IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. HCV 01384 OF 2005

BETWEEN	MELVIN ROBERTS	CLAIMANT
AND	EVANS SAFETY LIMITED	DEFENDANT

Bernard Marshall for the claimant
Christopher Dunkley for the defendant

November 17, 2006, February 7, 2007 and March 28, 2007

NEGLIGENCE, EMPLOYERS BREACH OF DUTY, SAFE SYSTEM OF WORK AND VICARIOUS LIABILITY

SYKES J.(delivered by McDonald-Bishop J. (Ag))

1. On September 24, 2001, at approximately 2:30pm, on property occupied by Evans Safety Limited ("Evans Safety"), there was an explosion. A one hundred and fifty pound fire extinguisher cylinder detonated. When the smoke and debris cleared, the claimant, Mr. Melvin Roberts was found suffering from serious injuries. The medical report of Mr. R. E. C. Rose, Consultant Orthopaedic Surgeon, recorded the injuries. The examination was done on January 5, 2006. The report is dated February 4, 2006. Mr. Roberts had a crush injury to the right thigh with development of a compartment syndrome in the right thigh. The report gives a history of surgical debridement and open fasciotomy performed on September 24, 2001, at the University Hospital of the West Indies. On September 27 and 29, 2001, there were a second and third surgical debridement. The wound was closed with skin flap and split skin graft performed on November 23, 2001.

2. The report indicated that Mr. Roberts reported that he returned to work in June 2002 with a single crutch which was discontinued after one month. According to Mr. Rose, Mr. Roberts reported that he was able to carry out his duties but he was in constant pain.

The January 5, 2006, examination
(a) history presented by Mr. Roberts

3. On January 5, 2006, Mr. Roberts reported intermittent pains in the right knee which were aggravated with excessive walking, standing as well as cold weather. This was significant because his occupation required prolonged standing and walking to service fire extinguishers.

4. There was pain if he attempted to run and that was a feeling of instability in the right lower extremity.

5. He told Mr. Rose that he was unable to squat fully because of pains in the lower extremity and knee. The impaired sensation in his right leg has made him extremely cautious about hitting his leg against any object. There is permanent swelling in the entire leg. There is tightness in the right Achilles heel tendon and a painful limp when walking.

(b) physical examination by doctor

6. When Mr. Rose conducted a physical examination he found a male with no obvious painful distress and no noticeable limp when walking. The doctor did not find any lower limb length discrepancy and an examination of the right hip did not show any abnormalities.

7. An examination of the right knee revealed a reduced patella mobility but no retropatella tenderness. There was mild tenderness along the medial line. No ligamentous laxity was found and the range of motion of knee was from 0° to 110°.

8. When the right ankle was examined the doctor found a full subtalar motion and dorsi flexion was limited to 10°. No damage to the neurovascular aspect of the right lower extremity was detected. The healed area was 20cm by 13cm along the right thigh which was the area that was degloved in the accident. A longitudinal scar was situated along the anterior aspect of the knee. Numerous scars were present along the left calf and leg from the rotation flap. Mr. Rose observed diffuse swelling of the right thigh and leg.

The diagnosis

9. Mr. Rose found chronic oedema of right lower extremity especially the right leg. He found also mild arthrofibrosis in the right knee.

The prognosis

10. Mr. Roberts will be plagued by chronic lymph oedema of the right lower limb especially the right leg. The swelling will continue to increase in size with the level of dependency of the leg. The arthrofibrosis of the knee has resulted in his inability to fully squat and he will experience increased pains in the knee with prolonged standing and sitting.

Disability rating

11. The impairments noted were related to the knee and oedema of the right lower extremity. The permanent partial disability in relation to the right knee is ten percent of the lower extremity which is equivalent to four percent of the whole person. The chronic oedema of the right lower extremity amounts to fifteen percent of the lower extremity which transforms into six percent of the whole person. The total permanent partial disability is ten percent of the whole person.

The claim and defence

12. For these injuries Mr. Roberts seeks compensation. He needs, however to prove the negligence of his employers. He has alleged that his employer failed to provide any adequate precautions for his safety while engaging in his job; the company failed to provide or maintain adequate or suitable plant tackle and appliances to enable Mr. Roberts to carry out his work safely. Specifically, the employer failed to provide (a) facilities for hydro testing; (b) adapter; (c) any protective cage; (d) any blow off or pressure release valves. He added that the system of work was not safe or proper. For good measure, he alleged res ipsa loquitur.

13. Evans Safety refuted these claim. The substance of the defence was that the claimant was told not to attempt to fill the cylinder that exploded. Having been told this, the claimant nonetheless took it on himself to fill the cylinder. In short, the claimant defied specific instructions and was injured because of his disobedience.

The law

14. Mr. Marshall relied on a number of authorities to establish the proposition that an employer cannot escape liability by arguing that he engaged the services of an expert.

15. It is well established that an employer has a duty to provide a safe system of work for his employees. It is equally well established that the employer cannot say that he had discharged that duty by employing a competent person to perform the job. This was stated quite emphatically by the House of Lords in ***Wilson and Clyde Coal Co. Ltd v English*** [1937] 3 All ER 628 (an appeal from Scotland). Lord Wright stated at page 640A-D:

> *This House held that, on the contrary, the statutory duty was personal to the employer, in this sense that he was bound to perform it by himself or by his servants. The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible. When I use the word "absolutely," I do not mean that employers warrant the adequacy of plant, or the competence of fellow employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill. The obligation is threefold--"the provision of a competent staff of men, adequate material, and a proper system and effective supervision";*

16. The reference to common employment, an illogical doctrine which thankfully was abolished by legislation, does not obscure the validity of the proposition regarding the responsibility of the employer. His Lordship continued at page 641H-642A:

> *The extent of the employer's obligation has several times been stated by this House. Thus in Wilson v. Merry & Cuninghame Lord Cairns said: "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work." To this must be added a third head--namely, to provide a proper system of working (see per Lord Colonsay in Merry's case). By this is meant, not a warranty, but a duty to exercise (by himself and his servants and agents) all reasonable care.*

17. And at page 643F-H:

> *There is perhaps a risk of confusion if we speak of the duty as one which can, or cannot, be delegated. The true question is, What is the extent of the duty attaching to the employer? Such a duty is the employer's personal duty, whether he performs or can perform it himself, or whether he does not perform it or cannot perform it save by servants or agents. A failure to perform such a duty is the employer's personal negligence. This was held to be the case where the duty was statutory, and it is equally so when the duty is one attaching at common law. A statutory duty differs from a common law duty in certain respects, but in this respect it stands on the same footing.*

18. If there were any room for doubt Lord Wright made sure that even the most obtuse would not fail to grasp the point. At page 644B - D:

> *I think the whole course of authority consistently recognises a duty, which rests on the employer and which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company, and whether or not the employer takes any share in the conduct of the operations. The obligation is threefold, as I have explained. Thus the obligation to provide and maintain proper plant and appliances is a continuing obligation. It is not, however, broken by a mere misuse or failure to use proper plant and appliances due to the negligence of a fellow servant, or a merely temporary failure to keep in order or adjust plant and*

appliances, or a casual departure from the system of working, if these matters can be regarded as the casual negligence of the managers, foremen, or other employees. It may be difficult in some cases to distinguish on the facts between the employer's failure to provide and maintain and the fellow servants' negligence in the respects indicated.

19. It is clear then that the employers cannot necessarily evade liability by relying on a competent supervisor. The employer is also liable even if he employs competent workmen but fails to provide a safe system of work. He cannot rely on the skill of his workmen to exonerate him if the system of work is unsafe. The case of ***General Cleaning Contractors Ltd v Christmas*** [1953] 2 W.L.R. 6 makes this point only too well. Lord Oaksey said at pages 189 - 190:

In my opinion, it is the duty of an employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his workmen. It is, I think, well known to employers, and there is evidence in this case that it was well known to the appellants, that their workpeople are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition.

20. Lord Reid added his voice at pages 193 – 194:

The question then is whether it is the duty of the appellants to instruct their servants what precautions they ought to take and to take reasonable steps to see that those instructions are carried out. On that matter the appellants say that their men are skilled men who are well aware of the dangers involved and as well able as the appellants to devise and take any necessary precautions. That may be so but, in my opinion, it is not a sufficient answer. Where the problem varies from job to job it may be reasonable to leave a great deal to the man in charge,

but the danger in this case is one which is constantly found, and it calls for a system to meet it. Where a practice of ignoring an obvious danger has grown up I do not think that it is reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do and to supply any implements that may be required such as, in this case, wedges or objects to be put on the window sill to prevent the window from closing. No doubt he cannot be certain that his men will do as they are told when they are working alone. But if he does all that is reasonable to ensure that his safety system is operated he will have done what he is bound to do. In this case the appellants do not appear to have done anything as they thought they were entitled to leave the taking of precautions to the discretion of each of their men. In this I think that they were in fault, and I think that this accident need not have happened if the appellants had done as I hold they ought to have done. I therefore agree that the appeal should be dismissed.

21. I have laboured these points for this reason. Mr. Dunkley took the position that Mr. Roberts was a well trained technician in the field of fire safety and he ought to have known the dangers involved and so when he went to fill the cylinders that knowledge ought to have prevented him from attempting to fill the cylinders. Thus, the employer is not to be blamed, because Mr. Roberts knew the risks even without instructions from the employer. Mr. Dunkley was driven to this position because the witness on whom the defendant was relying to say that Mr. Roberts was given specific instruction not to fill the particular cylinder in question appeared as a witness for the claimant.

22. In order to escape liability, Evans Safety needed to establish that it had a safe system of work. One way of doing this is by proving that the workman was given very specific instructions in relation to his safety. The employer may deflect liability by proving that he specifically told the workman how to do his job safely. This is what Evans Safety sought to do in this case. Unfortunately, the witness on whom it was relying, Mr. Jamie McMillan, had defected to the claimant's camp. Mr. Jamie McMillan was the assistant manager at the time of the accident. Under cross examination Mr. McMillan swore that he did not tell Mr. Roberts that he was not to recharge the cylinder that exploded. He also denied that he told Mr. Roberts to charge the exploding cylinder. It appears then that Mr. McMillan is saying that he said nothing about the cylinder to Mr. Roberts. The claimant's case is that he was told by Mr. McMillan to assist one Mr. Brown, another employee of Evans Safety, to recharge the exploding cylinder.

23. The problem for Evans Safety was this. Mr. Steve Evans, the principal officer of Evans Safety, did not speak directly or provide any written instructions to Mr. Roberts about the cylinder in question. He relied on Mr. McMillan to communicate with Mr. Roberts. To prove its case, the defendant adduced this evidence, or rather attempted to put this information before the court: Mr. Evans said that he was told by Mr. McMillan that he (McMillan) had told Mr. Roberts not to fill the particular cylinder. Mr. McMillan as has been stated denied this explicitly. There is no other witness to this instruction to Mr. Roberts. The Evidence Act does not make any provision for reception of this kind of evidence to prove a fact in issue. The Civil Procedure Rules does not assist (see rule 29). The Rules make provision for the witness statement of the person who made the statement to be admitted if the witness is not called to testify, but that is no warrant for saying that Mr. Evans can prove that instructions were given to Mr. Roberts by proving that Mr. McMillan told him (Evans) that he (McMillan) told Mr. Roberts not to refill the cylinder in question.

24. Thus at the end of the trial there was no admissible evidence from the defendant proving that it gave any specific instructions to Mr. Roberts about the cylinders. This evidential deficit drove Mr. Dunkley to make the argument that he did.

25. Mr. Dunkley's position may have been informed by ***Wilson v Tyneside Window Cleaning Company*** [1958] 2 W.L.R. 900, in which the Court of Appeal held that when an experienced workman was employed to do the particular job and he knew the risks involved then the employer had fulfilled his duty to the employee to take reasonable care for the safety of the workman. In that case the claimant was a window cleaner all his working life and had worked with the defendant for the last thirteen years before the accident. He was fifty six years old at the time of the accident. The accident occurred at a property at which the defendant was employed to clean the windows. The claimant worked at that property three months before. While cleaning the window the claimant held on to handle that gave way, he lost his balance and fell. He received very serious injuries. The evidence was that he knew that he should not rely on window handles although he had never experienced a window handle coming off as this one did. The employer did not provide him with any general safety instruction and did not tell him anything specifically about handles. An expert who gave evidence of the claimant testified that handles giving way was a frequent source of injury and in his opinion the employer ought to have printed rules about these dangers. Donovan J. (as he was at the time) gave judgment for the defendant. The claimant appealed. The Court of Appeal upheld the decision of the trial judge. The claimant sought to argue that when the employer sent the workman to another property the employer had a duty to inspect the building to make sure that it was not unsafe. The employer failed to do this thus, when the handle gave way and the claimant was injured that showed that the employer did not inspect the building and had exposed the claimant to an unsafe work place. According to Lord

Justice Pearce (as he then was) the duty on the employer is to take reasonable care, not absolute care. What was reasonable depended on the circumstances of the case and a factor in that determination was whether the work was done on the employer's premises as opposed to another's property.

26. At pages 120 - 121 Pearce L.J. quoted these findings of the trial judge:

> *The judge then considered the duty to make this particular handle safe, and decided that since it was not within the power of the defendants to do so and they had not the necessary control over the premises it could hardly be unreasonable not to do so. He concluded, on this point, "The defendants in fact met the situation in this case by telling the plaintiff, a very experienced man, that he need clean no window which he considered unsafe. I hold that there was no obligation upon the defendants to go further and make good the defective handle. The duty of an employer to take reasonable care to provide a safe place of work relates, in my view, only to that place of work which is in the employer's occupation or over which he is shown to have the necessary degree of control. This is not true of the premises in the present case."*
>
> *The judge then dealt with the defendant's alleged failure to warn the plaintiff of that which he already knew, namely, the danger of pulling on handles, and with the failure to give periodically repeated warnings in order to keep his caution vigilant, and decided that there was no negligent failure in that respect. He commented on the fact that there was no evidence of any practice in the trade with regard to repeated warnings. He differentiated between this case and cases where risks are "insidious and unseen," such as dermatitis cases, where, for instance, it might be that reminders as to the use of barrier cream and suchlike precautions were necessary; and he pointed out that in any event it was pure guesswork as to whether, if there had been periodic warnings, this accident would have been avoided. He found, therefore, that the defendants had not been negligent.*

27. Lord Parker also cited at pages 125 - 126 these findings of the trial judge:

> *Secondly, it is said that reasonable care demanded in this case that there should be repeated warnings given to the plaintiff of the danger of windows sticking and of handles coming off. In fact in the present case there not only has been no repeated warning, but no initial warning. But the circumstances here are*

these: this is a man who was 56 years of age, I think, at the time, and who has been all his life a window cleaner: he is a very experienced man, usually acting as a charge-hand, and he knew - and he frankly said that he knew - of the dangers involved, of handles coming off. It is said that he should have been told - one witness suggested that it should be impressed upon him twice a year - again and again. For my part, I would like to adopt entirely what Donovan J. said on that point. It seems to me that the disadvantages of doing that in the case of skilled men of this sort may well outweigh the advantages; and for my part I cannot think that "reasonable care" demands a repeated warning to skilled men in a case at any rate such as this, where the dangers involved are patent. It is not a case that one sometimes comes across of the danger of silicosis from particles of dust which are quite invisible and cannot be seen. I do not know, but it may well be that in such cases "reasonable care" would demand that the employer should warn and exhort the men constantly to wear masks. But there, as I have said, the danger is not patent.

28. Pearce L.J. expressed the matter in this way at pages 121 - 122:

Now it is true that in Wilsons & Clyde Coal Co. Ltd. v. English Lord Wright divided up the duty of a master into three main headings, for convenience of definition or argument; but all three are ultimately only manifestations of the same duty of the master to take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk. Whether the servant is working on the premises of the master or those of a stranger, that duty is still, as it seems to me, the same; but as a matter of common sense its performance and discharge will probably be vastly different in the two cases. The master's own premises are under his control: if they are dangerously in need of repair he can and must rectify the fault at once if he is to escape the censure of negligence. But if a master sends his plumber to mend a leak in a respectable private house, no one could hold him negligent for not visiting the house himself to see if the carpet in the hall creates a trap. Between these extremes are countless possible examples in which the court may have to decide the question of fact: Did the master take reasonable care so to carry out his operations as not to subject those employed by him to unnecessary risk? Precautions dictated by reasonable care when the servant works on the master's premises may be wholly prevented or greatly circumscribed by the fact that the place of work is under the

control of a stranger. Additional safeguards intended to reinforce the man's own knowledge and skill in surmounting difficulties or dangers may be reasonable in the former case but impracticable and unreasonable in the latter. So viewed, the question whether the master was in control of the premises ceases to be a matter of technicality and becomes merely one of the ingredients, albeit a very important one, in a consideration of the question of fact whether, in all the circumstances, the master took reasonable care.

29. Parker L.J. concurred with these words at pages 123 - 124:

I think that this case is a very good example of the difficulties that one gets into in treating the duty owed at common law by a master to his servant as a number of separate duties. Thus, it is often said (as it is said in this case) that the master owes a duty to make the place of employment as safe as reasonable skill and care will permit. Again, it is said that it is the master's duty to make the plant and tools as safe as reasonable skill and care will permit; and again it is said that it is the master's duty to devise and lay down a safe system of working.

Approached in that way, questions at once arise as to whether, and if so to what extent, any of those duties extend (in the case of premises) to premises not occupied or controlled by the master, or (in the case of plant and tools) to plant and tools bought from responsible and reputable suppliers or manufacturers - bearing in mind, as has been laid down so often, that in each case the duty is a duty personal to the employer, in the sense used in Wilsons' case. It is no doubt convenient, when one is dealing with any particular case, to divide that duty into a number of categories; but for myself I prefer to consider the master's duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men, or, as Lord Herschell said in the well-known passage in Smith v. Baker & Sons, to take reasonable care so to carry out his operation as not to subject those employed by him to unnecessary risk.

That general duty applies in the circumstances of every case; but the governing words "reasonable care" limit the extent of the duty in the circumstances of each case. Accordingly, the duty is there, whether the premises on which the workman is employed are in the occupation of the master or of a third party, or whether the tool has been made to the order of the master or his manager, servant or agent, or is a standard tool supplied and manufactured by reputable third parties; but what

reasonable care demands in each case will no doubt vary.

30. These passages are predicated on the evidential foundation that the workman in question was in charge of the operation that led to his injury and was so knowledgeable about his field that he needed no instruction. As I shall show, that is not the position here. Mr. Roberts was not in charge of the operation that led to his injury. Thus, although there is legal support for Mr. Dunkley's position, regrettably the evidence base on which the law would stand does not exist.

The evidence

31. The claimant's case was quite a simple one. He was assisting in refilling a fire extinguisher cylinder and it exploded. The explosion resulted in the injuries referred to earlier. He said that he was never told that he should not refill the cylinders. Indeed he specifically asserted that on the day in question he was told by Mr. McMillan that he should assist in filling cylinders. I accept his evidence on this point because it is the only credible evidence explaining how Mr. Roberts came to be in the room where the cylinder exploded.

32. It is common ground that Mr. Roberts was employed by Evans Safety to improve safety standards. He had extensive experience in fire safety and even had special training. There is no doubt that he was well qualified for his job. However, he testified that although he was employed as a supervisor and had the title, he did not in fact function in that capacity. He said that his authority was never firmly established. According to Mr. Roberts, the men in the service department never accepted his authority and he therefore spent the time inside the office viewing fire training videos.

33. He added that when he was employed to Evans Safety, no one took him around the service department. He did not receive any manual or booklet indicating the safety standards of Evans Safety. He said that no service manual was provided for the particular cylinder.

34. I accept Mr. Roberts' evidence that he was really a glorified workman with no real authority over the other workmen. I accept his evidence that he was told to enter the room where the cylinder was. I also accept his evidence that Mr. Brown the other workman in the room was in charge of the operation that concerned the particular cylinder which exploded. Mr. Brown did not testify in this case. There is no evidence about the qualification, competence, experience or training of Mr. Brown. There is no evidence to contradict Mr. Roberts' evidence about what took place in the room. I find that Mr. Robert's had been quite credible. His account is internally consistent, coherent and logical. These are the reasons I accept his evidence.

35. When cross examined, Mr. Roberts' account of the accident was even clearer than his witness statement. He said that he was sent into the room where the extinguishers were to assist another worker who was dealing with those cylinders. Mr. Roberts agreed that he was employed as a supervisor and should have had authority over the workers generally and the worker who he was assisting on the day in question. He said, however, that the reality was that his authority was not accepted and he was a supervisor in name only. The fact which I accept is that Mr. Roberts did not exercise any supervision of the workmen at the company.

36. His supporting witness, Mr. McMillan, said that those cylinders were refilled by Evans Safety prior to that accident. It is common ground that the instructions on the cylinders were in Spanish.

37. Mr. Evans admitted that when new workers are employed the company did not sit them down or give them a manual to read. He said that Mr. Roberts came well qualified for his job. I gather that what Mr. Evans was really saying was that it was not necessary for the company to give Mr. Roberts any specific instruction about safety in general because by his experience and training he would have already known this. This is exactly what the law says the employer cannot do. There was an affirmative duty on the company to provide Mr. Roberts with specific instructions on its safety procedures and in particular, how to deal with cylinders with non-English instructions.

38. The defendant is alleging that they have never filled those cylinders and never gave instructions for that to happen. There is a conflict between Mr. Evans and Mr. McMillan on this issue. But it is not important for this case whether the cylinder in question was part of a group of cylinders which were recharged previously. The important issue is whether the exploding cylinder was being recharged on the day of the explosion. The evidence is incontrovertible that it was being recharged on the day Mr. Roberts was injured. The only remaining issue is the circumstances under which it was being recharged. I have accepted Mr. Roberts' version of events. The conclusion then is that Evans Safety breached its duty to Mr. Roberts to provide a safe system of work. That duty was breached when Mr. Roberts was asked by Mr. McMillan to go and assist with the filling of the cylinders. I find that he was assisting Mr. Brown and that Mr. Brown was the person in charge of the specific operation that led to the explosion. In the absence of evidence indicating Mr. Brown's experience and training it cannot be said that Evans Safety discharged its duty to Mr. Roberts. Also in failing to ensure that Mr. Roberts' authority was established Evans Safety created a state of affairs in which the workmen were left to their own devices. In light of Mr. Evan's admission that workmen are not specifically trained or instructed in safety procedures at the plant an accident such as that which occurred was always likely. The system of work was unsafe. For these reasons Evans Safety could not find a safe harbour in ***Wilson v Tyneside Window***

Cleaning Company. Mr. Roberts was injured by the breach of duty. I now go the assessment of damages.

Assessment of damages

39. Counsel for the claimant submitted that an award of $6,500,000.00 to $7,000,000.00 would be an appropriate award for pain, suffering and loss of amenities. This sum includes an award for handicap on the labour market. Dr. Marshall relied on ***Delmar Dixon v Jamaica Telephone Company*** SCCA No 15/91 (delivered June 7, 1994), ***Roy Reid v Forest Industries Co. Ltd*** Suit No. C.L. 1990/R 054 (delivered April 6, 2001). These cases, according to Dr. Marshall when updated using CPI for October 2005 (2419.8) produce a low of $5,038,334.00 for the former case and a high of $7,065,109.00 for the latter case.

40. Mr. Dunkley relied on ***Francis v Pagon*** Suit No. C.L. 1992/F 069 (delivered June 15, 1994), ***Powell v O'Meally*** Suit No. C.L. 1996/P 081 (delivered June 13, 1997). These cases when updated produced an award of approximately $1,000,000.00.

41. None of the cases cited was of much value. In the instant case there is no evidence of a fracture. The medical report speaks of a crush injury but there is no medical evidence before me that states that a crush injury necessarily results in a fracture. What the medical report said that Mr. Roberts suffered was a crush injury that necessitated skin flap and split skin graft to close the wound on his right thigh. In ***Dixon's*** case, the claimant had compound fractures of the right and left femurs, a valgus deformity of the right lower limb and 15% - 20% permanent partial disability of the right lower limb. In ***Roy Reid*** the claimant suffered, inter alia, a fracture of the distal 1/3 of the left femur, a fracture of the midshaft of the right tibia and fibula and a fracture of the left lateral malleolus. There was deformity of the left thigh. There was evidence of sexual dysfunction, depression, anxiety and phobic responses, negative self image and severe insomnia. In addition, the claimant was left with chronic ligament damage to the left ankle, inability to extend the right thumb, a severely swollen right leg and gross mal-alignment with exposure of the right tibia.

42. ***Powell's*** case, which was cited by Mr. Dunkley, involved a claimant with pain in right knee, abdomen and chest, severed ligamentum patella and shock. In ***Francis***, the claimant suffered from tender left lower thigh with movements diminished due to pain and a comminuted supra condylar fracture of the left femur.

43. The most useful case I have been able to find is ***Turner v Cigarette Company of Jamaica*** Suit No. C.L. 1982/T 106 (delivered September 20, 1991) (Khan's Volume 4 at page 73). The claimant there received a severe crush injury to left leg, which is the part of the body between the knee and the foot. He had pain which extended over a period of seven years. There was a five inch shortening of the leg. He lost 70% of his leg muscles and walked and threw his leg. He was unable to stand

for long periods, walk long distances, dance, play cricket and felt pain when he put pressure on his leg. He was awarded $250,000.00. The current value of this award using the CPI for October 2006 is $2,554,687.50. The injuries suffered by Mr. Roberts are nowhere near as severe. This means that there must be substantial reduction.

44. What the medical evidence is saying is that arising from the crush injury there was quite likely necrotic tissue, hence the three debridements. The wound was open and necessitated taking skin from other parts of the body to cover the wound. Although Mr. Roberts complained that he had a limp, the doctor found no objective evidence to support the evidence. The doctor, on examination of Mr. Roberts, did not find any noticeable limp. There was no obvious painful distress. This means that there was no objective evidence to support Mr. Roberts' complaint of pain when attempting to run. Significantly, there was no lower limb length discrepancy and no abnormality in the right hip. There was no neurological damage.

45. In the end, not wishing to trivialise Mr Roberts' injuries, but what his injuries have come down to was a serious initial injury (crush injury) which has resulted in chronic (long term) swelling of the right lower limb, particularly the right leg (the area between the knee and the ankle) and mild arthrofibrosis of the right knee which is not arthritis but scar tissue around the knee. It is this scar tissue that has reduced his ability to squat. He has the scarring of the right thigh.

46. I take into account the pain, suffering and loss of amenity. Mr. Roberts says that he cannot stand or walk for long periods. He says that he is unable to participate in sports. There was no development on this. Mr. Roberts also said that his marriage has collapsed but there is no evidence that this was caused by the injury. In my view an appropriate award would be $1,000,000.00.

47. There is a claim for loss of earning capacity. Dr. Marshall submitted that I should use the multiplier/multiplicand method in this particular case. I do not agree with him for the reasons stated in ***Ebanks v McClymont*** Claim No. 2172 of 2004 (delivered March 8, 2007) which need not be repeated here. The medical evidence does not indicate that Mr. Roberts is unable to work or will have to stop working well before the end of his working life. This is not the kind of case that would attract the multiplier/multiplicand method of assessing loss of earning capacity. The evidence is that Mr. Roberts was employed by Evans Safety after the accident until 2005 when Mr. Roberts alleges that he was dismissed after he filed this claim against the company.

48. Mr. Roberts is currently unemployed. He has had a few jobs. There is no evidence from Mr. Roberts or from the doctor that would suggest that his current unemployment has been the result of the impaired earning capacity though I accept that he would not be able to compete as well on the open labour market. There is no

evidence of efforts made to find jobs which could, in the absence of medical evidence, have provided a proper evidential basis that the loss of earning capacity has begun to make itself felt financially. I shall therefore make a lump sum award of $100,000.00. This sum does not attract any interest.

Conclusion

49. There was no claim for special damages because Mr. Roberts' medical bills were paid by the employer, except, he says, $83,150.00 which he claims are overdue bills at the University Hospital of the West Indies. There is no proof of this sum. Mr. Roberts did not mention it in witness statement or in oral evidence. There were no receipts. I would have expected receipts or some attempt at explaining their absence. This sum is not recoverable.

50. The award for pain, suffering and loss of amenities is $1,000,000.00 at 3% interest from the date of service of the writ to March 28, 2007. There is an award of $100,000.00 for loss of earning capacity with no interest.