JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 6 OF 1984

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Ross, J.A.

BETWEEN	OWEN ELLIS	PLAINTIFF/APPELLANT
AND	INDUSTRIAL CHEMICAL CO (Ja.) LTD	DEFENDANT/RESPONDENT

Raphael Codlin & Mrs. Barbara Lee for Plaintiff/Appellant

B.J. Scott, Q.C., for Defendant/Respondent

February 11 & 12, March 1, 1985

ROSS, J.A.

The appellant had since June, 1975 been employed at a chemical plant at Windsor Road, Spanish Town, St. Catherine as an acid plant operator. The plant was owned by the respondent and it manufactured sulphuric acid and other substances. There were four plant operators, including the appellant, and they did eight hour shifts, with one operator usually off duty.

The acid plant is highly automated and after it begins to operate the plant operator spends most of his time in a control room observing the plant by inspecting gauges and recording the data in a log book. The operation of the plant was a continuous one, twenty-four hours per day, seven days per week, but there were occasions when it had to be shut down because of the failure of the electricity supply or the water supply. The plant operator had authority to shut down the plant, if in his opinion, he observed anything unusual taking place from his observation post in the control room. He would leave the control room only if from the gauges he observed anything unusual in the functioning of the plant or when it was necessary, as it sometimes was, for him to

to carry out certain essential functions, such as manipulating valves during the starting up or shutting down process.

On the occasions when it was necessary for an operator to leave the control room to manipulate valves, he would have to go into a danger area in the vicinity of the acid circulation tanks to carry out these functions. As the acid in these tanks was sulphuric acid, an extremely corrosive liquid, it was a clear rule of the respondent company that acid protective clothing must be worn by all employees entering that area and there was also a large notice, visible to all workers, at the entrance to the circulation tank warning workers of the need to observe the rule.

The protective equipment to be worn consisted of: safety boots, a face shield, safety helmet, safety gloves and an acid suit.

On 13th December, 1978 shortly before 2.00 p.m. the appellant was involved in the starting up operations of the acid plant which had been shut down because of lack of water. While going through the starting up procedures he observed from the control room a pin hole leak in the No. 2 pump; he switched off this pump and started the third pump, after consulting the maintenance supervisor who instructed him to do so. Having done so, he observed from the gauges that this pump was "priming" - and so he left the control room to open the valve. In order to do this he had to enter the danger area and climb steps to get to the valve attached to the pump on top of the circulation tank in which sulphuric acid was circulating. He climbed up the steps to the valve and while he was opening it the wheel and spindle came off in his hand and hot sulphuric acid gushed out of the tank onto him causing severe burns over a large area of his body. The appellant came down the stairs and got to the safety shower which was nearby. He then received first aid and was taken to the Spanish Town Hospital where he remained for nearly three months.

At the time when he received this injury he was wearing safety boots, a white safety helmet and a pair of short rubber gloves. He should in addition have been wearing an acid suit, safety gloves and a face shield. In his statement of claim he alleged that the respondent had been negligent in that the company had failed to provide a safe system of work; and his injuries had resulted from this negligence on their part.

On the other hand, the respondent, in its defence, denied negligence and alleged that the injuries had been caused by the appellant's negligence particularized as, inter alia, his "failing to wear the acid protective clothing issued to him by the respondent to wear in the area where the accident occurred."

In reply to the defence filed, the appellant denied the particulars of negligence alleged on his part and stated that no protective clothing apart from what he was wearing, was, on the day in question, supplied to him because none was available.

The learned judge stated at p. 19 of the record that:

> "Having regard to the matters pleaded there were a number of question raised for determination but the two main questions which emerged were: given the admitted fact that the injury to the plaintiff is not being denied by the defendants:
>
> (i) Did the defendants take reasonable care for the safety of its workers including the plaintiff?
>
> (ii) Was there adequate protective clothing available for the use of the workers at the defendant's plant?
>
> (iii) Assuming (i) and (ii) to be in the affirmative what is the duty of the employer to his workers as regards (ii)?

Then at p. 26 of the record the learned judge went on to say:

> "When the evidence in this matter is examined and assessed the matter boils itself down to the determination firstly of a question of fact as to the availability of protective clothing which in itself is bound up with another question as to whether there was in place a safe system of work at the defendan' s plant. The weight of the evidence tends to suggest an affirmative finding being given to both questions."

In reviewing the evidence on the question of protective clothing the learned trial judge said at page 27 of the record:

> "The plaintiff's evidence is that the acid suit which he wore, prior to going on his vacation leave in August 1978, was missing when he returned from leave in September 1978. When he was required to perform functions which necessitated the use of the acid suit during the period between September when he returned from leave and prior to 13th December he would use one from the pool of suits readily available in the control room. This was the same pool from which both Vinton King and Roy Harding testified that they procured acid suits when they had to venture into the danger area around the acid circulation tanks. For some strange reason, still unexplained, when the plaintiff received his injury, and his evidence is supported by that of Vinton King, there were no acid suits hanging from the usual place on the racks behind the door in the control room. Mr. Harding's evidence is, to the contrary, that there were acid suits seen by him on the racks in the control room within minutes following the injury to the plaintiff. Mr. Harding testified that he saw them there when he had gone into the control room to turn off the control switches and shut down the plant. Apart from this there is the evidence of Mr. Thomas Blakeley Markes, the Operations Manager and the then Safety Officer for the plant that sometime later in the afternoon following the injury to the plaintiff, deeply concerned about the injury suffered by the plaintiff and distressed over the fact that the plaintiff's serious injury was due to the fact that he was not wearing the acid suit, he made a personal check of the stores and found some thirty-one new acid suits in stock. This discovery came as a great measure of relief to him. It was the plaintiff's evidence that when he missed the acid suit which he had been wearing before going on leave, he had requisitioned a replacement but was informed by the stores that there were none in stock."

The learned judge went on to say at p. 28:

> "The fact that prior to 13th December, Harding, King and the plaintiff himself all had no difficulty finding a suit from the pool of suits in the control room when required to go into the danger area at the plant, the weight of the evidence is therefore clearly supportive of the finding on a balance of probability that on 13th December, 1978, there were acid suits on the racks in the control room when the plaintiff was in the process of carrying out the starting up operations."

Further at p. 30 the learned judge added:

> "The defendant's duty in so far as the plaintiff was concerned was completed by providing him with a safe plant in the manner as indicated above, with the protective clothing and by instructing him as to its use."

The plaintiff's case was rejected and judgment entered for the defendant.

Against this decision, the plaintiff has appealed and his grounds of appeal which are largely questions of fact, are as follows:

> "1. That the learned trial judge erred in holding that the defendant/respondent had in place a safe system of work notwithstanding that the evidence is to the effect that three persons had been burnt by sulphuric acid during a comparatively short period of time and that no member of management of the respondent company was able to identify the presence of protective clothing on the 13th December, 1978, before the plaintiff/appellant was burnt by sulphuric acid.
>
> 2. That the learned trial judge misdirected himself in holding that it was too high a duty to be cast on the defendant/respondent to ensure that safety clothing provided for workers should be worn by those workers.
>
> 3. That the judgment of the learned trial judge is unreasonable having regard to the weight of the evidence.

"4. That the learned trial judge misdirected himself in holding that there was a manufacturer's defect in the acid valve when there was no evidence to support that conclusion which said conclusion was denied by the principal witness for the defendant/respondent Mr. Markes.

5. That the learned trial judge misdirected himself in mistakenly evaluating the evidence of Vinton King, by stating that Vinton King had said that after the mishap he overheard certain maintenance workers saying that the valve in question had no gate. What King actually said was that immediately before the accident he was rushing to warn the plaintiff that there was no gate in the valve - pp. 90 et seq.

6. That the learned trial judge misdirected himself in holding that protective clothing was issued to the plaintiff/appellant. With the evidence given by defendant/respondent it is clear that neither Mr. Markes nor Mr. Harding had either issued a protective suit to the plaintiff/respondent or seen anyone do so. Both these gentlemen have testified that they cannot say if there was protective clothing available immediately before the accident."

In opening his submissions counsel for the appellant observed that at the commencement of the trial he had applied to amend the particulars of negligence in his statement of claim by the addition of the words "and breach of statutory duty" followed by a list of such breaches, but that his application was refused by the learned judge. He pointed out that in the endorsement of the writ it was stated that the appellant's claim was for damages for breach of statutory duty; however, there was no reference in his statement of claim to this breach. In paragraph 6 of the defence filed the respondent had set out several particulars of negligence of which (ii) reads as follows:

> "Failing to wear the acid protective clothing issued to him by the defendant to wear in the area where the accident occurred."

To this the appellant had replied denying this allegation and stating in paragraph 3 as follows:

> "The plaintiff will further say that no protective clothing was, on the day in question, supplied to the plaintiff because none was available, except a pair of short gloves reaching only a portion of the plaintiff's forearms, thus causing spewed acid to burn portions of the plaintiff's forearm and hand as the protection offered by that pair of gloves was insufficient."

From the above it would seem to us as it did to the learned judge that the question of the supply or availability of the protective clothing was clearly a major issue in the case and therefore the amendment to the statement of claim would have been largely a formality. It was however refused.

In his judgment at p. 18 the learned judge said:

> "It is to be observed that the allegation by the plaintiff as to "a failure to provide protective clothing" emerged in the Reply. It was not a part of the Statement of Claim. As such an allegation would have amounted to a breach by the defendants of their statutory duty under section 76 (b) of the Factories Regulations and as such would have given rise to an additional claim by the plaintiff, it is, to say the least, surprising that had this been a part of the instructions given by the plaintiff to his Attorneys that such an allegation by the plaintiff's Attorneys when filing the Statement of Claim, a matter so vital to the plaintiff's case, could have been omitted from it at the outset of the matter."

Counsel for the appellant submitted that from the above it would seem that the learned judge formed the view that the plaintiff was not speaking the truth and in consequence not only did this cause him to refuse the application to amend but also it affected the determination of the issues in the case. We are unable to understand why the amendment was not granted seeing that that issue was crucial in the determination of liability, and in the event was decided by the judge.

The Court was then referred to the evidence adduced in regard to the supply and availability of the protective suit. On the one hand, there was the evidence adduced by the appellant that before he went on leave in August, 1978 he had a protective suit which had been issued to him; he left this suit in the changing room and it was not there when he returned from leave in September; a few days later he sought a replacement of the suit and did not get it; again, on the day before the accident he unsuccessfully sought a replacement of the suit; at the time of the accident he was not wearing a protective suit because there was none available to him at the time; it was the practice of operators to leave their protective clothing in the control room without locking them away in their lockers because after acid spilled on the suits they had a pungent odour.

Vinton King, a trainee operator at the time of the incident gave evidence for the appellant. When he did so however, he was the senior operator at the plant. As he gave evidence on two crucial issues, viz. as to whether there was a safe system of work and as to whether protective clothing was available we set out extracts from his evidence in examination and cross-examination because it will be necessary to compare the evidence of the appellant and this witness with that of Mr. Markes and Mr. Harding who gave evidence on behalf of the respondents on the vital issues in the case. We have already summarised the plaintiff's evidence on this point.

The examination of King in part went thus:

Page 86. "When I went to take up my duties I was given no instructions. I was placed with the operator on duty at the time."

"Q. As a trainee have you been required to work in areas of the plant considered dangerous?

A. Yes sir.

Q. When you went there on the first day were you issued with protective clothing by the company?

A. No sir.

Q. What kind of clothing did you wear as a trainee?

A. Ordinary pants and shirt and my own shoes.

Q. As a trainee were you forbidden by the company to go to the areas considered dangerous?

A. No sir. There was no strict ruling.

Q. What do you mean by that?

A. I was told that the acid circulation tank is a dangerous area and as such protective clothing should be worn.

Q. Were you issued with any?

A. No sir."

(page 87.) "Q. Ever since you have been working with Industrial Chemical Company have you ever been issued with protective clothing?

A. No sir. Not as a trainee. At least not before Mr. Ellis' accident.

Q. Do you mean to say that when that accident happened you were still a trainee?

A. Yes sir.

Q. Were you issued with protective clothing after the accident?

A. Sometime after I was issued with protective clothing. ....."

(page 88.) "Q. From the time you started working there up to the time you were issued with protective clothing by the company have you ever worn protective clothing?

A. Yes sir. I would wear protective clothing belonging to the operators.

Q. How would you get those protective clothing?

A. They were left in the change room.

"Q. After a suit is worn and is left in the change room what would be its condition?

A. The outside was always very dirty and the cap that goes over one's head was always very smelly.

Q. What would happen if you were to lock that suit up in the locker?

A. It would become more smelly.

Q. You would get permission from the plant operators or you just took up a suit and wore it?

A. I got no permission. I would just take a suit if any was there."

(page 91.) "Q. Would you please tell the court what was the previous system (of obtaining protective clothing) before the accident?

A. A supervisor could go directly to the stores with a requisition form and obtain the article.

Q. What is the practice after the accident?

A. .....

Q. If anyone ever stated that at the time of the accident you were issued with protective clothing would that statement be true?

A. No. sir.

Q. If anyone ever stated that at the time of the accident there were several sets of protective clothing in the storeroom from which yourself and others could take to protect yourself would that statement be true?

A. No sir. The operators were trying to obtain suits and there was none. I know as a fact that operators were trying to obtain protective suits for those available in changing room were dirty. If protective suits were available I would have worn it.

Q. Before the accident have you ever worked with Mr. Ellis?

A. Yes sir.

Q. For about how long?

A. Several weeks.

Q. Have you ever seen him wear protective clothing on the occasions that you worked with him?

A. Yes sir.

Q. How often?

"A. In terms of days I cannot say but whenever the oleum plant is in operation samples have to be taken and he was always dressed in protective clothing to take the samples.

Q. If someone ever stated that on the day of the accident Mr. Ellis was in possession of protective suiting but refused to wear them would that be true?

A. No. sir."

The above questions were asked and answers given in examination-in-chief, and at the beginning of his cross-examination Mr. King summed up the effect of his evidence when he said this:

"On the day of the accident of my own knowledge there was no protective clothing in the locker room. To my knowledge there was none available in the stores. I never visited the stores or made enquiries of the storekeeper. I know that workers were trying to obtain suits and they never got them and I presume that if there were any they would have got them. As a trainee I could not attend to that myself. I asked for a suit before the date of the accident from the operator I was working with. I never got a suit. I helped myself to what was available in the changing room. Others could have done the same."

The effect of all this evidence was that although the witness as a trainee was advised that the area of the acid circulation tank was dangerous and that protective clothing should be worn there he was not issued with any such clothing. Protective clothing was issued to him only after the accident involving the appellant. At the time of the accident there were no protective suits in the store room as operators had tried unsuccessfully to obtain suits. On the occasions when the witness had worn a protective suit, it belonged to one of the other operators and it was kept in a change room.

If the above evidence adduced on behalf of the appellant were accepted by the learned judge he could have come to but one

conclusion and that is that the answers to the questions posed by him - whether there was a safe system of work and whether there was adequate protective clothing for the use of the workers at the plant - were in the negative. But these questions were answered in the affirmative and so we must look at the evidence adduced by the respondent.

The relevant evidence was given by Mr. Thomas Markes, operations manager, and Mr. Roy Harding, process engineer at the time. Mr. Markes testified that on the same afternoon after the accident:

> "I checked the main stores to see whether there were any acid suits in the place and all the acid clothing and I found that there were adequate stocks of protective clothing there. I seem to recall that there were thirty-one safety suits there. Safety suits are issued to each of the operators and if an operator required a piece of safety equipment he would be ranked as a supervisor and would be required to sign a requisition to the stores to obtain the equipment that he wishes."

There had been occasions, he said, when he had to speak to Mr. Ellis about his non-compliance with the safety regulations.

Then in cross-examination at p. 114 the record shows:

> "Q. Can you deny that between 1st September and 13th December, 1978, plant operators including the trainee, Mr. King, had on several occasions been made to operate sulphuric acid valves without protective clothing?
>
> A. I cannot deny that."

In regard to earlier evidence he had given of thirty-one protective suits being in stock after the accident, the record shows the following exchange in cross-examination at page 115:

"Q. Did you ever make any other similar check of the suits during that year?

A. No sir.

Q. So you don't know if they arrived there on the day of the 13th December, 1978?

A. I can't say.

Q. You cannot deny sir that shortly before the accident the plaintiff had unsuccessfully requisitioned protective clothing?

A. No sir.

Q. You cannot deny sir that between September and December, 1978 the plant operators had to borrow one another protective clothing because there were not enough supplied to them.?

A. I cannot deny this.

Q. You cannot deny that not one suit was supplied to Vinton King until after Mr. Ellis' accident?

A. I cannot deny that."

In further cross-examination of Mr. Markes at page 117 we have the following:

"Q. What prompted you to check the suit in the stores?

A. Because I was told that the plaintiff did not have on an acid suit at the time of the accident and I went there to see if there were any there as if there were none, then this would have been the only reason why he did not have on an acid suit.

Q. You don't think it was possible for the suits to arrive after the plaintiff got burnt?

A. It is possible.

Q. You don't think it was possible for the suits to have been there without anyone telling Ellis (plaintiff) of their presence?

A. It is possible.

"Q. Assuming they were there before plaintiff was burnt did you seek to find out if the plaintiff was told of their presence?

A. I did not."

It would seem to us that on a proper assessment of Mr. Markes' evidence he was quite unable to say precisely what the stock in his storeroom regarding protective suits was. Mr. Harding gave no evidence in this respect. The result was that the defendant had fallen short of proving that any suits were in their storeroom for the use of their operators at the time of the accident.

Mr. Roy Harding stated that he was concerned about the general safety procedures at the plant and was appointed safety officer by the plant manager, in which capacity he took various steps to improve safety at the plant including demonstrations and lectures. The general reaction, he said, to his efforts to improve safety at the plant was one of resistance to the implementation of any new system or the changing of any procedures as they existed in the plant at that time.

This witness was early on the scene when the accident occurred; he told how he heard screams, reached the scene in a few seconds and saw Mr. Ellis under the safety shower and acid gushing from the number 3 circulating pump. To quote the witness at p. 127:

"I said 'what happened'? 'Stay under the shower' and I went into the control room and shut off the two acid circulating pumps. By this time a number of people had gathered and I came out and told the plaintiff to stay underneath the shower and I went and got transport and a driver and a sheet and the sheet was put around Mr. Ellis as by this time his clothes had completely disintegrated.

"Q. Did you make any checks at the plant?

A. After the plaintiff left for hospital I supervised the shutting down of the plant completely and picked up the spindle off the valve that had come loose and took it into the main control room and I noted at that point that there were hanging on the racks as they usually are in that control room the safety equipment, that is, the suit, the gloves and the face shield.

Q. Prior to the date of the accident do you know what the stock of protective suits at the plant were?

A. I don't know the physical quantity of suits that were available at the plant but I do know that there were suits in the stores and suits in the control room and I know that the acid delivery men who work on the road tankers also had suits."

In the course of a lengthy cross-examination the record shows the following exchange:

Q. Are you aware that operators leave protective clothing in an area which has been described as the changing room from time to time?

A. I am aware that protective clothing is left in the control room of the acid plant.

Q. When was the last time you visited that room prior to the accident?

A. The morning before the accident.

Q. About what time in the morning?

A. About 8.00 - 9.00 a.m.

Q. You therefore cannot say whether or not any protective clothing were in that room immediately before Mr. Ellis went to manipulate the valve?

A. I cannot say that there was protective clothing there immediately before he went to operate the valve.

Q. Can you deny sir that perhaps a day or two before the accident Mr. Ellis unsuccessfully requisitioned protective clothing from the store?

A. I cannot deny it.

"Q. Can you deny that immediately before Mr. Ellis went up to manipulate that valve no protective suit was available to him?

A. I cannot deny it."

From the questions and answers given by Mr. Harding we think it is plain that there was no satisfactory evidence of the stock of suits in the stores, and there was no proof of the number of suits hanging on the racks in the control room. He was careful not to state the number of suits he saw after the accident, a matter which would not have been a difficult exercise for there were only four operators. It might perhaps be fairer to the witness to say that he was not asked any question to prompt that clarification. But the burden was on the respondent to prove that protective clothing had been provided as set out in their defence.

As we understand the evidence of Mr. Markes and Mr. Harding it does not contradict the positive evidence of Mr. Ellis and Mr. King that there were no protective suits in the control room immediately before Mr. Ellis went to manipulate the valves and so the only evidence before the learned judge on this point was that of the appellant and his witness. There was no evidence adduced by the respondent to show how many protective suits were available in the control room for the use of the members of staff, nor of the number of persons who might have gone to the control room at any time to procure a protective suit for use in a dangerous area. The picture presented by the appellant and his witness of the procedures at the plant at the time of the accident make it abundantly clear that it was not a safe system and the evidence called by the respondent did not alter this picture significantly. There is uncontradicted evidence that no protective clothing was either issued or available for the use of the appellant immediately before he went to manipulate the valves. There was

therefore a breach of the statutory duty owed to the appellant under the provisions of section 76 of the regulations under the Factories Act as well as negligence on the part of the respondent in failing to provide a safe system of work.

In his judgment (at p. 27 of the record referred to above) the learned judge had said that "for some strange reason, still unexplained, when the plaintiff received his injury ..... there were no acid suits hanging from the usual place on the racks behind the door in the control room." As we understand the evidence, this was the place where the operators hung their acid suits. There were four operators of which one i.e. the appellant did not then have a suit, if we accept the appellant's evidence. Further, Vinton King and Roy Harding did not then have a suit although all three of them would use a suit from the control room when they needed one. In the absence of evidence that there were spare suits available in the control room, it would seem that at most there would be only three acid suits in the control room available for the use of the three operators to whom they belonged, as well as for the use of the appellant, Vinton King and Roy Harding. It is not, we think, therefore strange that an occasion arose where the appellant went to the control room for a suit and found none. Although the learned judge concluded from the evidence of Mr. Roy Harding that he saw acid suits and other safety equipment on the racks in the control room within minutes following the injury to the appellant, this conclusion as to time, is not borne out by the evidence as Mr. Harding gave no estimate of the time which elapsed between the accident and his seeing safety equipment on the racks. From the extracts of the evidence set out above it will be plain that before Mr. Harding saw the safety equipment he had done the following things:

(1) Told the plaintiff to stay under the shower.

(2) Went into control room and shut off the two acid circulating pumps.

(3) Come out and told plaintiff to stay underneath the shower.

(4) Went and got transport and driver and and a sheet.

(5) After the plaintiff left for hospital he supervised the shutting down of the plant completely.

(6) Picked up the spindle off the valve and took it into main control room.

We would observe that no evidence whatsoever was called to explain the reason for this unfortunate accident. No technical evidence was given, for example, of tests carried out on the faulty valve after the accident, and the results of such tests. There was no satisfactory evidence of whether the valve installed satisfied the relevant specifications. It seemed to be thought adequate proof of a safe system of work to say that the firm which supplied the valve was a reputable one. From the answers given by the two senior officers of the company and which have been noted earlier in this judgment, no satisfactory checks or monitoring system appeared to be in place. Subsequent to the accident we would have expected that some enquiry would have been held. If one were held its results have not so far been made known.

The learned judge found that Mr. Harding's evidence contradicted that of the plaintiff and Mr. King that there were no acid suits hanging from the racks in the control room, but as would be seen from Mr. Harding's evidence in cross-examination an extract of which is set out earlier in this judgment, Mr. Harding could not deny that immediately before Mr. Ellis went up to manipulate the valve no protective suit was available for his use. It does not appear to us that there was any basis for this finding. Although this court is reluctant to make findings of fact contrary to those found by a judge, where such findings of the court below are not

based on the evidence this court is free to reverse his conclusions [see Kaiser Bauxite Co., v. Cadien (unreported - C.A. 49/81 29th July, 1983)].

This is a case where the only positive evidence as to the presence or absence of acid suits in the control room at the material time is that of the appellant and his witness, and the learned judge was obliged to find accordingly and to act on it. The same is true of the safety system existing at the plant at the time of the accident. Even accepting the evidence of the respondent's witnesses, it cannot be said that what passed for a safety system can be regarded as such in this day and age and it seems clear to us on the evidence that the respondent did not take reasonable care for the safety of its workers.

We would advert to the Regulations made under the provisions of section 12 of the Factories Act, of which regulation 76 provides as follows:

> "There shall be provided and maintained in good condition:
>
> (a) .....
>
> (b) suitable protective clothing including overalls, aprons, gloves, gauntlets, face shields and boots for the use of persons required to handle acids or other corrosive substances in the course of their work."

This regulation required the respondent to provide protective clothing for the appellant who was required to handle sulphuric acid, a very corrosive substance. The respondent pleaded in his defence that he had issued protective clothing to the appellant in compliance with the regulations and there was therefore an onus on him to prove that he had done so. He failed to adduce the necessary proof, as indicated above.

At the hearing of the appeal the parties raised other matters such as whether this was a case where there was a latent defect which caused the accident, but as we observed there was no evidence on which to decide this point although the

judge came to that conclusion. The doctrine of res ipsa loquitur, it was suggested, applied to the circumstances of this case. But on this we did not agree and need say no more about it.

At the trial in paragraph 5 of the defence, contributory negligence was raised by the respondents. As has been pointed out earlier, there is undisputed evidence that no protective suit had been issued to the appellant or was available for his use when required, and in the circumstances of this case this defence fails.

With all respect to the judge, we are unable to agree with his decision which must accordingly be reversed. It has not been necessary to refer to the cases cited as the questions here are all questions of fact.

Turning to the matter of damages, the court was informed that the parties had agreed the special damages in the sum of $1,320.00.

In regard to general damages Dr. Jackson, a plastic and reconstructive surgeon gave evidence of the burns which had healed and left scars over the neck, trunk, external genitalia and the upper and lower limbs. There was hypertropic and non-hypertropic scarring, there were patchy areas of depigmentation. There was no functional disability except for stiffness in the right chest and right groin due to tethering by the burnt scars. The burnt scars are permanent though with time changes in colour and texture will occur. The burnt areas tend to itch and superficial X-rays will help to cure this condition.

The appellant testified to his agony at the time of the accident and for most of the period of nearly three months spent in hospital. He is no longer able to play football and engage in athletics as he did before the accident.

The court was referred to cases of injury involving burns and the question of damages awarded in those case but the circumstances and degree of injury were far less serious than in the instant case. Counsel for the appellant asked that the court take into account the reduced value of the Jamaican dollar and the consequent inflation in recent years. Mr. Scott declined to address on this aspect of the appeal.

Having considered the evidence as to the serious injuries caused to the appellant, the pain and suffering experienced and the loss of amenities consequent thereon, it seemed to us that a fair and reasonable sum would be $150,000.00.

Accordingly, the appeal is allowed, the judgment in the court below is reversed and judgment entered in favour of the appellant in the sum of $151,320.00.

The appellant will of course have his costs both here and in the court below to be agreed or taxed.