In The Supreme Court of Bermuda

CIVIL JURISDICTION

2003 No. 54

BETWEEN:

ANTONIO MARQUES FAGUNDO

Plaintiff

-and-

ISLAND CLEANING SERVICES

Defendant

JUDGMENT

Date of hearing: October 13-16, 2009
Date of Judgment: October 30, 2009

Mr. Jai Pachai and Ms. Margaret Burgess-Howie,
Wakefield Quin, for the Plaintiff
Mr. Timothy Marshall and Mr. Kevin Taylor,
Marshall Diel & Myers, for the Defendant

Introductory

1. The Plaintiff is a Portuguese national born on January 3, 1943 who returned to Bermuda to re-join his Bermudian family from the Azores in or about 1998. He obtained employment with the Defendant as a full-time cleaner in 1999. He claims damages for personal injuries allegedly sustained on September 2, 2000 while he was engaged in the course of his employment. He contends the relevant accident was caused by the negligence of his employer.

2. The Plaintiff's Specially Indorsed Writ of Summons issued on February 7, 2003 initially asserted a claim for breach of the employer's common law duties of care and a claim for breach of statutory duty. The latter claim was sensibly abandoned at trial. The Defence was filed on or about March 7, 2003, and the Reply on October 20, 2003. Directions were ordered on May 6, 2004 by Consent for the trial of the action. However, on December 4, 2007, with the Plaintiff now represented by his current attorneys, a Re-amended Specially Indorsed Writ was issued. A Re-amended Defence was filed on December 17, 2007.

3. With the Defendant now represented by its current attorneys, further pre-trial directions were given on January 22, 2009. Expert evidence was limited to one medical witness and one expert as to cleaning methods per party, witness statements were ordered (pursuant to the new rules introduced in 2006 in this regard) and the matter was ordered to be set down for trial after May 1, 2009.

4. In the event, no expert evidence was adduced as to cleaning methods and only one medical witness was called by the Plaintiff. It was not disputed that the Plaintiff was before his employment nearly 100% disabled as regards to his right hand, and is now post-accident 60% permanently disabled in his left hand as well, his left wrist having been fused on or about February 23, 2006.

5. The principal disputes at trial centred on whether (a) the Defendant owed a contractual and/or tortious duty of care to have regard to the need for safety footwear, (b) whether the Defendant was in breach of any such duty, (c) whether any breach of duty by the Defendant caused the accident, (d) whether the Plaintiff contributed to his loss, and/or (e) whether the Plaintiff had taken adequate steps to mitigate his loss by seeking alternative employment after his injury.

The Pleadings

6. The Statement of Claim makes the following crucial averments which were set out in the Plaintiff's first pleading:

> "*4. It was an implied term of the Plaintiff's contract of employment that the Defendant would by its servants or agents, take all reasonable care to*

provide and/or maintain a reasonably safe system of work and effective supervision of the same.

5.On or about 2nd September 2000 when the Plaintiff was employed as aforesaid at M Soares and Sons Limited, the Plaintiff slipped on the said wax stripper and fell to the ground. As a result the Plaintiff has sustained injury loss and damage as hereafter appears.

6. The said accident was caused by the negligence and breach of duty of the Defendant, its servants or agents."

7. The pleading at first blush seems to blur the distinction between a claim in contract and in tort by alleging an implied contractual duty of care in paragraph 3 and simply referring to negligence-and not negligent breach of contract-in paragraph 5. However, having regard to the law and practice in relation to personal injury claims, the pleadings may be read as averring that it was a term of the contract of employment that the employer would exercise reasonable care for the employee's safety according to the principles delineated in the law of tort. After abandoning the plea that the Defendant was negligent by failing to provide appropriate training, supervision and/or machinery, the Statement of Claim as amended set out the following four particulars of negligence, only the first of which was new:

"*(ii) caused permitted or required the Plaintiff to carry out his duties of stripping wax without providing a safe system of work by*

(a)failing to show a greater duty of care to the Plaintiff knowing that he had a near 100% pre existing disability in his right hand thereby putting his left hand at greater risk of injury;

(b)unreasonably insisting that the Plaintiff provide his own protective clothing and footwear knowing that said footware [sic] *was not available on the Island and was as a matter of good practice provided by the Plaintiff's previous employer;*

(c)failing to provide sufficient number of employees to ensure the work was done safely;

(iii)caused permitted or required the Plaintiff to carry out his duties of stripping wax without providing any safe and/or protective clothing or footwear to be worn while using such wax stripper when they well knew or ought to have known of the dangers of using such wax stripper when not wearing such safe and/or protective clothing or footwear;

(iv)operated a system of work whereby the Defendant knew or ought to have known that the Plaintiff would have to walk on area of floor to which the wax stripper had been applied;

(iv)failed to heed and/or act upon prior warnings given to the Defendant by the plaintiff that the system of work was unsafe. "

8. Three crucial averments were set out in the original Defence:

> "*(3) The Defendant denies that it was negligent either as particularized in paragraph 6 of the Claim or at all save that it admits that it did not provide the Plaintiff with either protective clothing or appropriate footwear, both being matters that the Plaintiff understood and agreed were his personal responsibility.*
>
> *...*
>
> *(6) The proper method to remove all the wax from a floor and then to re-wax it requires the following successive steps:*
>
> > *(a) Application of a diluted solution of the stripper liberally on the floor using a mop and a bucket...*
>
> *(8) The Defendant states that if the Plaintiff fell, it was while applying the stripper, being step a) of paragraph 6 above, and that such was caused or contributed to by his own negligence.*"

9. The Defendant relied on four particulars of negligence, the third of which was added by way of amendment:

> "*a) He failed to follow the correct method of applying, scrubbing, and removing the stripper.*
>
> *b) He failed to follow the directions given by BETCO Corporation for the use of the stripper.*
>
> *c) He failed to keep from walking on that part of the floor where the stripper had already been applied by him.*
>
> *d) He failed to exercise care when walking on the floor well knowing that it was slippery.*"

10. The Defendant deleted the following averment from its original particulars of negligence: "*He failed to wear appropriate shoes or boots for the task.*"

Legal and factual findings: is the Plaintiff contractually debarred from asserting a negligent breach of contract claim based on the Defendant's failure to provide safety boots?

11. The Plaintiff was employed under two standard written contracts which specified his basic hours of work as 40 hours per week, his pay as $12 per hour for regular work and overtime, his holiday entitlement as 10 days plus public holidays and also prescribed the statutory deductions from his gross pay. The first contract was a two year contract commencing April 23, 1999, and the second was a one year contract commencing April 23, 2001. The first contract described his position as a supervisor whilst the second described his position as a "full-time cleaner".

12. There was no express written contractual requirement for the Plaintiff to purchase his own footwear for use at work. However, I accept Mr. Thompson's evidence as the ultimate beneficial owner and manager of the Defendant that the practice of the company was that staff selected and purchased their own footwear. The Plaintiff accepts that he understood and accepted this position in general terms. I find that there was a contractual agreement that it was the Plaintiff's obligation to select and purchase his own work shoes.

13. Although under cross-examination Mr. Thomson was obliged to justify why the Defendant did not consider it necessary to purchase protective footwear for use by employees such as the Plaintiff when stripping floors, in paragraph 19 of his Witness Statement he deposed as follows:

> "*...I can say without hesitation that had Mr. Fagundo or any other employee requested a pair of stripping shoes they would have been provided. He certainly never told me he wanted the shoes or had any concern about the shoes he chose to wore.*"

14. This assertion was confirmed by the Defendant's former Operations Manager, John Ferreira, but neither witness appeared to suggest that it was a term of the Plaintiff's contract that if he wished protective footwear he had to request his employer to purchase it for him. How the Plaintiff would have been aware of any such peculiar contractual term is unclear as the Defendant's case is that he never made any such request. Nor did the Defendant suggest that it was an overtly established practice for employees to request the company to purchase safety footwear for them, a practice of which the Plaintiff must be deemed to have been aware. The Defendant's pleaded case is not that protective footwear was not provided because he did not request it but that this was a matter which "*the Plaintiff understood and agreed* [was] *his personal responsibility*" (Amended Defence, paragraph (3). The Plaintiff's evidence is that when he and others suggested protective shoes should be supplied, Mr. Ferreira rebuffed the proposition.

15. Accordingly, I find that the parties agreed that the Plaintiff was responsible for purchasing his own work shoes. Is the Court entitled to go further and find that (by necessary implication) both (a) the Plaintiff was obliged to determine what type of footwear was appropriate, and (b) if the Plaintiff wished use protective shoes, he was contractually required to either purchase them himself or request the Defendant to purchase the special footwear for him? The Defendant accepts that it gave no directives as to what footwear was appropriate for wax-stripping work, but can point to no explicit written or oral statements made when contracting with the Plaintiff which would justify the implication of these additional terms. On the face of it, it does not seem obvious that that the contract would be unworkable unless such terms were implied. Nor indeed does the mere fact that protective footwear was not supplied by the employer make it obvious that the parties agreed more than that the Plaintiff was required to purchase his own working shoes and free (in the absence of specific directions from the employer) to choose what type of footwear to wear.

16. Yet Mr. Marshall for the Defendant invited the Court to find, in effect, that these nebulous unwritten terms should be construed by necessary implication as excluding any tortious liability that the Defendant might otherwise have for failing to exercise reasonable care for the Plaintiff's safety in relation to the entire footwear issue. The legal foundation for the proposition that tortious liability cannot be asserted to an extent which is inconsistent with an applicable contract is generally sound, but must be modified in the personal injuries context. Counsel supported this proposition with reference to the speech of Lord Goff in *Henderson –v-Merrett Syndicates Ltd.* [1995] 2 A.C. 145 at page 191, where he approved the following dictum of Dain J in the Canadian Supreme Court decision of *Central Trust Co –v- Rafuse* (1986) 31 DLR (4^{th}) 481 at 522:

> "*A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence.*"

17. The above passage was the third of five conclusions reached by Dain J. The second conclusory legal finding was the following statement of principle:

> "*What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of*

care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract."[1]

18. According to this *dictum*, tortious liability is only excluded by express and not implied co-extensive terms relating to the scope of the duty of care. The Plaintiff's claim presupposes no distinction between the implied contractual duty of care owed by the Defendant and the common law duty of care owed in tort. The Defendant contends that the implied contractual duty of care assumed by the employer in the present case has limited-and thus excluded-the usual common law duty of care in tort. The Supreme Court of Canada in *Central Trust Co –v- Rafuse*, a mortgage case, considered the then recent Privy Council decision in *Tai Hing Cotton Mill Ltd-v- Liu Ching Hong Bank Ltd.* [1986] A.C. 80, which the Defendant's counsel relied upon as binding on this Court. In the latter case, Lord Scarman, delivering the advice of the Board, crucially held as follows[2]:

"*Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action. Their Lordships respectfully agree with some wise words of Lord Radcliffe in his dissenting speech in Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] A.C. 555. After indicating that there are*

[1] At pages 521-522.
[2] At page 107.

cases in which a duty arising out of the relationship between employer and employee could be analysed as contractual or tortious Lord Radcliffe said, at p. 587:

> *'Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.'*

Their Lordships do not, therefore, embark on an investigation as to whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract."

19. This passage was approved by the Court of Appeal for Bermuda at page 6 of the judgment of Acting President Harvey da Costa in *White-v- Conyers Dill & Pearman* [1994] Bda LR 9, in relation to a solicitor and client relationship. I accept, subject to one important qualification[3], Mr. Marshall's submission that this principle is of general application and applies to all employment contexts, not simply commercial relationships. It will generally be a question of fact to be determined in individual cases whether the parties have contractually agreed to limit the tortious duty of care which exists either by virtue of or independently of the relevant contractual arrangements. Where there are no applicable express contractual terms, the implication of terms becomes a question of mixed fact and law.

20. The principles applicable to the implication of contractual terms, which I take to be uncontroversial, have been summarised by Richard Ground CJ in *Jupiter Asset Management-v- The Asset Management Group* [2005] Bda LR 1 as follows:

"*I take the law on this from Chitty on Contracts, 29th ed., vol. 1 and para 13–004.*

> *'Intention of Parties. In many cases, however, one or other of the parties will seek to imply a term from the wording of a particular contract and the*

[3] See paragraphs 24-27 below.

facts and circumstances surrounding it. The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and, secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria often overlap and, in many cases, have been applied cumulatively, although it is submitted that they are, in fact, alternative grounds. Both, however, depend on the presumed intention of the parties.'

Applying that to the circumstances of this case, it is not necessary to give business efficacy to this contract to imply the term sought. Looked at objectively the Loan Notes work perfectly well without the implied term. Even in the context of the shares for Notes swap, the Notes are effective without such an implied term, and the fact that they may confer a greater benefit on one side as against the other, does not render them any the less so.

Nor is the term sought to be implied so obvious that it goes without saying. I am not in any way satisfied that if it had been raised in negotiations that both parties would have agreed to it. Indeed, had an officious bystander raised the point, I have little doubt that the parties would have answered his interference quite differently.

Finally, on the question the implication of a term, I note the following observation by the learned authors of Chitty *(*supra*) at 13–007:*

'... in particular [the courts] will be reluctant to make any implication 'where the parties have entered into a carefully drafted written contract containing the detailed terms agreed between them.''

21. Terms may be implied into a contract either as a matter of business efficacy or as a matter of reflecting what the parties obviously must have agreed to. So it *is* obvious from the agreed fact that the Plaintiff was not supplied with working shoes by the Defendant, that the parties would had they directed their minds to it, have agreed that this was the Plaintiff's responsibility. It is not obvious, even though the parties did not contract on the basis of a comprehensive written document that the parties would have agreed that the Plaintiff as employee should assume sole responsibility for determining what footwear was required for potentially hazardous work and was bound to either (a) demand that the Defendant purchase appropriate special footwear whenever such special equipment was required, or (b) acquire the special footwear himself. The crucial test for implying an agreement that would limit the employer's liability in this way is therefore the business efficacy rule although as a subsidiary matter, a term ought not to be implied unless "*it is in all the circumstances equitable and reasonable*": '*Chitty on Contracts*', 29th edition, Volume 1, paragraph 13-009.

22. It is true that the Plaintiff, a moderately competent but less than fluent English speaker appeared to agree in cross-examination that he understood it to be his responsibility to determine what footwear was appropriate for particular jobs. But the evidence fell short of an express agreement to limit the Defendant's duty to exercise care for the Plaintiff's safety in this regard. The Plaintiff's evidence most clearly indicated that he understood that the Defendant did not supply safety shoes as a matter of course as did his previous Bermuda employer, Marshall's Maintenance, and agreed to work on this basis nonetheless. Neither Mr. Thompson nor Mr. Ferreira suggested in their Witness Statements or oral evidence, that an express oral agreement was reached with the Plaintiff that his employer would be exempted from any liability in respect of the footwear issue. So the standard test for the implication of terms is still engaged.

23. Applying the business efficacy rule to the present case, it is not seriously arguable that the relevant contract of employment would have been rendered unworkable without the implication of the limitation of liability contended for by the Defendant. The law ordinarily implies into contracts of employment "*the duty of the employer to each of his employees to take reasonable care to see that the plant, tools, equipment, premises and system of work used in his business are safe*" : *Chitty*, Volume 1, paragraph 39-098[4]. Absent express agreement or highly unusual circumstances surrounding a contract (for instance where an employee is paid 'danger money'), it will not be open to a court to imply as equitable, reasonable and necessary for the efficacy of an employment contract a term which displaces the standard implied terms as to the employer's duty of care for his employees' safety. No or no sufficient evidential basis exists in the present case supporting the implication of the term contended for by the Defendant and Mr. Marshall's submissions that the claim should be dismissed on this basis are rejected, even assuming the duty of care to be a wholly contractual one.

[4] There is of course a corresponding implied term that the employee will exercise reasonable care for his own safety: *Chitty*, paragraph 39-06.

24. But counsel was unable to adduce any authority illustrating the application of the 'contract not tort' principle in the context of a personal injury claim by an employee against his employer. This is doubtless because the prevailing view appears to be that the law of tort ultimately governs the scope of the employer's duty of care for his employee's safety, even if the duty is incorporated by implication into the contractual relationship. According to *Chitty*[5]:

> "*Although there may be differences between the relevant rules of tort and contract, it seems to be assumed by the courts and the profession that the rules to be applied when an employee brings an action against an employer for personal injuries suffered by the former in the course of his employment are the rules of tort. This may perhaps be justified on the basis that there is an implied term in the contract of employment to the effect that if the employee suffers personal injury as the result of a breach of tortious or statutory duty of the employer, the liability of the employer and the remedy of the employee are to depend on the rules of tort.*"

25. So personal injuries claims against employers are a special exception to the general rule that where parties have entered into a contractual relationship, the law of contract rather than the law of tort governs all rights and obligations between them. The contractual rules relating to the implication of terms into a contract still apply when considering whether or not the parties agreed that the Plaintiff would be solely responsible for deciding what footwear was required in the course of his employment. But the implication question must in the present context be analysed not in a vacuum, but from the starting point that the parties are assumed to have agreed as a standard implied term of the employment contract that the employer owes a tortious duty of care in respect of the employee's safety at work. The crucial question is whether there are grounds for implying an agreement to limit that duty of care, in the present case, on terms that the employee would assume full responsibility for determining what footwear was safe for the various tasks he was required to perform. As has already been noted above, unusual circumstances would be required to justify the implication of what amounts to an exemption clause, absent an express agreement. And where the contract is partially evidenced by writing, such an agreement would be so exceptional that one would expect to see it recorded in writing.

26. Further and in any event, this common law rule has been affirmed, albeit in non-actionable terms, by Parliament. Section 3(1) of the Occupational Health and Safety at Work Act 1982 provides as follows:

> "*It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.*"

[5] Volume 1, paragraph 39-101.

27. Section 22 of the 1982 Act states that breaches of the general duties set out in , *inter alia*, section 3 shall not be actionable, without prejudice to existing (i.e. common law) remedies. Breaches of regulations made under the Act are actionable, and any clauses purporting to contract out of such Regulations will be void[6]. By necessary implication, therefore, section 22 permits the parties to an employment contract to contract out of the general duties imposed on employers by section 3 and other related provisions in the Act. Although the duty created by section 3 of the 1982 Act is not actionable, it is certainly arguable that to contractually displace the common law equivalent of these statutory rules, an express exemption clause should ordinarily be required. At the very least, it must be clear as a matter of inference that the employer and employee must have agreed to exempt the employer from the standard duty of care either wholly or to a limited extent. In the present case there was no express written or oral exemption or limitation of liability agreement, nor is there any reasonable basis for concluding that the parties must by necessary implication be deemed to have reached any such agreement.

Legal and factual findings: did the Defendant's duty of care regarding employee safety include a duty to have regard to appropriate footwear?

28. To my mind it is obvious that the Defendant as a company in the cleaning business owed a general duty, as part of the umbrella duty to provide a safe place of work, system of work and safe equipment, to have regard to what footwear was required for potentially hazardous work and to direct employees to wear appropriate footwear for any tasks where special protection was required.

29. The precise scope of this general duty is less clear, but for present purposes the work in question most importantly involved stripping polish off polished floors using a bucket and mop and a highly corrosive fluid, scrubbing the floors with a machine, and applying new wax by means which were not in issue at trial. It is common ground that rubber soles must be worn to protect the soles of one's feet from the corrosive effects of the stripping fluid, However, it is disputed that the risk of slipping when walking on the freshly applied 'stripper' is sufficiently great, assuming employees carry out the relevant task in an efficient and safe manner, to justify mandating footwear with special grip. The Plaintiff's claim centrally depends upon the assertion that the Defendant owed him a duty to supply safety boots or shoes to eliminate or reduce the risk of his slipping while carrying out his stripping duties, as he contends occurred on September 2, 2000. It also relies on the narrower point that a higher standard of care was owed to him than to other employees, because his near 100% right hand disability made the consequences of any injury to his left hand particularly grave. This subsidiary point can most conveniently be dealt with first, as it shapes the Court's approach

[6] No Regulations had, as of the date of the trial, yet been introduced. However, it is believed that Regulations may have been made since, although they have no relevance to the present case.

to the central issue of whether or not the duty of care contended for may be found to have existed.

30. It was common ground that the extent of an employer's duty of care falls to be defined with reference to the individual characteristics of the claimant employee. The Plaintiff contended that the scope of the Defendant's duty of care to him was enlarged because the consequences of any injury to his one functional left hand were graver than would be the case for the average employee with two functional hands. Mr. Pachai relied in particular on the House of Lords decision in *Paris-v-Stepney* [1951] 1 All ER 42. The Defendant contended that the duty of care owed to the Plaintiff should be diminished because of the substantial experience possessed by the Plaintiff relevant to the work he was required to do. Mr. Marshall relied heavily on the House of Lords decision in *Qualcast (Wolverhampton) Ltd.-v- Haynes* [1959] A.C. 743.

31. The *Qualcast* case supports the principle relied upon by the Defendant's counsel but also emphasises the broader point that decided cases rarely serve as precedents. The question as to whether or not a duty of care exists and has been broken is essentially a question of fact. I accept, as Lord Radcliffe noted[7], that "*an experienced workman dealing with a familiar and obvious risk may not reasonably need the same attention or the same precautions as an inexperienced man who is likely to be more receptive of advice or admonition. Here, no doubt, the question of delimiting the duty merges with the question of causation.*" However, the central holding in this case, where a workman spilt molten metal on his foot while not wearing protective spats, was that the employer's common law duty was discharged by making the protective footwear available. No additional duty was owed to an experienced workman to insist that he wore the protective spats. So this case also illustrates the fact that in appropriate circumstances the employer's duty of care to an experienced workman may require safety equipment to be made available, even if the employee may elect not to use the equipment.

32. The *Paris* case also supports the proposition for which it was cited by the Plaintiff's counsel. The central decision was that although there was no convincing evidence of industry practice with respect to the wearing of goggles, because the consequences of injury to a man with one eye were so severe, a reasonable employer would have supplied goggles to this particular employee. As Lord Oaksey observed[8]:

> "*The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case. The fact that the servant has only one eye, if that fact is known to the employer, and that, if he loses it he will be blind, is one of the*

[7] At page 754.
[8] [1951] 1 All ER 42 at pages 50-51.

circumstances which must be considered by the employer in determining what precautions, if any, shall be taken for the servant's safety. The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances. As the circumstances may vary infinitely it is often impossible to adduce evidence of what care an ordinarily prudent employer would take. In some cases, of course, it is possible to prove that it is the ordinary practice for employers to take or not to take a certain precaution, but in such a case as the present where a one-eyed man has been injured it is unlikely that such evidence can be adduced. The court has, therefore, to form its own opinion of what precautions the notional ordinarily prudent employer would take. In the present case the question is whether an ordinarily prudent employer would supply goggles to a one-eyed workman whose job was to knock bolts out of a chassis with a steel hammer while the chassis was elevated on a ramp so that the workman's eye was close to and under the bolt. In my opinion, Lynskey J was entitled to hold that an ordinarily prudent employer would take that precaution. The question was not whether the precaution ought to have been taken with ordinary two-eyed workmen and it was not necessary, in my opinion, that Lynskey J should decide that question- nor did he purport to decide it, although it is true that he stated the question in one sentence too broadly. **The risk of splinters of steel breaking off a bolt and injuring a workman's eye or eyes may be, and I think is, slight, and it is true that the damage to a two-eyed workman if struck by a splinter in the eye or eyes may be serious, but it is for the judge at the trial to weigh up the risk of injury and the extent of the damage and to decide whether, in all the circumstances including the fact that the workman was known to be one-eyed and might become a blind man if his eye was struck, an ordinarily prudent employer would supply such a workman with goggles. It is a simple and inexpensive precaution to take to supply goggles and a one-eyed man would not be likely, as a two-eyed man might be, to refuse to wear the goggles**. *Lynskey J appears to me to have weighed the extent of the risk and of the damage to a one-eyed man, and I am of opinion that his judgment should be restored.*" [emphasis added]

33. The quoted passage illustrates that even where the risk of serious injury is "slight", a Court may fairly concluded that protection should be afforded to a vulnerable employee who would be completely incapacitated in the unlikely event that injury occurred. In the present case the risk of serious injury to an ordinary cleaner might be characterised as "slight" for two reasons.

34. Firstly, in the best of all possible worlds, a cleaner carrying on stripping work would never walk on freshly applied stripper at all. Slipping is not a risk which is specifically warned against by the manufacturer on the container which contains

the relevant fluid, with boots arguably being suggested merely to avoid contact with the corrosive stripper fluid. However, I accept Mr. Bento's oral evidence that irrespective of how this type of work might theoretically be carried out, persons doing stripping work will occasionally walk on floors which are slippery because the stripper has not yet been scrubbed and dried. In his witness statement he stated that it is possible undiluted stripper is applied to floors, contrary to the recommended practice as well. Safety shoes with special soles which have to be ordered from abroad are accordingly supplied to workers to minimize the risk of slipping. This is the practice which both his current company, Assured Quality Cleaning Ltd., follows and his former employer Marshall's follows as well. Mr. Bento's current company also encouraged workers to wear gloves to protect their hands from possible contact with the corrosive fluid.

35. In his evidence-in-chief Mr. Bento testified that the most common reason for a cleaner walking on freshly applied and still slippery stripping fluid was due the uneven nature of many Bermudian floors which resulted in fluid running off and what appeared to be 'missed spots'. In addition during the scrubbing process, the machine would often miss corners meaning that these would have to be done by hand. As long as the loosened wax had not re-hardened, the floor would still be slippery. If you waited for the scrubbed wax to dry, you would have to start the whole process over again. He said under cross-examination that at Marshall's and at his current company, it was impossible to avoid walking over freshly applied stripper. He accepted that one could theoretically wait 10 or so minutes until the old wax was scrubbed to go back and do missed spots, but insisted that no company in Bermuda actually did this. Bento's evidence is to some extent supported the fact that a company called Jordan David apparently markets boots to workers doing stripping work using the colourful slogan: "Strip Safer with Grippers for Strippers". So the risk of slipping may be slight, but it is clearly foreseeable.

36. Secondly, the risk of serious injury from any slip may also be said to be slight, in the case of the average able-bodied employee. One can envisage numerous slips and falls which might result in no or serious injury at all. Indeed, the medical evidence in the present case reveals that the Plaintiff did not suffer any broken bones, and became 60% disabled because of a progressive degeneration of the muscles of the wrist area. But the Plaintiff was not an average employee.

37. It is unclear to what extent, if at all, his age (57 at the time of the accident) or the fact that his right hand is nearly 100% disabled contributed to the severity of his injury. But it seems self-evident that (a) the Plaintiff would be more likely to break any fall with his left hand rather than both hands (increasing the risk of a more severe injury to the one functional hand), (b) that his recovery prospects from any severe injury would be less than those of a younger man, and that (c) the impact of serious injury to the Plaintiff's one fully functional hand would potentially render him unfit for manual work. A reasonable employer aware of

such heightened risks would not, in my judgment, leave it entirely to an employee in the Plaintiff's position to either demand safety footwear or to purchase such safety equipment himself. I make no findings as to whether or not the Defendant's Mr. Ferreira received and ignored previous warnings (from the Plaintiff's brother-in-law and the Plaintiff himself) as the evidence on both sides was not wholly convincing. One incident involving stripping wax relied on the evidence of the Plaintiff's brother-in-law; the other did not involve stripping wax at all. The Plaintiff and Mr. Ferreira did not appear to like one another and at least one major row after the accident. The previous warnings issue was not to my mind pivotal at all in any event.

38. Having regard to all of this evidence, I find that the Defendant did owe the Plaintiff a duty of care to supply safety shoes with special soles designed to reduce the risk of slipping, similar to the shoes introduced into evidence as Plaintiff's Exhibit 1 to the Plaintiff. It was not reasonable in all the circumstances for the Defendant to (a) leave it to the Plaintiff's judgment as an experienced worker to demand protective footwear, or (b) to leave it to the Plaintiff as an experienced workman to establish his own policy of never walking on the freshly applied and slippery stripper, irrespective of what the time and costs consequences for his employer might be. The fact that he was experienced and was doing highly repetitive work over extremely long hours increased the risk of that the Plaintiff would be careless or take short cuts which might result in his being injured. Moreover, the idea that the Plaintiff as a comparatively vulnerable apparently non-unionized work-permit holder should be viewed by virtue of his experience as easily able to make safety demands of his employer seems highly artificial having regard to the obvious disparities in power between him and the Bermudian principal of his employing company.

39. As Lord Oaksey observed in his speech in the House of Lords decision in *General Cleaning Contractors Ltd. –v- Christmas* [1952] 2 All ER 1110, upon which Mr. Pachai effusively relied:

> "*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."[9]

Was the accident caused by the Defendant's negligent breach of duty?

40. The issue of causation is the most difficult factual issue because the only direct evidence about the accident comes from the Plaintiff himself, and it appears that his first witness statement was made on April 16, 2008, almost 8 years after the accident. The earliest written articulation of his case was the Statement of Claim indorsed on the Writ some three years after the accident.

41. I was easily satisfied that the Plaintiff was injured on or about September 2, 2000 while in the employ of the Defendant. His assertions as to where and when the accident occurred were not positively challenged. The fact that he made no immediate report of the accident and continued working for several days before he eventually visited the doctor is consistent with the nature of his injuries as described by Dr. Froncioni and the documentary medical evidence. It also consistent with the type of work that the Plaintiff did and his apparent reliance on regular overtime pay, that he would not take time off work unless and until he was suffering extreme discomfort.

42. The Plaintiff described the accident in paragraph 9 of his first Witness Statement as follows:

> "*Because of the lack of safety shoes, and the slippery conditions, I learned that it was safer to do part only at a time. After I had spread the chemical on the one part of the floor, I looked back and saw an area in the corner that had been missed. I walked back to mop it and when I turned around to grab the bucket and leave that area I slipped on the floor. Thinking that I might bang my head against the bucket, I instinctively tried to break the fall with my left hand and landed on my left hand….*"

43. He stated that no one else saw the fall, and that he carried on working that day and subsequently until the pain did not subside and on September 12, 2000, he visited a doctor. He elaborated upon how the accident happened in his second Witness Statement, and was broadly consistent in explaining what happened under cross-examination. He denied that walking over the freshly applied stripper to re-do a missed spot was the last thing that he should have done and insisted that wearing safety shoes would have reduced the chances of his slipping, even if he slipped in part because he lost his balance (as he described in his second Witness Statement made shortly before the trial).

[9]Page 1114 ; [1953] AC 180 at 189-190.

44. The Plaintiff was a very emotional and argumentative witness, who was not credible on all issues. For instance, it had initially been asserted as part of his claim that the stripping fluid should have been applied by a machine instead of by bucket and mop, a complaint which was abandoned at trial. This complaint was made in both the initial and the Amended Statement of Claim and in Mr. Bento's Witness Statement dated August 31, 2006. Under cross-examination, Mr. Bento satisfactorily explained that in exceptional cases stripper might be applied using a machine with a pouch. The Plaintiff did not satisfactorily explain why he had authorised his former attorneys to assert a claim that the Defendant had failed to use appropriate machinery for applying the stripping fluid. As far as the Plaintiff is concerned, his ability to speak and read English is not good and it is possible that the machine issue was pleaded as a result of a genuine misunderstanding on his former lawyer's part. His own Witness Statement accepted that the fluid was ordinarily applied with a bucket and mop, both at Marshall's and at the Defendant's. As far as paragraph 7 c) of Mr. Bento's statement is concerned, which is the sole reference to "*apply*[ing] *the diluted solution by the pouch on the machine*", I find that this portion was included in his Witness Statement as a passing reference only, and not as a central part of his evidence. There is nothing in the rest of the Statement which suggests that Mr. Bento intended to positively assert that the stripping fluid (as opposed to the scrubbing fluid) ought to have been applied by a machine in the circumstances of the present case. So, on balance, I did not find that the Plaintiff had changed his story in any material way.

45. The weight of the Plaintiff's evidence was generally weakened by the absence of any comprehensive early account of how the accident occurred. However, it does not lie in the Defendant's mouth to complain if they did not obtain and record his account of what happened as soon as the first sick note was received from Dr. Chelvam on or about September 19, 2000. The advisory Occupational Health and Safety (Approved Code of Practice) Notice 1997 suggests a Health and Safety Committee for all places of work with more than five employees. This Committee should not only carry out risk assessments but also carry out in-house investigations, including "*recording and checking statements of witnesses*". So it was really for the Defendant to record a statement from the Plaintiff as soon as it learned that he had been injured at work.

46. Dr. Sherwin in addition to providing a sick note on September 19, 2000 also wrote a referral letter to Dr. Chelvam. The consultant orthopaedic surgeon on September 29, 2000 following negative X-ray results indicated that an injection had reduced pain but suggested that excision of a joint might be required. The earliest recorded description of the accident appears to be the notes of Dr. Chelvam dated October 30, 2000 by which time an MRI was being considered:

> "*6/52 ago pt was at work & he injured (L) wrist.*
> *P slipped & fell-tried to block his fall usin [sic] (L) hand kept working-altho' was getting [sic] some pain…*"

47. This patient history obviously derived from what the Plaintiff himself reported is consistent with the core story told by the Plaintiff in his Witness Statement and trial, albeit in abbreviated form. Although the history suggests that the accident took place six weeks before October 30, 2000, the Plaintiff's account of when he contends the accident occurs was not directly challenged at trial. The six weeks coincides with the date when Dr. Sherwin initially referred the Plaintiff to Dr. Chelvam, so it is entirely possible that this was a mistake on the consultant's part. The merits of the claim are not affected by the precise date of the accident in any event.

48. Has the Plaintiff proved that the Defendant's breach of duty caused the accident and his resultant injuries? It appeared to be common ground that the established principles governing the causation of loss were to be applied. May LJ in the English Court of Appeal has recently summarised those principles as follows:

> "*In the context of causation, the two words "but for" are shorthand. They encapsulate a principle understood by lawyers, but applied literally, or as if the two words embody the entire principle, the words can mislead. They may convey the impression that the claimant's claim for damages for personal injuries must fail unless he can prove that the defendant's negligence was the only, or the single, or even, chronologically the last cause of his injuries. The authorities demonstrate that such an impression would be incorrect. The claimant is required to establish a causal link between the negligence of the defendant and his injuries, or, in short, that his injuries were indeed consequent on the negligence.* **Although, on its own it is not enough for him to show that the defendant created an increased risk of injury, the necessary causal link would be established if, as a matter of inference from the evidence, the defendant's negligence made a material contribution to the claimant's injuries**. *As Lord Rodger explained and demonstrated in Fairchild, there was "nothing new" in Lord Reid's comment in Bonnington that what was required was for the plaintiff to make it appear at least "that, on a balance of probabilities, a breach of duty caused, or materially contributed to his injury". Lord Rodger observed that there was ample authority for the proposition in English and Scots law, both before and after Lord Reid had, in effect, treated it as so elementary that it required no support from authority.*" [10] [emphasis added]

49. It is not enough for the Plaintiff to satisfy the Court that the Defendant's failure to make the safety shoes available increased the risk of his slipping and being injured. Breach of a duty of care without proof of causation of loss does not make out a valid claim. This was not a case where it inevitably flowed from the finding that a duty of care existed and was breached that the relevant breach caused the loss complained of. This is because the Defendant joined issue with the Plaintiff

[10] *Ellis-v-Environment Agency* [2008] EWCA 1117, Transcript, page 8.

on whether or not wearing protective shoes would have made any difference and no expert evidence was adduced on either side on the question of causation.

50. Mr. Thompson carried out his own trial of the difference in terms of grip between safety boots and ordinary sports shoes (of a kind worn by the Plaintiff and his co-workers) and claimed that there was little difference. The Plaintiff was adamant that if he had been wearing appropriate footwear, he would not have slipped. Neither of these opinions, if strictly admissible at all, carried very much evidential weight, emanating as they do from the two most partisan witnesses in the present case. However, I did accept part of Mr. Thompson's evidence, which was supported to some extent by Mr. Bento, that unless the safety boots are cleaned regularly, walking on scrubbed and stripped polish will make their soles smooth and all but eliminate their grip. But this point was advanced with a view to justifying not supplying boots at all, and has little relevance in terms of identifying a causative link between the failure of the Defendant to supply special footwear and the accident which occurred. In this context, in my judgment, the crucial question is whether the failure to supply the safety footwear (assuming they would have been worn and properly maintained) was-as a matter of inference- a material cause of the accident.

51. Mr. Bento testified under cross-examination irrespective of what footwear one wore, there was always risk. What the cleaning companies he worked for did was to try to minimize the risk. He did not seek to make the exaggerated claim that there was no risk of slipping whatsoever if the safety shoes were worn. This measured testimony combined with the fact that Marshall's and Mr. Bento's current company have taken the trouble to import special footwear for workers doing stripping work I find is just enough to support the inference that the Defendant's breach of duty (by failing to supply such equipment) was a material cause of the accident. I find that the Plaintiff slipped while carrying out a routine task in a permitted manner and that had the defendant supplied shoes this would have materially reduced the risk of his slipping, even though I am unable to find that, in literal terms, but for the breach of duty complained of, the accident would not have occurred.

52. I also reject the submission that since the warnings on the stripping fluid container (Defendant's Exhibit 1) do not mention slipping as a hazard, this suggests that walking on the freshly applied stripping fluid was something which the Plaintiff ought never to have done. This argument might have had some relevance if the Defendant's case was that what the Plaintiff did was explicitly forbidden. Neither Mr. Thompson nor Mr. Ferreira (the Plaintiff's supervisor and the Defendant's Operations Manager) pointed to any policy in this regard. Furthermore, I accept Mr. Bento's evidence that the problem of 'missed spots' is particularly a problem in Bermuda where there are many uneven floors and that walking on freshly applied stripper is really something which is an incidental occurrence rather than an essential part of using the product. And this case concerns not whether a duty of care is owed to all workers doing stripping work, but whether such a duty is

owed to a partially disabled worker for whom the consequences of slipping would be unusually grave. So the absence of any warning from the manufacturers about the dangers of slipping on the stripping fluid does not weaken the inference that the failure to supply the Plaintiff with safety shoes was a material cause of the accident which occurred on or about September 2, 2000.

53. It follows that the defence of *volenti non fit injuria*, based on the premise that the accident was wholly caused by the Plaintiff voluntarily accepting the risk of injury, fails. This defence has a limited application in the employment context, as Mr. Pachai, citing paragraph 63 of *Halsbury's Laws*, 4th edition, Volume 34, correctly submitted:

> "*Where the relationship of employer and employee exists the defence of volenti non fit injuria is theoretically available but is unlikely to succeed. If the employee was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of employment an employee is not generally in a position to choose freely between acceptance and rejection of the risk, and so the defence does not apply in an action against his employer.*"

54. The Defendant sought to argue not simply that the Plaintiff had contractually agreed to assume the risk of deciding what footwear was appropriate, a point already rejected for the reasons set out above. It was further contended that the accident only occurred because the Plaintiff was carrying out his duties in an unauthorised and obviously dangerous manner. Mr. Thompson stated that if industry practice was followed, a person stripping floors would never have to walk on the freshly applied stripper. There was, however, no independent expert evidence to support this view, and I prefer the evidence of the independent Mr. Bento to the effect that walking on the freshly applied stripper was a routine occurrence even if, taking far more time to do the work in question, this could, theoretically, be avoided. More significantly, there was no suggestion that the Defendant had established any policy explicitly forbidding workers such as the Plaintiff from ever walking on the stripper.

55. Mr. Ferreira also stated in his Witness Statement that it was not necessary to walk on the freshly applied stripper, without suggesting that there was any policy prohibiting this, nor indeed that walking on freshly applied stripper never occurred. Indeed, Mr. Ferreira indicated under cross-examination that although he did not consider the safety shoes beneficial, the freshly applied stripper was "*very slippery*" and if the Plaintiff, who was more experienced than the witness himself, had asked for safety shoes, he would have purchased them for him. This was inconsistent with his further testimony that one should only go back to strip missed spots after scrubbing the floor, by which time the floor would not be slippery at all and you could run over the floor. He would not walk on freshly applied stripper even wearing safety shoes. It makes no sense that if one never had

to walk over the floor while it was slippery and the Operations Manager himself had such strong views that about the inability of safety shoes to alleviate the risk of slipping that Mr. Ferreira would have ensured that the company nevertheless buy safety shoes with soles designed to prevent slipping on freshly applied stripping fluid. Further, it seems unbelievable that the Defendant company could operate free from the obvious commercial consequences in terms of added time and expense that operating in a wholly risk free manner would entail.

56. The facts of the present case are far removed from those where a claimant is held to be "*the sole author of his won misfortune*" because he is bound to admit that what he did was "*a crazy thing to do*": *Rushton-v-Turner Brothers Asbestos Ltd.*[1959] 3 All ER 517 at 521. The accident was caused by an inherent risk which the Defendant chose neither to eliminate (by policies explicitly forbidding walking on slippery stripper) nor to mitigate (by providing safety footwear). And as da Costa JA observed in *Trustees of the Seventh Day Adventist Church-v-Wilson* [1986] Bda LR 31 at page 8:

> "*If the employer is not able to eliminate the risk, he must at least take reasonable care to reduce it as far as possible: General Cleaning Contractors Ltd. v. Christmas (1953) A.C. 180; Ellis V. Ocean S.S. Co. Ltd. (1958) Times 15th November, CA. As Munkman points out,*
>
> > *'These cases show that where a man is exposed to an unavoidable danger, as by working in a high place as a window-cleaner, or at a place near a ship's side where there is no rail, it is not sufficient for the employer to say that the workman must rely on his own skill and judgment; he must take such safety measures as are practicable.'*
> > *(Munkman ubi sup. P. 76).*"

Contributory negligence

57. Section 3(1) of the Law Reform (Liability in Tort) Act 1951 provides as follows:

> "**Apportionment of liability where contributory negligence**
> *3 (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the amount of damage recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage…*"

58. The correct approach to the issue of contributory negligence, in the particular context of a negligence claim brought by an employee against his employer[11], was lucidly summarised by da Costa JA in *Trustees of the Seventh Day Adventist Church-v-Wilson* [1986] Bda LR 31 at page 12 as follows:

> "*The section therefore enables the court to reduce the damages in proportion to the degree of responsibility for the accident; and the court may take into account not only the share of each party in causing the accident, but also the degree of blameworthiness. In Davies v. Swan Motor Co. (Swansea) Ltd. (1949) 2K.B. 291 at 326 Denning L.J. said:*
>
> > *'While causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless the amount of the reduction does not depend solely on the degree of causation. The amount of reduction is such an amount as may be found by the court to be 'just and equitable', having regard to the claimant's share in the responsibility for the damage. This involves a consideration, not only of the causative potency of a particular factor but also of its blameworthiness.'*
>
> *In deciding what amounts to contributory negligence all the circumstances must be taken into account. And, 'if a skilled man adopts a dangerous course of conduct not for the sake of saving himself trouble but primarily in order to get on with his employer's business the courts will be slow to put blame on him.' (Salmond and Heuston ubi sup. p. 452).*"

59. I find that the Plaintiff slipped while carrying out his contractual duties in a manner which was somewhat dangerous but which was not prohibited by any policies laid down by the Defendant. If the Plaintiff had adopted the method suggested by the Defendant at trial, this would cost the Defendant more money in terms of overtime –the accident happened on a Saturday and the Plaintiff's basic pay covered five days a week. If, as I find to be probable, the Plaintiff was working in a manner and at a speed which was comparable with the way similar

[11] The more flexible test formulated by Wade-Miller J in *Rooney-v-DeFrias* [2001] Bda LR 61 and approved by the Court of Appeal in *DeFrias-v-Rooney* [2002] Bda LR 21, a road traffic case, has no application to the present factual matrix.

work was done at a significant competitor firm (Marshall's), there is no basis for concluding that that this additional cost could be passed on to the Defendant's clients. It cannot credibly be suggested that the Plaintiff was taking a short cut for his own benefit, because (on the day in question and for almost half the time he spent at work-nearly 70 hours per week), the longer he worked the more he got paid.

60. A migrant worker on a work permit who is working such extraordinarily long hours for comparatively modest returns (earning less than $1000 per week for almost two basic week's work with no uplift for overtime) can hardly be said to be blameworthy for saving time by performing his duties in a risky manner which was not prohibited by his employer. Why was the long-winded approach suggested at trial not officially mandated by the employer at the time of the accident? It seems improbable that the Defendant had a commercial interest in expanding the time that the cleaning work took; in commercial premises such as a supermarket, the cleaning work could only be done during restricted hours when the business was closed. And Soares Grocery appeared on the evidence to be a comparatively small single premises business which can be presumed to have been more cost-sensitive than a supermarket chain might be. The cleaning business seems to be a competitive business and, based on the general tenor of Mr. Thompson's evidence, a commercial arena which does not generate quick and easy money.

61. Accordingly, I reject the Defendant's plea that the Plaintiff's damages claim should be reduced by virtue of his own contribution to the accident. There are no or no cogent grounds on which this Court could properly find that it would be just and equitable to make any such reduction.

General damages

62. The Plaintiff seeks general damages at the high end of the scale bearing in mind he has suffered a 60% disability in respect of what was his only good hand. It is common ground that the appropriate scale is the Judicial Studies Board Guidelines for the Assessment of Injuries. The Defendant produced an extract from the 2008 Oxford University Press publication, while the Plaintiff downloaded an apparently updated scale from Lawtel on May 20, 2009. I shall use the more recent scale. The relevant item in the scale, the Defendant's arguments to the contrary, provides as follows:

> "**(H) Wrist Injuries**
> *(a) Injuries resulting in complete loss of function in the wrist, for example where an arthrodesis has been performed. £30,500 to £38,250.*"

63. In my judgment the fact that the Plaintiff is able to use his left hand to a limited extent (as demonstrated by the Defendant's private investigators) does not alter the medical evidence as to the nature and effect of a wrist fusion operation.

Bearing in mind that the injury was sustained to the Plaintiff's only fully functional hand, I agree that the award should be at the high end of the scale. I award £35,000 @ 1.60 (or such other rate as may be agreed or ordered[12]) = $56,000.

Special damages

64. The Plaintiff seeks a maximum of $343, 414.61 (with all but less than $3000 attributable to loss of earnings). The Defendant contends the upper limit should be $266, 038.29. The minor medical and travel expenses can conveniently be dealt with first.

Medical and travel expenses

65. I reject the claim for $823.40, being the cost of his daughter travelling with the Plaintiff and his wife when he attended the Lahey clinic. I see no justification for viewing the Defendant as liable to compensate for this loss. I award the amount of $459.80 which the Defendant's counsel accepted was a proper amount.

66. Medical expenses were agreed at $ 1,885.50.

Loss of earnings

67. The Defendant contended that any damages awarded should be reduced based on the evidence at trial according to one of three possible scenarios. Scenario (a) was that the Plaintiff should have had his wrist fusion operation in or about June 2002, based on the advice of Dr. Stephen Margles of the Lahey Clinic, who indicated in December 2001 that the Plaintiff "*needs to be considered for a left wrist fusion…full disability until after surgery*". As of June 1, 2002, the Plaintiff had HIP insurance cover, so there were no further impediments to this surgery being promptly pursued. If the operation had taken place then, the Plaintiff could have returned to the workforce bringing his loss of earnings claim to an end. The Defendant's counsel also submitted that because Dr. Froncioni was not qualified as an expert, his opinion as to when the operation could have been performed could be disregarded in favour of the "view" of Dr. Margles.

68. In my judgment Dr. Froncioni is so well known as an expert in the Bermuda courts that he did not need to be formally qualified in the witness box. In any event, if the Court were to adopt such a technical approach, Dr. Margles was not qualified as an expert either. And the relevant medical position can be determined by reference to the documentary records. Still, what counsel actually quotes as representing the distinguished doctor's opinion (Plaintiff's Documents Bundle, TAB 39) is not an expert report from Dr. Margles of the Lahey Clinic, but a form apparently signed by Dr. Trott of Orthopaedics & Sports Medicine Ltd. of

[12] The rate used by the Plaintiff of £1.00=$2.00 seemed overly generous having regard to current exchange rates as published in the Royal Gazette.

Bermuda. This does not in terms opine that fusion should be *performed*; rather it says this should be "*considered*". Dr. Margles and another Lahey Clinic surgeon performed an operation seemingly less drastic than a fusion on the Plaintiff in August 2001, as Dr. Froncioni reported to the Defendant's then attorneys on June 4, 2004. This surgery followed Dr. Margles' May 30, 2001 report to Dr. Trott, which discusses arthrodesis and similar options as problematic for the Plaintiff since "*he would be very much incapacitated because of the limited use of his right hand*." It was only in Dr. Margles' March 19, 2002 letter to Dr. Trott that, on hearing that the initial surgery was unsuccessful, that he for the first time[13] opines: "*I do not think a procedure other than a total wrist fusion would have very much likelihood of being successful.*"

69. So it is correct that by June 1, 2002 this drastic solution had been proposed by Dr. Margles, but just over two ½ months earlier. And the factual medical evidence as a whole supports the same finding as Dr. Froncioni's impugned opinion: wrist fusion was only considered as a last resort after less drastic medical solutions were first explored. I would reject the Defendant's scenario (a) as it seems to me that it was reasonable for the Plaintiff to take further time to consider such a life-changing surgical procedure.

70. The Defendant's scenario (b) is that the Plaintiff ought to have had the operation in or about June 2004 when Dr. Froncioni first advised (by letter dated June 7, 2004) that this operation was required. In the interim, the Plaintiff issued the present proceedings on February 7, 2003, and his then attorneys sought a confirmatory medical opinion from Dr. Margles, which was supplied a week later. The Plaintiff offers no explanation for declining to follow this advice save for the fact that he was having insurance problems. These problems are not well documented. However, it appears that Dr. Sherwin wrote to the Hospital on his behalf on November 18, 2003 seeking "*indigent status*" ((TAB 40, page 77). If insurance to cover the operation was a problem after June 7, 2004, one would have expected the Plaintiff to be able to produce specific written or oral evidence of attempts made between then and 2006 to obtain the necessary insurance support. His Witness Statements are both silent on these issues, as is the Amended Statement of Claim, whilst the Plaintiff's oral evidence was vague in the extreme on this topic.

71. I accordingly find that the Plaintiff ought to have elected to have the surgery by June 30, 2004 at the latest. However, it seems reasonable to assume (as seems clear from the Defendant's scenario (b) analysis), that the operation might not take place until the end of August with a further four month period required for post-operative assessment, so that he would in fact have been unable to work before the end of 2004. Since he would have been 62 years of age on January 3, 2005, he would at most be able to claim loss of earnings for another three years.

[13] It is true that Dr. Ryan's notes (TAB 34, page 66) reference a February 7, 2002 appointment with the Plaintiff suggest that as at this date Dr. Margles may have mentioned the possibility of a wrist fusion. No positive recommendation appears to have made at this juncture, however.

72. The Defendant contends that the Plaintiff's loss of earnings claim should not extend beyond December 31, 2004 at all, because of his failure to mitigate his loss by seeking employment. The response to this contention is the somewhat illogical response that seeking further employment was impeded by the Plaintiff's Immigration status. But unless the Plaintiff can satisfy the Court that he would likely have continued to work in Bermuda after his operation, there is no basis for his recovering post-operation lost earnings (based on his Bermudian average wages with the Defendant) at all. Although the Plaintiff was last employed on a one year work permit, he apparently has a Bermudian daughter and in any event has been permitted to reside in Bermuda since his employment terminated at the end of 2001. This supports an inferential finding that the Plaintiff would probably have been given permission to seek employment as soon as he was fit to return to work, albeit work of a far lighter kind. Equally, I am satisfied that but for the accident, he likely would have continued to do the sort of work he was employed to do by the Defendant until retirement age.

73. While the burden is on the Plaintiff to prove his loss, the Defendant bears the burden of proving that the Plaintiff has failed to act reasonably in mitigation of the loss[14]. The Defendant has easily discharged this burden, because the Plaintiff has made no attempts to mitigate at all, leaving the somewhat intractable question of what would have happened if reasonable attempts to obtain employment after the operation had been pursued. It is possible that if he had sought work the Plaintiff would have been unable to find work, but his duty to mitigate his loss required him to make reasonable attempts to find fresh employment. These unsuccessful attempts could have supported a finding that despite his best efforts, he had in fact become fully unemployable, and that he was entitled to recover in full the earnings he would otherwise have made.

74. Since the evidence clearly indicates that if he had sought and obtained alternative employment he would not have been able to perform the same work, the Plaintiff's failure to mitigate does not necessarily mean that the post-operative loss of earnings claim automatically falls away altogether. Because even if he had returned to work, he might not have been able to replicate his pre-accident earnings. But no material has been placed before the Court to enable the Court to decide between two possibilities: either the Plaintiff might have been able to obtain less remunerative work, or alternatively, he might have been able to obtain equally remunerative work through working in a more senior capacity as a supervisor. The possibility of him being employed as a supervisor was suggested by Mr. Thompson; was this possibility a prospect which was only realistic at a firm which already had a relationship with the Plaintiff? No indication of the likely wages was given.

75. It is for the Defendant to prove that the loss which *prima facie* flows from its breach of duty was not caused by its negligence. The Defendant has discharged

[14] *Geest plc-v-Lansiquot* [2003] 1 All ER 383 (PC).

that burden in relation to the Plaintiff's claim for 100% of his lost earnings for the post-December 31, 2004 period. However, when the Plaintiff ought to have sought work in January 2005, he was (a) 62 years old, (b) an unskilled worker who could no longer perform the duties he had performed for most of his recent working life, (c) had one hand nearly 100% disabled and the other previously fully functional hand was 60% disabled, and (d) required the permission of the Immigration Department to work in Bermuda. It seems inherently improbable that the Plaintiff would have been able to secure employment generating an average income equivalent to what he was only able to generate prior to the accident by doing over 70 hours work per week.

76. The Defendant's scenario (b) financial analysis (which obviously omits the medical and travel expense items) was as follows:

Maximum Potential Lost Earnings	**$266,038.29**
Less amount claimed from 31/12/04-31/12/07	**$134,160.00**
Total special damages	**$131,878.29**.

77. The maximum figure is roughly $75,000 less than the Plaintiff's total of $340, 705.81 as set out in his Revised Schedule of Special Damages. The main difference is that the Defendant uses an average weekly wage of $860 (for the post December 31, 2001 period) based on the cheques produced by the Plaintiff while the Plaintiff uses a higher average of $936. I accept the Defendant's more conservative numbers for the loss of earnings head of claim generally. However, I find that the Plaintiff would potentially have earned no more than 50% of his average weekly wage if he had obtained work. Accordingly, the amount to be deducted for the December 31, 2004 to December 31, 2007 period should be 50% of $134,160.00 or $67,080.00. The total sum awarded with respect to loss of earnings is accordingly $266,038.29 - $67,080.00 = $198,958.29.

Special damages: summary

78. The total special damages sum is accordingly $198,958.29 + $ 1,885.50 + $459.80 = $201, 303.59.

Interest

79. The Plaintiff in his Amended Specially Indorsed Writ seeks interest on general damages from the date of the Writ until judgment at the rate of 3.5% and interest on special damages from the date of the accident until judgment at the same rate. The Defendant contends no interest should be awarded at all by reason of the Plaintiff's delay. This submission was not supported by reference to any correspondence pressing the Plaintiff to expedite the action; the action never went to sleep altogether, prompting a strike-out application on grounds of want of

prosecution. The relevant principles as to the grant of interest in personal injuries cases have been summarised by Ground CJ in *Correia-v-Dublin and Minister of Works and Engineering* [2005] Bda LR 10 at page 6 of the Judgment, following *Jefford-v-Gee* [1970] 2 QB 130.

80. The general rule under Bermuda law is that interest on general damages will be awarded at the rate of 2% from the date of the Writ's issue until judgment and on special damages at the rate of 3.5% from the date of the accident until judgment. Nevertheless the discretion to award interest is essentially designed to penalize a defendant for the delay in paying sums which have been found to be due to the plaintiff and which ought properly to have been paid at some earlier date. In *Jefford-v-Gee*, Lord Denning M.R. (giving the judgment of the English Court of Appeal) noted:

> "*Interest should not be awarded as compensation for the damage done. It should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him.*"[15]

81. In the present case, (a) the Plaintiff took three years to commence proceedings, and (b) his medical prognosis was unclear both immediately after the accident and when the writ was issued and beyond. The fact that he would have a 60% disability in his right hand with no further pain and the extent of his future earning capacity would first have come to the Defendant's attention when he ought reasonably to have been in a position to return to work, on or about January 1, 2005. Prior to that, the Defendant would not reasonably have been able to reliably assess the amount of either the general damages or loss of earnings element of the Plaintiff's special damages claim. The Defendant continued to employ the Plaintiff for more than a year after the accident until Mr. Thompson seemingly lost patience with no clear resolution in view. Taking into account the fact that this case has taken nine years to come to trial, it would be unjust for the defendant to be ordered to pay interest on special damages for a more than four year period during which the vast majority of the relevant sum could not reasonably have been assessed.

82. Accordingly, I award the Plaintiff interest on general damages and special damages from January 1, 2005 until judgment at the rate of 2% (general damages) and 3.5% (special damages) respectively. Thereafter, interest at the statutory rate of 7% is awarded in the usual course.

Conclusion

83. The Plaintiff's claim for damages for personal injuries sustained while in the Defendant's employment due his employer's negligence succeeds, without any reduction for contributory negligence.

[15] At page 146.

84. However, the Defendant's submission that the Plaintiff acted unreasonably in failing to have the wrist fusion operation until June, 2006 and failing to seek alternative employment is accepted on the basis that the Plaintiff ought to have had the surgery in 2004 so as to be in a position to return to work in January 2005. As the Plaintiff failed to make any efforts to seek employment, the Court is bound to assume that he could have obtained employment, albeit with a 50% reduced earning capacity.

85. He is awarded general damages in the amount of $56,000[16] and special damages in the amount of $201, 303.59[17]. Pre-judgment interest on the total sum of $257,303.59 is awarded at the rate of 2% on the general damages element and at the rate of 3.5% on the special damages element, from January 1, 2005 until judgment and thereafter until payment at the statutory rate.

86. Subject to hearing counsel on any relevant matters which arise from the present judgment, the Plaintiff is awarded the costs of the present action.

Dated this 30th day of October, 2009 _____
KAWALEY J

[16] Subject to any minor exchange rate adjustments.
[17] Subject to the corrections of any arithmetical errors.