the mat was to collect water and debris off people's shoes. If it had been closer to the door, it would have caught both feet. She said the floor was not wet when she checked it. She said she could see a film, but was uncertain if there was actually water on the floor. At discovery she stated that there had been moisture on the floor. She also stated at discovery that the tile had a bit of a textured top. At trial, however, she said she had never felt the top of the tile, but knew that it was textured. She agreed that a runner mat would soak up water, and that a Permastick strip would help prevent slipperiness. She had never slipped on the tile herself.

Florence Hardy

[63] Ms. Hardy worked as a teller at the bank and was present the day Mrs. Miller fell. She stated that she arrived around 8:50 a.m. Geraldine Hudson was already there when she arrived. She could not see between the front door and the entrance door to the bank. She looked out in the foyer saw the plaintiff down. She went to the door. She asked her she needed a chair. She observed that the floor was moist and dampish, but there was not a lot of water on it. The entrance mat was in place to absorb moisture and catch debris.

[64] Ms. Hardy did not recall the type of flooring in the foyer or when it was placed. She was uncertain if there was a policy respecting cleanup. If she saw water on the floor she would mop it up or bring it someone's attention so that it would be mopped. She was unaware if there was a log kept regarding cleanup, or a schedule for the tellers to mop the floor. She could not recall mopping the floor that morning.

[65] She agreed that there was a light rain. On cross-examination she could not say whether people on the video were wearing rain coats, nor could she say if the road outside the bank was wet. She knew it had rained when she entered the bank and was not prepared to challenge the Environment Canada report of showers. She said there was a small amount of water on the floor, which she believed came from

boots and shoes. The caution sign was put out so that people would be aware of the floor. She did not recall any mopping that day. The floor was not saturated. She was unaware of any log for maintenance, but said she would not necessarily be aware if there was one.

Joseph Pyke

[66] Joseph Charles Pyke is the manager of the Royal Bank branch in North Sydney, and was manager at the time of Mrs. Miller’s fall. He is also manager of the Sydney Mines branch. He described the layout of the bank, which had a foyer, then double doors to enter the interior of the branch itself. He said the lobby was 8 feet by 12 feet, and the ATM area was open continuously. The bank was open for business from 10 a.m. to 3 p.m. The floor of the lobby is laid out in a grid format. A person entering the outside door would make a right turn and would then be standing on square ceramic tiles.

[67] Mr. Pyke said he did not know who installed the tiles. He said he knew Glen Burton but did not know that he owned the store across the street. He said he did not have any conversation with Mr. Burton regarding the suitability of the Flaviker tile. He was not aware that anyone else at the bank was spoken to. He said he was not familiar with the product used to cover the tiles and did not recall anyone showing him this material or suggesting that it be installed. Mr. Pyke stated he had no involvement in sourcing any of the material for the construction of the branch. The renovation was handled by BLJC Group, an outside company and supervised by an architect, Bob Ojolick, who would have been responsible for sourcing the material.

[68] Mr. Pyke said that approximately 600 people went through the branch, including the foyer, each day. There were no previous complaints regarding the floor and no reports of falls. In cross-examination he stated that there was no system for cleanup, no schedule for employees to do cleanup, and no log books. There was no designated person to do cleanup and no plan in place. Customarily, mats were put out for safety, in order to absorb water. Although Mr. Pyke had no direct knowledge of this, he was told that there were more instances of people tripping when mats were down. There were two additional mats in front of the ATMs.

[69] Mr. Pyke's evidence conflicts with that of Mr. Burton with respect to Mr. Burton's claim that he discussed the tile with the manager, and expressed his concerns about it, before installing it. Given his long experience in tile installation, I infer that Mr. Burton would have been aware that the architect who was involved with the project would be the appropriate person to contact to raise his concerns about the suitability of the tiles. His failure to relay his concerns to the architect calls into question his account of the discussion with Mr. Pyke. I am also left in some doubt by the fact that he proceeded to install the tiles, on the basis that if he did not do so, someone else would. This further weakens the credit I am prepared to accord to his claim to have drawn Mr. Pyke's attention to his concerns about the tile. Mr. Burton's assertion that Mrs. Miller was limping within one to two weeks is contrary to the evidence of Dr. Poulos and Mrs. Miller. Finally, it appears that Mr. Burton at least implicitly encouraged the plaintiff to pursue an action against the defendant. In all the circumstances, I accept Mr. Pyke's denial that such a conversation took place.

Dr. Stuart Smith

[70] Dr. Smith is an engineer with C.R. Tyner & Associates Ltd.. He conducted friction tests with a Sand-n-Sun Sport sandal which, he wrote, "appears to be the same as the sandals" worn by the plaintiff when she slipped, and a tile similar to type used in the defendant's lobby. His retainer required him to determine the friction of sandals like those worn by Mrs. Miller on a tile floor. In addition to the tile and sandal, he was provided with specification sheets from Olympia Tiles and a report by Glen Burton.

[71] In his report Dr. Smith reviewed the video frame-by-frame, and noted that the Environment Canada weather report for 10:00 a.m. ADT (9:00 AST) on October 3, 2002, indicated a temperature of 10.6° C and rain showers at the Sydney airport. He regarded this weather report as being consistent with wet footprints on the floor of the bank. He went on to describe his understanding of the layout of the accident scene based on his examination of photographs and the video, noting that he had not actually been there. At trial he stated that, while it would have been preferable to do his testing on the actual floor, his understanding

was that the floor no longer existed in the form it had been in at the time of the accident. He stated that the foyer was 12 feet by 15 feet and the entrance mat was five feet by five feet.

[72] Dr. Smith wrote in his report that “the static coefficient of friction is the ratio of the horizontal force (to initiate sliding motion) to the vertical force of gravity pressing a shoe against a floor. The coefficient of friction is a measure of the slip resistance of a particular shoe on a particular floor. The method of testing, as he described it at trial, involved loading a shoe with ten light weights, totaling 3044 grams, approximately seven pounds of light weight, and using a spring balance to identify the force required to remove the loaded shoe on the tile and determine the dry friction coefficient. The measurement concentrated on the static coefficient friction – the force required to initiate movement – rather than the dynamic or towing friction, which is required to maintain the movement once started. In comparing the performance of a sandal similar to that worn by the plaintiff to several other shoes he tested in the same manner, Dr. Smith concluded that all of the shoes tested retained 89 to 95 percent of the dry friction on a wet Flaviker tile, which contained clean water to a depth of about 1/16 inch (1.6. millimetres). The Sand-n-Sun sandal had a ratio of between .89 and .91. None of the shoes, he wrote, would be “significantly more hazardous on wet than on dry “Flaviker” floor tiles,” although the Sand-n-Sun and the hard-soled “Alia” shoe had “significantly less friction than the three other shoes tested.” Dr. Smith did not explain how the shoes he tested were selected. His assessment of the Sand-n-Sun Sport sandal, as described at trial, was that it was “on the low end of the acceptable range, but not in a particularly hazardous dangerous sense.”

[73] As to the slip resistance of the floor tile, Dr. Smith said at trial that his testing “showed that this particular floor tile did not become significantly more slippery” when wet than when dry; he said the difference was “perhaps 5 to 11 percent more slippery . . . when wet than when dry, but it didn’t go down radically, like by half.” He reviewed several international standards for friction coefficients, there being no standard under the *Canada Building Code*. He wrote that the Sun-n-Sport sandal on dry Flaviker tile would be rated “minimum standard” (according to standards published by the British Standards Institute), “poor” (American Society for Testing and Materials) or “satisfactory” (International Standards Organization). The “Alia” shoe would rate “poor to fair” (BSI), “poor” (ASTM) or “marginal” (ISO). The other shoes would be “good” (BSI and ASTM) or “satisfactory” (ISO). Dr. Smith also reviewed a report prepared by the Smith

Emery Company, and provided by Olympia Tile, which stated that “Flaviker tiles tested at a certain time in history at a certain friction coefficiency,” as he put it at trial. The tile used in these tests was not necessarily the same tile used at the bank. The Smith Emery report found dry friction coefficient of 0.71 and a wet friction coefficient of 0.67, using a neolite material, which Dr. Smith said is commonly used in shoe heels and soles. The difference between the dry coefficient and wet coefficient is that a person walking on a dry floor expects a certain amount of traction, which is reduced on a wet floor. However, if the wet coefficient of friction on wet tiles and dry tiles are similar then it does not go down by a large amount. The Smith Emery report therefore indicated a reduction of between five and six percent. In layman’s terms, Dr. Smith said, this meant “[i]t’s not slippery when wet.” He said this was not a significant difference between the traction that could be expected when the tile was dry and when it was wet.

[74] On a review of the video, Dr. Smith said he could establish the distance the plaintiff traveled by reference to the grout lines around the 12-inch tiles. He added that in a one-second interval – the length of the interval between frames of the video – he would expect “approximately one movement of each foot.”

[75] Dr. Smith went on to review the activity on the video. At 8:55:33 a.m. Mrs. Miller has her left foot on the entrance mat, with her toe at the edge of the mat, and her right heel is about to strike the tile about two feet from the mat, having taken one complete step from the previous frame. At 8:55:34 Mrs. Miller’s right foot is on the tile, four-and-a-half to five feet from the edge of the mat, her left heel appears to be slightly lifted, and she is leaning forward with her right arm down and her left arm extended. Dr. Smith said this represented one second of travel from 8:55:33 to 8:55:34. At 8:55:35 Mrs. Miller is down with her weight centered over her left knee, seven-and-a-half to eight feet from the edge of the mat. Her weight is extended over her right knee, which also appears to be on the tile, as are both of her hands. At 8:55:36 Mrs. Miller is starting to sit up, at 8:55:37 she beginning to rise to her knees, and at 8:55:38 she has risen to her knees. He observed that there was very little movement from 8:55:38 to 8:55:43. At 8:55:44 she begins to get up on her left knee, at 8:55:45 she rises with the weight on her left foot, and at 8:55:46 turns to her left and has both feet on the floor. Between 8:55:47 and 8:55:49 she walks from the ATM area to the interior door and raises her hand to the door.

[76] Dr. Smith stated that although Mrs. Miller claimed that she fell as she was stepping off the mat with her right foot, this is not supported by the video. He noted that on one occasion, she stated that she had no recollection from the time she stepped off the mat until she was walking to the entry door, a period of 14 to 16 seconds. He did not believe that the manner of fall was as she described, because of her distance from the mat when she fell.

[77] In cross-examination, Dr. Smith agreed that it would have been better to do a testing of the actual floor at the defendant's premises, in order to leave no doubt that he had tested the same tiles that were involved in the accident. He did not accept, however, that it would have affected the result had he been able to drag the shoe over several tiles rather than only one. He said this would not affect the static coefficient, because it is defined by the force required to initiate movement, which does not require any length of dragging; he said the "first millimetre" of movement was sufficient to determine the static coefficient.

[78] Dr. Smith could not say what type of material was in the plaintiff's shoe, except that it appeared to be a foam material.

[79] Dr. Smith indicated that he found it inconceivable that the plaintiff could do the splits as she stepped off the entrance mat because of the distance she moved in other frames. At 8:55:34 she had moved to the point where she would be expected to be by moving in a "right foot – left foot" motion. He believed that it was inconceivable that she had managed to do the splits and get back up in the course of one frame. Dr. Smith acknowledged the video was one frame per second, as compared to 30 frames per second in a television video.

[80] Dr. Smith could not say how other testing agencies conducted tests, aside from the manner in which they reported them. He was also asked whether he had done similar testing as that done by Clifford Tyner, who gave expert evidence in another slip-and-fall case, *Corbin* v. *Halifax (Regional Municipality)* (2003), 214 N.S.R. (2d) 345 (S.C.). He used the same testing scale and loading of the shoe with weights. Although he had not done four tests, he conducted different tests on four different shoes. As Mr. Tyner had done, he compared his results with standards prepared by ASTM, BSI and ISO.

[81] Dr. Smith disagreed that .75 would be required for an acceptable coefficient of friction. He stated that in the Olympic test, they came up with a rating of .5 for

a fully satisfactory floor tile. He did not use a James machine although he found that to be immaterial to his conclusions. He said the James machine does not measure dynamic sliding friction and was not intended for use on wet surfaces. He did not agree with the suggestion that he was only able to conduct drag sled field tests measuring the dynamic sliding friction between Mrs. Miller's shoe and the tile sample. Rather, he measured the static friction and the dynamic friction. He said he referred to the results of the ASTM testing to determine what is an appropriate slip resistance. He agreed that he would not have been able to give the court the results of testing if he did use the approach taken by ASTM and BSI in their laboratory testing. He agreed that there was a debate as to whether .5 was the acceptable standard, because the American Society for Disability called for a friction coefficient of .6 relating to people with walking disabilities who may have irregular feet and therefore would require greater friction on the floor than the average person. It depends on the point of view whether .4, .5 or .6 is the appropriate standard but he said that a range of .4 to .6 is acceptable. Dr. Smith was prepared to admit that the ASTM, BSI and ISO are recognized as independent bodies but did not know whether the Smith Emery Company was equally independent.

[82] Dr. Smith did not think that wetting the uppers of Mrs. Miller's sandals would have made an appreciable difference in the results. He agreed that different forces and walking gait might produce a different result than dragging a sandal with 7 pounds of weight. He agreed that he did not have any knowledge in the field of kinesiology and was also prepared to agree that a person with a long stride is more likely to slip on a wet surfaces than one with a shorter stride.

[83] When questioned by the court, Dr. Smith stated that the weight of an individual does not have any impact on dry friction coefficient. He said that the more loading is put on a surface, the more the water is dispelled, so more loading would tend to make the friction greater.

[84] I do not accord much weight to Dr. Smith's evidence. In particular, I am satisfied that the tile he used was not identical to the tile in the bank. I am also not satisfied that the group of shoes he tested provide a useful sample upon which to base a legal conclusion that the plaintiff contributed to her own fall by wearing the particular shoes she was wearing. While they may have provided somewhat less slip resistance than most of the other shoes tested, I am not satisfied that this establishes that they are more slippery than shoes generally. I reject any

suggestion arising from Dr. Smith's evidence that a bank customer should be held to be contributorily negligent for wearing shoes that do not give the same slip resistance as footwear with the maximum slip resistance.

Nancy MacNeil

[85] Nancy MacNeil gave evidence respecting the cost of housekeeping services. She works for Cape Breton Care Services as assistant manager. Cape Breton Care Services provides services that include washing, light housekeeping and meal preparation. They charge $12 per hour plus HST. They are available seven days a week. Their employees are paid $8 per hour, plus payroll costs. Ms. MacNeil did not review the medical reports (this would be done by a staff nurse) and did not assess the house or Mrs. Miller's needs. In order to determine the time required, she would have to visit the home.

MEDICAL EVIDENCE

Dr. Douglas Watt

[86] Dr. Watt was qualified to give expert evidence in the field of physical medicine and rehabilitation. He reviewed existing medical reports, including those of Dr. Poulos, Dr. Pollett and Dr. Collicut, before preparing his own report, dated January 26, 2007. Mrs. Miller was first referred to Dr. Watt by her family doctor, Dr. Poulos. He first saw her on March 17, 2003. He reassessed her on May 29 and September 5, 2003.

[87] Dr. Watt stated that RSD is a chronic regional pain syndrome caused by a triggering event in the arm or leg. Pain is disproportionate to trauma, and is reflected by sweating, swelling and coldness. He said he cannot predict the level of RSD over time. He stated that if Mrs. Miller did the splits, this could cause RSD, and that RSD could also have been caused by the fall.

[88] Dr. Watt stated that Mrs. Miller attended the pain clinic at the Northside Harbour Hospital and saw Dr. Harry Pollett. Dr. Pollett observed some swelling and prepared a treatment plan. In respect of treatment, Dr. Watt said, he defers to

Dr. Pollett. He recommended that Mrs. Miller increase the dosage of Amitriptyline. She started her treatment with Dr. Pollett on September 5, 2003.

[89] Dr. Watt next saw the plaintiff on January 26, 2007. According to Dr. Watt's report, she told him that she had slipped at the bank, with her right foot going forward and her falling to the ground. She could not say whether she fell forward, backward or sideways, and did not recall striking anything as she fell. She reported no loss of consciousness. In his report Dr. Watt stated that Mrs. Miller had reported, among other things, "constant pain about her right lower back, right buttock area and right anterior thigh and from her knee down to her foot. . . . On specific questioning, she reported that it is her low back pain which bothers her the most." There was swelling of her right foot, which was cooler than the left foot, and a glossy appearance to the skin on her distal right shin. He also noted her abnormal gait. He wrote that it was "impossible to tell what initial injury she had with her slip and fall, rather she has a chronic pain problem." His impression was that it was "of the complex regional pain syndrome type." He recommended Amitriptyline. He also suggested a body pillow and exercise in a pool.

[90] According to Dr. Watt, sometimes no underlying cause of RSD can be identified. However the symptoms are: coloration, dry skin, wasting, temperature and osteoporosis, usually in the pain area. Initially there were no physical findings but on the second visit she reported swelling. The timing of her symptoms is not out of keeping. She had pain first and RSD later. It takes time for physical findings to manifest themselves; he has treated people with RSD before although it is not a large part of the practice, perhaps four people a year. Currently, Mrs. Miller has pain from her knee to her foot. She has chronic regional pain syndrome (CRPS). He stated that she reported significant low back pain, which he believed was the area giving her the most pain. As to disabilities or impairments that might be expected, Dr. Watt wrote that she would continue to be limited by pain, and that the severity of the limitations would "most likely vary based upon the severity of her pain at the time." He anticipated that she would "continue to complain of pain indefinitely."

Dr. Peter Poulos

[91] Dr. Poulos carries on a family medical practice in North Sydney, Nova Scotia. He has been in practice for 25 years. He adopted the contents of his report, which was available at trial. Mrs. Miller has been a patient of Dr. Poulos since

March 1994. Mrs. Miller had a number of pre-existing medical issues, including panic attacks and anxiety disorder, that predated the fall in 2002.

[92] Dr. Poulos said the plaintiff is suffering from complex regional pain syndrome, also known as reflex sympathetic dystrophy. RSD is a form of complex pain syndrome. Dr. Poulos said RSD is associated with a number of causes, including a direct blow, although the impact may be relatively minor. To his knowledge RSD is most commonly caused by trauma, but it can be caused by infection or by radiation therapy. There are situations where there is no direct impact to the site which might cause RSD. Dr. Poulos acknowledged that the accuracy of the information provided by the patient is very important for proper diagnosis. Trauma of different types may make it difficult to determine the source. The location of the injury is very important. There is a fairly well-known constellation of symptoms. It is a chronic pain condition and is related to anxiety/depression. Dr. Poulos agreed that RSD is controversial and that there are different opinions as to the modalities of treatment. RSD is usually referred to the pain clinic or anesthesia specialist for treatment.

[93] Some medical practitioners, such as Dr. Pollett, rely on temperature. Dr. Poulos said this was beyond his expertise. There is a one degree difference between the temperature in Mrs. Miller's legs, but he was unable to say there is much significance to this.

[94] Dr. Poulos agreed that fibromyalgia is a controversial diagnosis, in the sense that it is a diagnosis of exclusion and there is an overlap with other physical conditions, but not with RSD. He said he is not a specialist in myofascial pain syndrome. He did not believe there is an association between fibromyalgia and trauma.

[95] Dr. Poulos said he made the diagnosis of complex regional pain syndrome. Dr. Pollett did not specify a particular diagnosis, but his notes reflect that Mrs. Miller was being treated for that condition. Dr. Poulos believed that he was advised of CRPS by Dr. Pollett. It may be that Dr. Pollett was treating the symptoms without having made the diagnosis.

[96] Dr. Poulos agreed that Dr. Pollett suggested certain treatments that were declined by Mrs. Miller. It appears that she was concerned about the effects of medication. She discontinued the treatment program recommended by Dr. Pollett.

He said a patient has a right to refuse treatment. He agreed that Dr. Watt recommended Elavil and Amitriptyline in an attempt to improve her sleep. In some instances this medication can be prescribed for fibromyalgia or myofascial pain syndrome.

[97] Dr. Poulos made a referral to physiotherapy in October 2003, and medication in January 2004. It became evident that physiotherapy was not helping Mrs. Miller. An electronic stimulator did not bring any improvement. Traction made it worse.

[98] Dr. Poulos said Mrs. Miller's medical condition, as of the time of trial, consisted of chronic panic disorder, agoraphobia, neck pain, dizziness, nausea, tiredness, sleep disorder, digestive tract problems, stomach disorder, chronic headaches, scoliosis and degenerative disc disease (unrelated to the fall). He subsequently revisited an earlier diagnosis of fibromyalgia, concluding that she did not have this condition.

Dr. James Collicutt

[99] Dr. Collicut is an orthopedic surgeon. He was qualified to give expert evidence in the field of musculoskeletal injuries.

[100] In his initial report, dated November 7, 2005, Dr. Collicutt stated that the plaintiff had related "a history of injury to the back and the right leg. She has actually gone on and evolved into a RSD symptom complex of the lower part of her right leg." As she related her accident, she did "a split type mechanism and sort of landed on her left side on the buttock and the posterior side of the pelvis." She told him that she was limping within one or two weeks of the fall. On examination, he observed wasting of the calf muscle on the right leg and slight discoloration the right leg, which he wrote was "probably improving with time." He found no evidence of trigger points or fibromyalgia. X-rays showed early arthritic changes in her hip and confirmed scoliosis.

[101] Dr. Collicutt concluded that the plaintiff's complaints "are basically those of pain and dysfunction in the right leg." His findings were "in keeping with a resolving RSD in the right leg." He believed that the injuries were "a direct result of the slip and fall accident." Her disabilities were "related to any activity or chore that requires prolonged walking or standing," though he believed that "she would

have no impairment or disability in a sitting position based on this current problem." He expected the problem to stabilize over time, but concluded that the plaintiff "will never be asymptomatic and she will never regain full function in that leg." He did not expect further deterioration, however, "as that is not the natural history of an RSD." As to her working ability, he thought that "[i]f the anxiety symptoms could be controlled I do believe that she would be fit for a sedentary occupation."

[102] Dr. Collicutt saw the plaintiff for an update on March 26, 2007. He noted that she had declined the Lidocaine drip suggested by Dr. Pollett. As to her general health, he wrote that there had been "over all no real changes. . . . Subjectively she complains of more cramping pain in the right and a colder sensation in the right leg above the knee." He wrote that she had "pain on a daily basis twenty-four seven. She has a sleep disturbance every night and has ongoing rest pain." The right hip remained discoloured, but there was "no obvious temperature change to palpation." Many of his findings on the right leg were unchanged from the previous exam. He went on to summarize and answer the questions addressed by counsel. He wrote:

> In summary therefore this lady has the on going sequelae of a soft tissue injury and an obvious post RSD status in the right leg. . . .
>
> 1. Her current complaints are back and right leg pain. The injuries suffered were soft tissue in nature and resulted in a clear cut RSD in the right leg. She had a soft tissue to the back as well.
>
> 2. The injuries and complaints are a direct result of the accident. She had no real musculoskeletal problems prior to this. . . .
>
> 3. Her treatment is as detailed above including physiotherapy, chiropractic, pain clinic assessments, rehab assessments, and a neurology consult. It has been very thorough.
>
> 4. The disabilities and impairments that this client can expect as a result of the injuries is gait dysfunction and all activities requiring use of the right leg. She also has on going pain which is chronic in nature.
>
> 5. I think her prognosis is one of continuing symtomatogy likely in a stable fashion. Other than the complaint of more pain in the right foot, nothing is

> different than the last examination. I think that any deterioration will likely be age related in this patient.
>
> 6. I do not recommend any treatment at this point in time.
>
> 7. My definition of chronic pain is pain which has persisted for a period of time longer than expected based on the objective magnitude of the trauma sustained and for which there is no foreseeable remediation. This client does suffer from chronic pain, and it is likely to make her miss time from work in the future. We must note however that she was not working at the time of the accident primarily because of an anxiety related disorder.
>
> 8. I do believe that the accident is the cause of all or most of the client's complaints.
>
> 9. I do believe it likely that she would be pain free if it were not for the accident in question.
>
> 10. The client has sustained a permanent impairment in this circumstance which is basically loss of motion and strength in the affected leg with walking and standing.
>
> 11. This impairment is very important to the injured person as [it] influences her mobility, her walking ability, and her ability to be gainfully employed.
>
> 12. This impairment of bodily function is serious to the injured person. It has in a large part been a life changing event with the disability as related above.

[103] Dr. Collicutt testified that he did not believe that Mrs. Miller will be able to return to work. He said her gait pattern is terrible. She has a restricted range of motion. She has a lurching and surging movement where she wobbles on her hip and knee or hip or ankle. She will never walk normally and will never be without pain. Surgery to correct these problems is unlikely; she is in a static condition. There is a possibility that in the future, as she ages, she would be in a walker or wheelchair.

[104] Dr. Collicutt said there are a number of events which can trigger RSD, including trauma, heart attack, radiotherapy, infection, carpal tunnel, post operative, gunshot wounds.

[105] As to the manner of the plaintiff's fall, Dr. Collicutt was not prepared to say that the video eliminated the possibility that the plaintiff did a splits-type movement which precipitated her fall.

[106] According to Dr. Collicutt, individuals who suffer from RSD are referred to pain management and are frequently treated with physiotherapy, activity and drugs. Physiotherapy assists in preventing stiffness. It is too much of an assumption to say that RSD is cured by early intervention. RSD may be minimized by early treatment but not eliminated. Dr. Collicutt said he encourages patients to continue with physiotherapy if they are suffering from RSD. Discomfort alone is not a sufficient reason to discontinue physiotherapy. If the patient discontinues the pain clinic, this reduces the chance of a good result.

[107] Dr. Collicutt stated that the arthritic changes in the plaintiff's hips are not related to the fall and that the degenerative disc disease has no impact on the RSD. He said the curve in her back resulting from scoliosis is not a massive one, and the scoliosis appears to be asymptomatic.

SIMILAR FACT EVIDENCE

[108] The plaintiff seeks to introduce evidence of three witnesses that are said to constitute "similar fact" evidence. Carmen Pheifer, a private investigator, was asked to visit various bank branches in the area in order to establish the types of floor tile in use, and the presence, if any, of mats. Robert Clemens and Troy Wilson operate businesses in the area. Mr. Clemens is the franchisor of two Dairy Queen franchises in the Sydney area. Mr. Wilson is the franchisee of a number of Wendy's/Tim Horton's outlets. Both were called to testify with respect to the flooring and matting procedures in their respective businesses, and the placement of warning signs.

[109] The plaintiff quotes John Sopinka, Sidney Lederman & Alan Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), at §11.200, to the effect that "[e]vidence is admissible to prove that previous accidents have occurred as a result of the physical state of the defendant's premises." Further, similar fact evidence may be adduced to establish a standard practice. The authors write, "[i]n negligence actions, where the standard of care must be proved, evidence is admitted as to the performance of the act on other occasions": *Law of Evidence in Canada* at §11.205. The authors conclude that prejudice as it relates to

similar fact evidence is less significant in civil cases than in criminal ones, and propose that "evidence of similar facts should be admitted if it is logically probative to an issue in the case as long as . . . it is not unduly 'oppressive or unfair' to the other side, does not consume a disproportionate amount of court time, and does not bear the whole burden of proving the case": *Law of Evidence in Canada* at §11.208.

[110] The plaintiff asserts that Mr. Pheifer's evidence will establish that other banks in the area have installed abrasive or non-stick flooring, and that an industry standard has been established. The defendant says – correctly, I believe – that the evidence the plaintiff seeks to adduce is not similar fact evidence, but is collateral to the issues. It does not relate to any prior conduct of the defendant, but to the conduct of third parties. The allegation that Mr. Pheifer's evidence will establish an industry standard is not supported by any expert evidence. The operations of other businesses in various circumstances, with different physical circumstances and varying levels of customer traffic is not of assistance in establishing the proper standard of care to be met by the defendant in the particular circumstances of the day of the accident. I am satisfied that this evidence is irrelevant and should not be admitted.

FINDINGS OF FACT

[111] I make the following findings of fact:

> 1. The plaintiff, Brenda Miller, slipped and fell on a tile floor in the foyer of the defendant Royal Bank of Canada branch in Sydney Mines, Nova Scotia, on October 3, 2002, between 8:55 and 8:56 a.m.
>
> 2. The defendant was the occupier of the premises where the slip-and-fall occurred.
>
> 3. The weather was misty.
>
> 4. The plaintiff was wearing "Sand-n-Sun Sport" sandals.
>
> 5. The foyer measured 12 feet by 15 feet. The two ATMs were along the far wall from the door. An entrance mat, measuring 5 feet by 5 feet, was located at the entrance to the foyer. There were two additional mats directly in front of the two ATMs.

6. The floor tiles in the foyer had a porcelain matte finish. They measured 12 inches by 12 inches, including grout.

7. There were footprints of water on the tiles in the foyer. There were no puddles, paper or other debris on the floor. The quantity of water that was on the floor has not been established beyond the presence of wet footprints.

8. There were no signs warning of wetness or slipperiness in the foyer. The floor was not mopped by any of the defendant's employees between 8:20 a.m. and 12:40 p.m. on the day the plaintiff fell.

9. There was no evidence of the type or composition of any cleaning fluids or agents used to clean floors on the defendant's premises.

10. The plaintiff took several steps off the entrance mat and fell to the floor.

11. The mechanics of the fall, and whether the plaintiff fell in a "splits"-type motion, are not established on a balance of probabilities.

12. The defendant did not have a system in place to check the condition of the floor.

13. There was no evidence of any previous falls on the floor of the foyer at the defendant's premises from the date the tile was installed by Glen Burton, about one-and-a-half to two years prior to the fall.

14. Prior to the fall the plaintiff suffered from panic attacks and an anxiety disorder. These conditions were sufficiently disabling to keep her from returning to employment. She was not suffering from fibromyalgia at the time of the fall.

15. The plaintiff suffered permanent injuries as a result of the fall.

16. The plaintiff elected not to continue certain treatments and medication recommended by Dr. Harry Pollett.

17. The tile provided to Dr. Stuart Smith for purposes of establishing the coefficient of friction was not the same tile as was installed in the defendant's foyer.

18. The evidence does not establish that the plaintiff's "Sand-n-Sun Sport" sandals contributed to causing her to fall.

19. The plaintiff was performing some of the housework, but not the majority of it, prior to the fall. Her ability to do housework has declined since the fall. Her husband, Gary Miller, has proportionately increased his share of housekeeping duties and is currently responsible for 80 to 90 percent of the housework.

LIABILITY

[112] The statutory duty of an occupier is described in section 4 of the *Occupiers' Liability Act*, S.N.S. 1996, c. 27:

> 4 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.
>
> (2) The duty created by subsection (1) applies in respect of
>
> (a) the condition of the premises;
>
> (b) activities on the premises; and
>
> (c) the conduct of third parties on the premises.
>
> (3) Without restricting the generality of subsection (1), in determining whether the duty of care created by subsection (1) has been discharged, consideration shall be given to
>
> (a) the knowledge that the occupier has or ought to have of the likelihood of persons or property being on the premises;
>
> (b) the circumstances of the entry into the premises;
>
> (c) the age of the person entering the premises;

(d) the ability of the person entering the premises to appreciate the danger;

(e) the effort made by the occupier to give warning of the danger concerned or to discourage persons from incurring the risk; and

(f) whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection.

(4) Nothing in this Section relieves an occupier of premises of any duty to exercise, in a particular case, a higher standard of care that, in such case, is required of the occupier by virtue of any law imposing special standards of care on particular classes of premises.

[113] The effect of the *Occupiers' Liability Act* is to replace the common-law duty of an occupier with the standard set out in the statute. The duty of an occupier was considered in *Corbin v. Halifax (Regional Municipality)* (2003), 214 N.S.R. (2d) 345 (S.C.), where Wright J. stated, with respect to the duty set out in s. 4(1):

> [32] In interpreting the identical provision found in the *Occupiers' Liability Act* of Ontario in *Waldick et al. v. Malcolm et al.* (1989), 35 O.A.C. 389; 70 O.R. (2d) 717 (C.A.), Blair, J.A., described the essence of this statutory duty in the following passage (at para. 19):
>
> > A similarly worded statement of an occupier's duty occurs in all other Occupiers' Liability Acts. All courts have agreed that the section imposes on occupiers an affirmative duty to make the premises reasonably safe for persons entering them by taking reasonable care to protect such persons from foreseeable harm. The section assimilates occupiers' liability with the modern law of negligence. The duty is not absolute and occupiers are not insurers liable for any damages suffered by persons entering their premises. Their responsibility is only to take "such care as in all the circumstances of the case is reasonable". The trier of fact in every case must determine what standard of care is reasonable and whether it has been met. Occupiers are also not liable in cases where the risk of injury is "willingly assumed" by persons entering the premises or to the extent that such persons are negligent ...
>
> [33] This interpretation of the statutory duty requiring an occupier to take such care as is reasonable in the circumstances of the case was affirmed by the Supreme Court of Canada on the further appeal of that case. In a decision reported at [1991] 2 S.C.R. 456 ... Justice Iacobucci affirmed (at para. 45) that "(t)he goals

of the Act are to promote, and indeed, require where circumstances warrant, positive action on the part of occupiers to make their premises reasonably safe". He further described the statutory duty on occupiers as follows (at para. 33):

> ... After all, the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation - thus the proviso “such care as in all circumstances of the case is reasonable” ...

The principles of reasonable care as applied to “slip and fall” cases where discussed by MacLellan J. in *Smith v. Atlantic Shopping Centres Ltd.* (2006), 243 N.S.R. (2d) 293 (S.C.):

> [50] In *Gallant v. Roman Catholic Episcopal Corp. for Labrador/Diocese of Labrador City- Schefferville* [(2001), 200 Nfld. & P.E.I.R. 105] the Newfoundland Court of Appeal summarized the issues involved when a Court is faced with a slip and fall case. Cameron, J., speaking for the Court said:
>
>> As already noted, in the common law jurisdictions in Canada a generally consistent approach to occupiers' liability has emerged.... The following is not an attempt to create an exhaustive list but a collection of principles which emerge from the cases under the current, generally accepted view of occupiers' liability and which are relevant to the law in this province, post [*Stacey v. Anglican Churches of Canada* (1999), 182 Nfld. & P.E.I.R. 1 (Nfld. C.A.]:
>>
>>> 1. There is a positive obligation upon occupiers to ensure that those who come onto their properties are reasonably safe...;
>>>
>>> 2. The onus is upon the plaintiff to prove on a balance of probabilities that the defendant failed to meet the standard of reasonable care - the fact of the injury in and of itself does not create a presumption of negligence - the plaintiff must point to some act or failure to act on the part of the defendant which resulted in her injury...;
>>>
>>> 3. When faced with a prima facie case of negligence, the occupier can generally discharge the evidential burden by establishing he has a regular regime of inspection, maintenance and monitoring

> sufficient to achieve a reasonable balance between what is practical in the circumstances and what is commensurate with reasonably perceived potential risk to those lawfully on the property. An occupier's conduct in this regard is to be judged not by the result of his efforts (i.e. whether or not the plaintiff was injured) but by the efforts themselves...;
>
> 4. The occupier is not a guarantor or insurer of the safety of the persons coming on his premises....

[114] Welsh J. of the Newfoundland & Labrador Court of Appeal provided the following summary in *Williams v. Thomas Development (1989) Corp.* (2007), 283 D.L.R. (4th) 273:

> [53] .... Before turning to the circumstances of this case, it is helpful to set the context by reference to more general principles related to occupier's liability. In addition to those set out in [*Gallant v. Roman Catholic Episcopal Corp.* (2001), 200 D.L.R. (4th) 643 (Nfld. C.A.)], I would refer to the summary found in Linden and Feldthusen, *Canadian Tort Law*, 8th edition, (Markham: LexisNexis Butterworths, 2006), at pages 752 to 754:
>
> a) The Reasonableness Threshold
>
> The standard of care required of an occupier is one of reasonableness, not perfection. Occupiers are required to take such care as is reasonable in the circumstances to ensure that visitors are reasonably safe on their premises. Occupiers are not expected to be insurers, responsible for all harm that befalls anyone entering their premises, but an affirmative duty -- sometimes requiring affirmative action -- is imposed on them to take care for the reasonable safety of visitors.
>
> ...
>
> Remedial steps taken after a mishap are not generally considered as proof that such steps were required to make the premises safe, but are merely one factor to be considered in whether the premises were reasonably safe. Nor is prior safe use of premises determinative; such use is also merely a relevant factor to consider in the analysis of whether premises or an activity is reasonably safe.
>
> ...

> b) Looking Out for One's Own Safety
>
> Along with the requirement that the occupier behave in a reasonable manner, visitors must also behave reasonably by looking out for their own safety....
>
> c) Reasonably Safe in the Circumstances
>
> An important component of the reasonableness inquiry is an examination of all of the relevant circumstances, so that each case must necessarily be decided on its own unique set of facts. ...

[115] The plaintiff says the defendant failed to meet the requisite standard of care. The plaintiff refers to *Campbell v. Royal Bank of Canada*, [1964] S.C.R. 85, a case involving a slip-and-fall accident on a bank floor that was slippery with water from ice and snow that had been tracked inside. Decisions pre-dating the *Occupiers' Liability Act* must be referred to with caution. As noted above, the duty is "to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises." The standard is one of reasonableness, rather than "unusual danger", as described in Campbell, although I duly note that one of the considerations in determining whether the standard has been met, is "whether the risk is one against which, in all the circumstances of the case, the occupier may reasonably be expected to offer some protection."

[116] The defendant says an occupier can rely upon a "track record" in order to support their claim that the standard of care has been met. In *Corbin*, *supra*, Wright J. considered the reasonableness of the choice of a particular floor tile for a changing room at a sports facility. He said:

> [44] In any event, one cannot lose sight of the reality that during approximately 13 years of operation, which translates into well over a million users of the aquatic centre alone by females, and hence a similar volume of use of the ladies change room, there have been no other reported slip and fall accidents in the lavatory area. Given that track record, and the limitations of the expert opinion evidence above identified that cast doubt on the validity of the results expressed, I am unable to conclude that the lavatory floor tiles are unsafe for ordinary use such as to constitute negligence on the part of the defendant. I might add that even if the lavatory floor tiles did have a slip co-efficient that was less than the institutional standards referred to by Mr. Tyner, there is no evidence that the

> defendant should reasonably have been aware of that, in light of its then seven year accident free track record.

[117] Similarly, in *Young* v. *Hubbards Food Services* (1995), 145 N.S.R. (2d) 13 (S.C.), Saunders J. (as he then was), dealing with a slip-and-fall on a dance floor at a club, concluded that there was "no evidence that the defendant should reasonably have been aware that its floor had a slip coefficient of less than 0.5, or that its procedures in cleaning and maintenance were unreasonable, inappropriate or unsafe" (para. 46). In the present case, it is not disputed that there was no history of slip-and-fall accidents on the tile floor of the bank foyer.

[118] It has been established that moisture existed on the tile floor where the plaintiff fell. It was apparently in the form of wet footprints. There were no puddles of water. The weather was misty, and it appears that there had been some rain, but it was not raining when the plaintiff entered the bank. In the circumstances, I am not satisfied that the defendant's liability should extend to a slip on a wet footprint. It is acknowledged that the defendant had no system or policy respecting floor cleanup. Rather, the employees monitored the floors on an *ad hoc* basis, and mopped or cleaned as needed. While ideally the defendant might have had such a policy in place, it appears that both Ms. Hudson and Ms. Hardy had observed some moisture on the floor of the foyer that morning, but did not believe it was significant enough to mop up.

[119] I do not believe the defendant can be required to observe a standard of perfection, or to act as an insurer, in keeping its foyer floor dry, which, I believe, is what would be required if it were found necessary to monitor an ATM foyer for the presence of wet footprints in order to meet the duty of care under the *Act*.

[120] I am likewise not convinced on the evidence that the choice of floor tile for the foyer amounts to a failure to meet the standard of care. In this respect, I have considered that there is no history of complaints of slip-and-fall accidents on this floor, although this is not determinative. Mr. Burton's evidence suggests that the tile may have been more slippery than others that were available. I am not satisfied that this establishes that the tile was actually unsafe. To suggest that the bank could only meet its duty under the *Act* by installing the least slippery tile available also seems to demand a standard of virtual perfection. As with Dr. Smith's evidence regarding the plaintiff's footwear, there is no comprehensible standard offered by which the relative slipperiness can be judged.

[121] I am, accordingly, unable to find that the defendant is liable to the plaintiff in the circumstances of this case. Nevertheless, I will proceed to consider the issues of causation and damages.

CAUSATION

[122] The leading case on causation is *Athey* v. *Leonati*, [1996] 3 S.C.R. 458; [1996] S.C.J. No. 102, where Major J., for the court, set out the following essential principles (citations omitted):

> 13 Causation is established where the plaintiff proves to the civil standard on a balance of probabilities that the defendant caused or contributed to the injury. ...
>
> 14 The general, but not conclusive, test for causation is the "but for" test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant. ...
>
> 15 The "but for" test is unworkable in some circumstances, so the courts have recognized that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury.... A contributing factor is material if it falls outside the *de minimis* range. ...
>
> 16 In [*Snell v. Farrell*, [1990] 2 S.C.R. 311], this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.
>
> 17 It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. ... As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

> 18 This proposition has long been established in the jurisprudence. Lord Reid stated in [*McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.)], at p. 1010:
>
> > It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.
>
> 19 The law does not excuse a defendant from liability merely because other causal factors for which he is not responsible also helped produce the harm.... It is sufficient if the defendant's negligence was a cause of the harm. ...
>
> 20 This position is entrenched in our law and there is no reason at present to depart from it. If the law permitted apportionment between tortious causes and non-tortious causes, a plaintiff could recover 100 percent of his or her loss only when the defendant's negligence was the sole cause of the injuries. Since most events are the result of a complex set of causes, there will frequently be non-tortious causes contributing to the injury. Defendants could frequently and easily identify non-tortious contributing causes, so plaintiffs would rarely receive full compensation even after proving that the defendant caused the injury. This would be contrary to established principles and the essential purpose of tort law, which is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant.

[123] These principles of causation were recently reiterated in *Resurfice Corp.* v. *Hanke*, 2007 SCC 7; [2007] S.C.J. No. 7, where McLachlin C.J.C., for the Court, wrote:

> 20 Much judicial and academic ink has been spilled over the proper test for causation in cases of negligence. It is neither necessary nor helpful to catalogue the various debates. It suffices at this juncture to simply assert the general principles that emerge from the cases.
>
> 21 First, the basic test for determining causation remains the "but for" test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.

> 22 This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. As stated in [*Athey v. Leonati*, [1996] 3 S.C.R. 458] at para. 14, per Major J., "[t]he general, but not conclusive, test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant." Similarly, as I noted in [*Blackwater v. Plint*, [2005] 3 S.C.R. 3, 2005 SCC 58] at para. 78, "[t]he rules of causation consider generally whether 'but for' the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities."
>
> 23 The "but for" test recognizes that compensation for negligent conduct should only be made "where a substantial connection between the injury and defendant's conduct" is present. It ensures that a defendant will not be held liable for the plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": [*Snell v. Farrell*, [1990] 2 S.C.R. 311] at p. 327, per Sopinka J.

[124] The defendant says the plaintiff should be denied recovery on the basis of the "crumbling skull" doctrine. In *Athey* v. *Leonati*, *supra*, Major J. wrote at pp. 473-474:

> 35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the preexisting condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the preexisting damage. ... Likewise, if there is a measurable risk that the preexisting condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award. ... This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position. [Emphasis in original.]

[125] The defendant notes that the plaintiff suffered before the fall, and continues to suffer, from a variety of medical complaints. The defendant submits that Complex Regional Pain Syndrome (CRPS), or Regional Sympathetic Dystrophy (RSD), is of uncertain origin and could have a variety of causes. Given the plaintiff's prior medical history, the defendant submits, causation cannot be proven on a balance of probabilities. As a "crumbling skull", the defendant submits, the

plaintiff would have suffered most, if not all, of her current complaints if she had not fallen at the bank. The defendant refers to *W.E.D.* v. *Rice*, [2000] N.S.J. No. 14; 2000 NSCA 12, where the trial judge had been satisfied that the plaintiff had suffered from various physical and mental complaints, which would have occurred even had the accident not occurred. Dismissing the appeal, the Court of Appeal said:

> 2 Although the appellant has experienced numerous physical and mental impairments over the last several years, the trial judge, after considering the general principles established in *Athey v. Leonati* . . . was satisfied that "the motor vehicle accident of June 24, 1992 did not materially contribute to any of the continuing difficulties or problems" she experienced. The trial judge concluded on the basis of the expert medical evidence presented that:
>
> ...
>
>> Clearly the Defendant is not liable for any health problems or difficulties not caused by his negligence. The Plaintiff's emotional or mental health problems pre-dated the motor vehicle accident. These problems continued after the accident and have in and of themselves led to and perpetuated the Plaintiff's claim of chronic pain syndrome and depression and associated cognitive deficits. I specifically find that the Plaintiff has failed to prove on a balance of probabilities that any physical pain she may now suffer is the result of the motor vehicle accident.
>
> ...
>
>> ... it is clear that a multitude of intervening events have occurred which would have had a negative impact upon the Plaintiff even if the motor vehicle accident had not occurred, impacting adversely upon her health, avocational and vocational activities just as such events had impacted upon the Plaintiff prior to the motor vehicle accident.
>
> ...
>
>> This case is an example of a classic crumbling skull scenario. The evidence establishes that the Plaintiff's pre-accident problems would have detrimentally affected the Plaintiff in future regardless of the Defendant's negligence. ...

[126] The defendant points to the various health matters (detailed above), financial pressures, personal problems (such as the meeting with her biological mother), medication problems and previous accidents (such as the fall in her yard in September 2002). Further, the defendant claims that the plaintiff's development of RSD in her right leg is not consistent with the manner of the fall seen on the security video, which, in the defendant's view, was to her left. In addition, as noted above, the origins of RSD are unclear, and there are multiple possible causes. While trauma, even of a low level, is a possible cause, the defendant points out that the plaintiff was involved in a previous car accident, as well as the fall in her yard. The defendant also contends that the plaintiff's description of her improved condition before the accident – including her claim that she was able to do 80-90 percent of the housework – is inconsistent with the medical documentation, particularly her Canada Pension Plan record, by which she was regarded as totally disabled before the fall.

[127] I am satisfied that the plaintiff's RSD is separate and distinct from her pre-existing medical conditions, and that but for her fall on the defendant's premises, the plaintiff would not be suffering from RSD in her right leg. This is not a case like *Rice*, where the plaintiff's physical pain cannot be attributed to the effects of the defendant's actions. The medical evidence is clear and convincing on this point. I am satisfied that the injuries of which the plaintiff complains are the result of falling at the bank, and are distinct from her pre-existing conditions.

DAMAGES

General damages

[128] The plaintiff seeks general damages in excess of the range set out in *Smith* v. *Stubbert* (1992), 117 N.S.R. (2d) 118 (C.A.); for "persistently troubling but not totally disabling injury" (para. 37), contending that the present case is one of "totally debilitating injury." The plaintiff cites *Dillon* v. *Kelly* (1996), 150 N.S.R. (2d) 102 (C.A.), where the Court distinguished *Smith* v. *Stubbert* as follows:

> [68] Justice Chipman concluded that a finding that Mr. Smith was permanently disabled from "doing the type of work in which he was engaged at the time of the accident would be, on the medical evidence presented, perverse. The probabilities are that he would regain his abilities to do this work and even if not, a number of other types of gainful employment."

> [69] This finding should be contrasted with the conclusion of the trial judge in this case "that Mrs. Dillon's enjoyment of life, participation in recreational and other social activities have been substantially if not totally curtailed as a result of her injuries and the ensuing pain".
>
> ...
>
> [75] I conclude that the range expressed in **Smith v. Stubbert** is for an injury considerably less debilitating than that suffered by Mrs. Dillon. [emphasis in original]

[129] The Court of Appeal set aside the trial judge’s award of general damages of $45,000, substituting a figure of $65,000.

[130] In *Marinelli* v. *Keigan* (1998), 168 N.S.R. (2d) 252 the plaintiff, a nurse, suffered a whiplash injury, leading to debilitating pain, precluding her from working and curtailing other aspects of her life. The Court awarded $80,000 in general damages, which was subsequently affirmed on appeal: 173 N.S.R. (2d) 56 (C.A.).

[131] The plaintiff also refers to *White* v. *Slawter* (1996), 149 N.S.R. (2d) 321 (C.A.) and *Wood* v. *Boutilier* (1998), 171 N.S.R. (2d) 18 (S.C.). The plaintiff suggests that the award of $85,000 on account of chronic pain and permanent disability is the upper limit. The plaintiff suggests general damages between $75,000 and $85,000.

[132] The defendant argues that general damages should fall within the upper range of *Smith* v. *Stubbert*, reflecting a condition that is, to repeat, “persistently troubling but not totally disabling.” The defendant cites the opinion of Dr. Collicutt (November 7, 2005) that the RSD in the plaintiff’s right leg would stabilize over time and that further deterioration was not to be expected, “as that is not the natural history of an RSD.” At trial, Dr. Collicutt confirmed that pain medication was not necessary and that the plaintiff’s condition had plateaued.

[133] The defendant refers to a range of cases where plaintiffs suffered chronic pain more severe than has been established here, usually requiring narcotic pain medication: *Abbott* v. *Sharpe*, 2007 NSCA 6 (general damages of $100,000); *Roberts* v. *Cape Breton Hospital* (1997), 162 N.S.R. (2d) 342 (S.C.) ($115,000);

Teed v. *Amero* (2001), 195 N.S.R. (2d) 359 (S.C.) ($150,000on account of pain described by one physician as "continuous pain of a horrible nature with periodic excruciating exacerbation"). By contrast, the defendant says, the plaintiff has "resolving" RSD in her right leg, without further deterioration expected, and without a need for further treatment or medication. In addition, the plaintiff had extensive pre-accident medical conditions, in contrast with the plaintiffs in the aforementioned cases. As such, the defendants suggest general damages of $50,000.

[134] I have considered the nature and extent of the plaintiff's injuries resulting from the fall, as well as the relevant case law. I am satisfied that her injuries resulting from the fall are somewhat more serious than the *Smith* v. *Stubbert* range of "persistently troubling but not totally disabling, without rising to the upper level of chronic pain that is permanently disabling. Taking inflation into account, an appropriate quantum of general damages would be $65,000.

Loss of housekeeping capacity

[135] The treatment of loss of housekeeping capacity as a matter of damages distinct from general nonpecuniary damages was discussed in *Carter* v. *Anderson* (1998), 168 N.S.R. (2d) 297 (C.A.), where Roscoe J.A. said:

> [27] In my opinion, the modern advancement of this area of the law of damages, which is premised on the concept of direct economic loss of the plaintiff whose ability or capacity to perform homemaking or housekeeping tasks has been impaired, should be acknowledged and accepted in Nova Scotia. Future loss of capacity, where proved, should be compensated separately whether or not replacement help has been paid in the past. The award for lost capacity should not simply be part of the non-pecuniary damages as "an element of loss of amenities". Housekeeping capacity is ordinarily not an amenity. Its loss is not an intangible loss comparable to the appellant's loss of ability to dance, to skate, or to ride horses. As noted by appellant's counsel, Mrs. Carter did not go next door and ask to mop her neighbour's kitchen floor because she enjoyed mopping. Managing one's home and keeping it clean and organized is important and necessary for the health and safety of the family. The partial or total loss of that ability has economic value which should be recognized. In another case, it may be more appropriate to compensate most of the loss with a nonpecuniary award for a loss of amenity, if for example, the plaintiff proved that he deprives personal gratification from doing housework.

As to quantification of the loss, the Court said:

> [34] It is not necessary here to say that one of these approaches is better than another. Each case will depend on its own facts for a reasoned calculation. This case was advanced on the basis of the approach described by Vancise, J.A., in [*Fobel v. Dean* (1991), 83 D.L.R. (4th) 385 (Sask. C.A.)]. Use of that method to quantify the economic value of the future loss of housekeeping capacity should produce a reasonable result in this case. Here the evidence of the appellant was that before the accident she did 99% of all the household tasks, now her husband spends approximately thirteen hours weekly doing work she did previously. A portion of this work done by Mr. Carter could reasonably be attributable to the fact that there is simply more work to be done as a result of the addition of a fourth child to the family. Even without the accident, his leisure time could very well have been curtailed in order to assist with the daily housework. It would also be reasonable to assume that the five or six hours he spends doing the heavy "weekend" cleaning is representative of the loss capacity of the appellant. The appellant does not appear to have lost any of the management component of the housekeeping capacity as identified by Vancise, J.A, in *Fobel*.
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> ...
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> [39] In summary, the appellant has proven that, as a result of the accident, she has lost the capacity to perform heavy housework. She should be compensated for that future loss of housekeeping capacity as a separate head of pecuniary damages. The extent of the loss is estimated to be five hours per week, and taking into account the ages of her children, and other positive and negative contingencies, it is appropriate to award the sum of $41,000. This figure is rounded down to the nearest thousand, calculated as follows:
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> 1. 5 hours per week x $10.14 per hour x 52 weeks = $2,636.40.
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> 2. $2,636. 40 x. 11.9074 (the factor calculated by the actuary to represent the present value of $1 of annual loss for 15 years) = $31,392.67.
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> 3. $31,392.67 x 1.32 (32% gross-up for the effect of income tax) = $41,438.32, rounded to $41,000.

[136] In the present case, the plaintiff’s position is that before the fall, the plaintiff did up to 80-90 percent of the housework. Now Mr. Miller has become responsible for maintaining the home, and the plaintiff says this situation will likely continue for the foreseeable future. Mrs. Miller, it is submitted, cannot vacuum or do other heavy cleaning, such as the bathtub. She has difficulty taking dishes out of the

dishwasher or putting something in the oven. Mr. Miller's evidence was that he spends at least four hours per day doing things that he would not have been doing before the accident. The additional pressures arising from his wife's disability, he submits resulted in him taking stress leave commencing August 22, 2006. The plaintiff says this is a rare and exceptional case because she is almost totally disabled.

[137] Mr. Miller's evidence was that his daily tasks include preparing breakfast for the children, getting them ready for school, and driving them to school; doing dishes and putting them away, washing clothes; sweeping floors; preparing lunch for the children, picking them up at school, and returning them to school after lunch; making the beds; pick the children up from school; making supper; and cleaning up after supper.

[138] The plaintiff refers to Kenneth Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont: Carswell 1996), where the author cites survey data to the effect that "[e]mployed women average approximately 18-20 hours per week on housework if they have no young children, and approximately 30-35 hours in that activity if they do have young children." In terms of past loss of housekeeping capacity, the plaintiff bases her claim on a 28-hour week, taking into account that the children are "young" (six and 11 years of age at the time of the accident). For future loss, during which period the children will not be "young", the plaintiff suggests a 20-hour week. As to future loss, the plaintiff assumes 30 years, based on the respective ages of the Mrs. Miller (42 years) and Mr. Miller (46 years) at the time of trial. At 20 hours weekly, times a factor of $18.68, with a 3.5 percent discount rate, the plaintiff says this results in a total for future loss of housekeeping capacity of $196,980.00. The plaintiff suggests a rate of $10 per hour, based principally upon the evidence of Nancy MacNeil of Cape Breton Care Services, who testified that her firm charges $12 per hour (plus tax) for housekeeping services, while paying their staff $8 per hour plus vacation pay, CPP and Worker's Compensation deductions.

[139] The defendant submits that there should be no separate award for loss of valuable services or housekeeping capacity, but that an amount should be included in an award for general damages. The defendant asserts that Mrs. Miller continues to do "most of the work around the house that she previously did." This is not borne out by the evidence. The defendant says Mrs. Miller continues to make tea and sandwiches, do dishes and drive the children to school, as well as loading the

top shelf of the dishwasher. The defendant also refers to discovery evidence indicating that Mrs. Miller was able to sweep floors, mop floors (in stages) and clean the bathtub with a brush. Before the fall, the defendant says, the plaintiff was totally disabled and relied heavily on the family, including her mother, to do housework. The defendant suggests that any increase in the amount of housework being done by Mr. Miller is likely attributable to the death of Mrs. Miller's mother in December 2003.

[140] The defendant says *Carter* v. *Anderson* is distinguishable and represents the highest award made by a Nova Scotia court for diminished housework capacity. Relying upon *Leddicote* v. *Nova Scotia (Attorney General)* (2002), 203 N.S.R. (2d) 271 (C.A.), the defendant says a claim for lost housekeeping capacity must be supported by proof of economic loss, of which the defendant alleges there has been no evidence presented. Saunders, J.A. (dissenting in part, but not on this issue) said:

> [50] The question becomes to what extent, if at all, have the injuries impaired the claimant's ability to fulfill homemaking duties in the future? Thus, in order to sustain a claim for lost housekeeping services one must offer evidence capable of persuading the trier of fact that the claimant has suffered a direct economic loss, in that his or her ability or capacity to perform pre-accident duties and functions around the home has been impaired. Only upon proper proof that this capital asset, that is the person's physical capacity to perform such functions, has been diminished will damages be awarded to compensate for such impairment....

[141] The defendant argues that the evidence does not support a claim for lost housekeeping capacity amount resulting from the fall.

[142] The plaintiff's ability to do housework has been reduced as a result of her injuries. I find that she is entitled to an award for lost housekeeping capacity, but not in the amount claimed. I have already concluded that Mrs. Miller was not doing 80 percent of the housework in the period immediately before her fall, and that Mr. Miller was, at that time, already assuming a significant portion of the housework. In view of this conclusion I allow an amount of $4,000 attributable to the pre-trial period and $70,000 post trial, for a total award of $74,000 attributable to lost housekeeping capacity.

MITIGATION

[143] The defendant says the plaintiff has failed to mitigate her damages by consistently following the recommendations of her treating physicians and health care providers. As such, the defendant says any damages awarded should be reduced by 50 percent. There is evidence that the plaintiff declined to follow medical advice in some instances, as, for example, when she declined to take certain recommended medications due to her concern about side effects (Neurotonin and Lidocaine). She also discontinued taking Elavil due to side effects. It is also suggested that she failed to mitigate by discontinuing physiotherapy (as well as treatment by Dr. Pollett at the Pain Management Clinic), and that the evidence does not establish that she pursued an exercise program as recommended by Dr. Poulos.

[144] In the main, I am not satisfied on the evidence that the plaintiff contributed to the development or progress of the RSD by "frustrating the efforts of her treating physicians," as the defendant submits. I note in particular that the medical evidence did not establish that the treating doctors regarded it as unreasonable for the plaintiff to decline certain medications due to side effects. This is not a case like *Grundy* v. *Boudreau* (2006), 248 N.S.R. (2d) 70 (S.C.), where the plaintiff "consistently either refused or neglected to follow medical advice and pursue prescribed treatment" (para. 64). I am not satisfied that the medical evidence establishes that "a substantial improvement could have been expected in the plaintiff's condition" if she had followed medical advice on these specific matters (see *White* v. *Slawter* (1996), 149 N.S.R. (2d) 321 (C.A.) at para. 88). I am not satisfied that a failure to mitigate has been established on the evidence.

CONCLUSION

[145] I find that the defendant is not liable to the plaintiff under the *Occupiers' Liability Act*. I have, however, provisionally assessed the issues of causation, damages and mitigation, as set out above.

INTEREST

[146] The plaintiff would be entitled to pre-judgment interest of 2.5 percent per annum, following *Bush* v. *Air Canada* (1992), 109 N.S.R. (2d) 91 (A.D.).

COSTS

[147] If the parties are unable to agree on costs, they may provide written submissions within one month of the date of release of this decision.

J.