JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 132/02

BEFORE: **THE HON. MR. JUSTICE FORTE, P.,**
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.(Ag.)

BETWEEN: **MARJORIE WALKER, MICHAEL COSTA AND KENNETH NEYSMITH, EXECUTORS OF THE ESTATE OF NEVILLE WALKER (DECEASED)** **APPELLANTS**

AND: **VICTOR LOBBAN** **RESPONDENT**

John Givans instructed by Givans & Company for appellant.

Ainsworth W. Campbell for respondent.

May 31, June 1, and December 20, 2005

FORTE, P.

Having read in draft the judgment of Harris, J.A. (Ag.) I agree with the reasons and conclusions therein and have nothing further to add.

K. HARRISON, J.A.

I too have read the judgment of Harris, J.A. (Ag.) and agree with the reasoning and conclusion therein.

HARRIS, J.A. (Ag.)

This is an appeal against a decision of the Honourable Mr. Justice Dukharan in which he gave judgment for the respondent in an action for negligence .

The appellant Neville Walker has died since the filing of the appeal. His executors have been substituted as appellants. However, for convenience, reference will hereinafter be made to Mr. Walker as the appellant.

The appellant was the principal shareholder and Managing Director of two companies, namely, Triumph Car Specialist Ltd. and Triumph Commercial Ltd. Triumph Car Specialist Ltd. repaired motor cars while Triumph Commercial Ltd. sold and repaired trucks. In November 1987 the companies conducted business at adjoining premises on 18 Elgin and Lyndhurst Roads .

On November 11, 1987, the respondent, an apprentice welder, was carrying out work on a truck at 18 Elgin Road, when it fell from a jack on which it was mounted, fracturing his right foot and ankle.

The respondent's evidence was that he had been taken to 18 Elgin Road by a Mr. Michael Amos who introduced him to the appellant. He had commenced working there about 2½ months prior to the accident. He further stated that he was paid a salary of $80.00 weekly by Mr. Amos. On the evening of the accident, he related that the appellant removed him from a job on which he was engaged and sent him to build up a spring on the truck. In the process of installing the spring, the truck fell from the jack on his foot, causing the injury.

The appellant denied that the respondent had ever been employed by him. He had never paid him wages. He also refuted that he had been introduced to him by Mr. Amos. He further testified that he had never given him instructions to work on the truck on the day in question.

In the court below, Mr. Amos was named co-defendant with the appellant. Mr. Amos asserted that he was employed as a welder by Triumph Commercial Ltd. It was also denied by him that he had made the introduction as alleged by the respondent. He had known the respondent about seven years before the accident and had taken him to Triumph Commercial Ltd, to do work on truck bodies. It was however refuted by him that he had ever given him directions to work, or instructions to work on the truck spring on the day on which he was injured.

The learned trial judge found the appellant liable and awarded the respondent the following:

Special damages - $508,850.00 with interest at 6% per annum from November 8, 1987 to September 20, 2002.

General Damages- $1,600,000.00 for pain and suffering and loss of amenities with interest at 6% per annum from January 18, 1994, to September 20, 2002

Future surgery - $60,000.00

Handicap on the labour market $416,000.00

Seven grounds of appeal were filed, the first five of which concerns liability. The last two grounds relate to damages. Consideration will first be given to grounds 1 to 5 which are as follows:-

> "1. The Learned Trial Judge erred in fact in holding that the Appellant was the employer of the Respondent, as this finding was against the weight of the Respondent's own evidence that the Respondent was unsure as to who was his employer and where the endorsement on the Respondent's own Writ of Summons alleges that the Respondent believed that he was employed to Triumph Car Specialist Limited and/or Triumph Commercial Limited.
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> 2. The Learned Trial Judge erred in holding that the Appellant was the employer of the Respondent given the absence of any pleading or evidence that the Appellant was personally engaged in any business at premises at 18 Elgin Road, Kingston 5, housing a garage and where the Statement of Claim itself concedes that Triumph Car Specialist Limited and Triumph Commercial Limited were the ones carrying on business at the said premises and not the Appellant personally and further where the Respondent's evidence stated that Triumph Car Specialist operated the garage.
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> 3. The Learned Trial Judge erred in law in failing to appreciate the difference between the Appellant and the said two companies of which he was a shareholder.
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> 4. The Learned Trial Judge erred in failing to have due or any regard for the earlier suit filed by the Respondent arising out of the same accident, suit No. C.L. 1988/L063, Victor Lobban vs Triumph Car Specialist Limited which suit was determined by a judgment against the Respondent and in which suit the Respondent contended that his employer was

the said company Triumph Car Specialist Limited.

5. The Learned Trial Judge erred because, even if the Appellant was in fact the employer of the Respondent, the Respondent furnished no evidence as to the system of work, the nature and competence of the staff, and the type and effectiveness of the plant and appliances at the garage, to give the Learned Trial Judge any sufficient material from which to conclude that the Appellant was negligent as the Respondent's employer. Further the sparse evidence furnished by the Respondent does not offer any material for the operation of the doctrine of Res Ipsa Loquitur. In particular, there was no evidence that either the truck which fell on the Respondent or the jack, was under the control of the Appellant."

Mr. Givans argued that the learned trial judge erred, in finding that the appellant was liable, as the pleadings and the evidence demonstrate that the respondent was uncertain as to whom he was employed. He argued that by the endorsement on the Writ of Summons, it was alleged that he was an employee of both the appellant and Mr. Amos but believed that Triumph Car Specialist Ltd. or Triumph Commercial Ltd. was also his employer. It was also argued by him that the premises at which the respondent was injured was occupied by the two companies which were engaged in the sale of cars, auto body repairs and mechanic work. He further submitted that there was no allegation in the pleadings that the appellant conducted business there in his personal capacity and no evidence had been proffered to show that at the material time, the

appellant had been carrying out business in his personal capacity, yet the learned trial judge found him personally liable.

In arriving at his decision, the learned trial judge said:

> "I find that there was a working relationship between the Plaintiff and the Defendants. The Second Defendant, Neville Walker was the employer of the Plaintiff. This is a finding of fact. Was the Second Defendant negligent ?
>
> I find that the Second Defendant directed the Plaintiff to work on the truck and did not have regard for the Plaintiff's safety. The Second Defendant was negligent and liable for the Plaintiff's injury."

The question emerging from the learned trial judge's findings is whether there were averments in the pleadings and proof that the appellant was the respondent's employer. In finding that the appellant was the respondent's employer, the trial judge stated that there was a "working relationship" between them. The primary issue which arose for determination before the learned trial judge was whether there was evidence of a contractual relationship between the appellant and the respondent, or the respondent and any other at Elgin Road, so as to categorize that person the employer of the respondent.

There is no dispute that the appellant was the majority shareholder and Managing Director of the companies Triumph Car Specialist Ltd. and Triumph Commercial Ltd. An averment in the Statement of Claim speaks to this. The appellant's status with the companies had been acknowledged by his admission. It was also averred by the respondent that the appellant had employed and directed him to do the work which resulted in his injury.

It was further argued by Mr. Givans that a company is a distinct entity from its shareholders. It enjoys all rights and is subject to duties and liabilities exclusive of its members. In support of his proposal, he cited the case of **Salomon v Salomon & Co.** [1897] AC 22 in which Lord McNaughten at page 64 recognized this proposition in the following context:

> "The company is at law a different person altogether from the subscribers; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members liable, in any shape or form, except to the extent and in the manner provided by the Act."

A company is in fact separate and distinct from its members or manager. A company acts through its agent, in this case the appellant.

A Managing Director would be a servant or agent of the company. It follows therefore, that all acts carried out by an agent acting on behalf of a company, within the scope of his authority renders the company and the agent liable. All liabilities incurred on its behalf by its Managing director, acting within the parameter of his status, under apparent or ostensible authority, are ascribed to the company.

On the evidence the learned trial judge found that a "working relationship" existed between the appellant and the respondent and concluded that a master and servant relationship was in existence between them.

On the question of a master's liability to a servant, in **O'Reilley v Imperial Chemical Industries Ltd.** [1955] 1 WLR 1155 at 1162 Parker, L.J. stated:

> "If a duty of master to servant is to be found in any case it can only be where there is either a true relationship of master and servant or a relationship of master and servant of a temporary character as that envisaged in *Mersey Dock and Harbour Board* case. Unless one or other of those features is proved I cannot see any possibility of maintaining a claim for breach of duty owed by a master to his servant."

It is important to mention at this juncture, that the respondent had in 1993 unsuccessfully brought an action against Triumph Car Specialist Ltd. claiming damages for the injury he sustained on November 11, 1987. The court having dismissed his claim against that company, he would be precluded from bringing any further action against that company as the matter had already been adjudicated upon.

The Statement of Claim avers that Triumph Commercial Ltd. carried on business at 18 Elgin Road in auto body repair and mechanic work. The respondent's further averment therein was that he was employed to the appellant and Mr. Amos or, alternatively by the appellant. In the endorsement on the Writ of Summons he asserted he worked at the directions of both or either the appellant and Mr. Amos and expressly or impliedly he believed that he was employed to Triumph Car Specialists Ltd. or Triumph Commercial Ltd.

Unlike Triumph Car Specialist Ltd., in November, 1987, Triumph Commercial Ltd. was principally engaged in the repairs of trucks. At the time of

the injury, the respondent was assigned to carry out work on a truck. Despite the state of the pleadings, he would be at liberty to proceed against Triumph Commercial Ltd, provided he could establish that the company was his employer at the material time.

Was there evidence before the learned trial judge to establish that the appellant, as Managing Director of Triumph Commercial Ltd., had employed the respondent? The appellant testified that he never entered into a contract of employment with him, nor was he employed to either of his companies. He never paid him a salary. However, the respondent worked at the company's business place. The appellant, the company's managing director, gave him orders which he carried out. It is necessary therefore to explore whether a master and servant relationship existed between the appellant as agent of Triumph Commercial Ltd. and the respondent.

In the course of his testimony, the respondent stated that on arrival at 9 o'clock the first morning at work, Mr. Amos told him to do some work on a truck. At midday he was introduced to the appellant by Mr. Amos. The appellant told him he liked hardworking men. On the following day, the appellant instructed him to assist the mechanic during his sojourn there. Clearly, this is an indication that he had selected him to be a member of the team of workers there. During the respondent's tenure, the appellant also directed him to do work together with Mr. Amos.

There is no dispute that the respondent had been on the company's premises for about two and a half months before his injury. The appellant acknowledged that he had seen him there. It cannot be said that he had been working there for that period without the appellant's consent and approval. It is obvious that the learned trial judge was not persuaded that he was there merely at Mr. Amos' bidding The appellant gave him instructions relating to his job. Although Mr. Amos also gave him instructions, it is clear that Mr. Amos being a welder, the respondent being an apprentice, Mr. Amos would have been acting in a supervisory position over him. The work the respondent did there was obviously for the benefit of the company. When injured, he was carrying out the company's work, having been instructed by the appellant to assist the mechanic to install the spring on the truck.

The respondent related that Mr. Amos paid him $80.00 weekly. Mr. Amos attempted to refute that he had paid him weekly by declaring that he could not have employed him, as, there were times when over a two to three week period they were not paid. However, in cross examination, he asserted that "at times depending on how much money I got, it was split among four of us". In this context, "us" included the respondent. Implicit in his statement, is that he paid him from funds from the company, through the appellant.

Although, there is no direct evidence that the respondent had received a salary from the appellant, the necessary inference is that there was an arrangement between the appellant and Mr. Amos from which the learned trial

judge could have concluded that after the introduction of the respondent, the appellant, asserting that he liked hardworking men, issued instructions to him, ratifying his assignment to the company with the understanding that he should work as an apprentice not only to Mr. Amos, a welder, but also with the mechanic of Triumph Commercials Ltd.

It is clear from the evidence that the learned trial judge found that there was an agreement between the appellant and Mr. Amos that he should pay the respondent from his salary. Consequently, the inference to be drawn is that the respondent was paid indirectly by the company. When Mr. Amos was paid it could not be that it was intended that he should have kept all the proceeds for himself. He would have been obliged to have paid the respondent from it.

Following the accident, the respondent received $80.00 weekly for four weeks from Mr. Amos. Further, after the injury he was given $1000.00 by the appellant. I must hasten to add that the payment of the $1000.00 is not by itself proof of liability but it tends to show that there was some arrangement by the appellant for the respondent to work for the company and an attempt was being made to compensate him.

In his capacity of Managing Drector of Triumph Commercial Ltd., the appellant was intricately involved in giving the respondent instructions relating to his job. Throughout the time he worked at Elgin Road, he was subject to directions of the appellant. It is obvious that he was under his control, he actively directed his work and the manner in which it should be done. It was the

company and the appellant as its Managing Director which benefited from the duties which the respondent performed. In my view, there is adequate basis for the learned trial judge to have correctly found that the appellant was the respondent's employer.

The claim is founded on negligence. The particulars of negligence and or breach of employers liability were stated thus:

> "PARTICULARS OF NEGLIGENCE AND
> OR BREACH OF EMPLOYERS' LIABILITY
>
> a) Failure to provide a safe system of work.
> b) Failure to provide adequate training and or supervision.
> c) Failure to provide adequate equipment for use by the Plaintiff.
> d) Failure to have sufficient regard for the Plaintiff's safety.
> e) Res Ipso Loquitur.
>
> By reason of the defendants' negligence and or breach of employers' liability the Plaintiff has suffered injuries."

The nature and scope of an employer's common law duty to his workmen is well settled. It is a duty to take reasonable care in all the circumstances of the case. In **Wilsons & Clyde Coal Company v. English** [1937] 3 All ER 628, Lord Wright describes this duty as one which imposes on an employer an obligation to provide a reasonably safe system of work, adequate equipment and material, competent staff of men and effective supervision. The nature of this duty was defined by Lord Wright at p 644, in the following terms:

> "I think the whole course of authority consistently recognizes a duty which rests on the employer, and

> which is personal to the employer, to take reasonable care for the safety of his workmen, whether the employer is an individual, a firm or a company, and whether or not the employer takes any share in the conduct of the operations. The obligation is three-fold, as I have explained."

In **Paris v. Stepney Borough Council** [1951] AC 367 at 384 Lord Oaksey described the duty as follows:

> "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 law demands from an employer a high standard of care for the safety of his employees. In keeping with this proposition, in **Cavanagh v. Ulster Weaving Company Ltd.** [1960] AC 145 at 165, Lord Keith declared:

> "... The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen, and all other rules or formulas must be taken subject to this principle."

Consequently, an employer's duty to his employee is stricter than that which is required by an individual to take reasonable care for himself. This duty prevails irrespective of whether the employment is inherently dangerous. See **Speed v. Thomas Swift & Co Ltd** [1943] KB 557. Although the duty imposes on the employer a high standard of care, the duty is not an absolute one. It is possible that such duty can be performed by the exercise of due skill and care. An employer ought not to be exposed to tortuous liability in circumstances where he has taken all reasonable care to provide a safe system of work. He must however endeavour to meet the obligation cast on him.

In **Winter v. Cardiff R.D.C.** [1950] 1 ALL ER 819 at 822, Lord Porter stated:

> "The duty cast on the master is, of course, not absolute, but only to do his best to fulfil the obligation imposed on him, though, indeed, a high standard is exacted. As the law stands, that duty must be considered in relation to the circumstances of each particular case, and the question to be answered is whether adequate provision was made for the carrying out of the job in hand under the general system of work adopted by the employer or under some special system adapted to meet the particular circumstances of the case."

It was argued by Mr. Givans that there was no evidence as to the owner of the jack. He further submitted that no evidence had been adduced to show who jacked up the truck and whether the jack was defective. There was nothing to show why the jack fell. There was no evidence touching the system of work in place at Elgin Road at the time. He also urged that there was also no evidence as to the nature and competence of the staff, the effectiveness of the plant, or the equipment at the garage. He further submitted that the sparse evidence furnished by the respondent renders ipsa loquitur inoperative.

The respondent was only able to testify that the appellant owned the jack and that it was a standing jack. He was unable to adduce evidence to show how the accident happened. As a consequence, he prayed in aid the doctrine of res ipsa loquitur. In outlining the application of the principle, Sir William Erle, CJ., in **Scott v London & St. Katherine Docks Co.** (1865) 3 H& C 596 at 601, said:

> "There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

In cases in which all the facts are known, the principle is inapplicable. Where all the facts are unknown the doctrine rallies to the assistance of a claimant, in discharging the onus placed on him, in proof of negligence. For the doctrine to become operative two elements ought to be present.

These are:

(a) The "thing' must be shown to be under the control or management of a defendant or his servant or agent.

(b) The accident must be such that in the ordinary course of things would not have happened had those who had the management of the "thing" exercised proper care.

The truck on which the work was being carried out and the Jack were on the company's compound. It is undeniable that the company as employer and the appellant its Managing Director, were the beneficiaries of the work being done. Therefore, they had the right of control of both the truck and the jack. However, it does not always follow that all the facts occurring should be within a defendant's control.

In **Jamaica Omnibus Services Ltd. v. Hamilton** (1970) 16 W.I.R. 316 at page 319 Fox J.A. said:

> "Also, it is not always necessary that all the circumstances should be within the control of a defendant. This was the view taken by Fletcher-Moulton, L.J. in **Wing v. London General Omnibus Co.** when, in *obiter dicta*, he generalised ([1909] 2 K.B. 652, at 663):
>
> 'The principle (*res ipsa loquitur)* only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants or their servants, so that it is not unfair to attribute to them a *prima facie* responsibility for what happened'."

Work was being done on the truck in the car park. The car park was not the normal area at which work was carried out on vehicles. It was the duty of the appellant to have ensured that the work was done in an area where the truck could have been safely and securely elevated to have facilitated the respondent to carry out the work without the risk of being exposed to danger of the truck falling on him.

The respondent was not the one who jacked up the truck. When he went to the truck, the Jack had already been in place. It fell off while he was under the truck. The truck fell on his foot and broke it. The obvious inference is that the person who put the truck on the jack was an employee of the company. He ought to have ensured that the Jack was in proper working order. Additionally, the appellant ought to have ensured that a competent member of staff carried out the installation of the Jack and that the respondent, an apprentice, who had been employed for only two and an half months, was properly supervised.

It cannot be open to dispute that the appellant, as agent of Triumph Commercial Ltd. owed a duty of care to the respondent. The appellant, the Managing Director of the company, instructed the respondent to do work on the truck. He had a fundamental duty to provide a Jack that was safe for the respondent's use. He had an obligation to maintain the Jack so as to keep its mechanisms free from defects. It was incumbent on him to ensure that the catches of the jack were in place, so that the release of any of its mechanism would not have caused it to malfunction, or, that the jack had been securely placed under the truck and could not slip from its mount.

A further issue which arises is whether there has been a breach of the duty of care. The appellant, as Managing Director of Triumph Commercial Ltd., conducted business relating to the repairs of trucks. He supplied workmen. He would also supply the equipment and material, including a jack, to be utilized on the work to be done on the truck It ought to be the general practice of establishments such as the kind operated by Triumph Commercial Ltd., to provide jacks which are not defective. A safe jack ought to have been made available for the respondent while he worked underneath the truck, to ensure that the truck remained in an elevated position until the work was completed.

The risk of that type of accident occurring, ought to have been foreseen by the appellant in relation to the respondent who was engaged in the type of work in which he was. It is reasonable to infer that the chance of the truck falling on him would have been obvious. The absence of a suitable jack exposed

the respondent to the likely risk of an accident. Had there been a proper jack in place, it is a distinct possibility that the accident would not have occurred. It is obvious that from the material which the learned trial judge had before him, he concluded that the doctrine of res ipsa loquitor was applicable in this case. He cannot be faulted for finding that the appellant, in the capacity of Managing Director of Triumph Commercial Ltd., is liable to the respondent for the injuries he sustained.

I now turn to the grounds with respect to damages:

Ground 6 states:

> "6. Regarding special damages the Learned Trial Judge erred in making the award of $508,850.00 to the extent that the main component of this sum was lost earnings as there was no proper evidence before the Court to show why the weekly earnings should be higher than $80.00."

The special damages claimed was as follows:

> "Loss of earnings from:-
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> | | | |
> |---|---|---|
> | (i) | 18/11/87 to December 1988 i.e. 59 weeks at $80.00 per week i.e. | $ 4,720.00 |
> | (ii) | 1/1/89 to 31/12/89 i.e. 52 weeks at $250.00 per week i.e. | 13,000.00 |
> | (iii) | 1/1/90 to the 31/12/90 i.e. 52 weeks at $400.00 per week i.e. | 20,800.00 |
> | (iv) | 1/1/91 to 8/10/93 i.e. 14 weeks at $500.00 per week i.e. | 72,500.00 |
> | v) | 11/10/93 to November 1993 at $700.00 per week and continuing i.e. | 2,800.00 |

Medical expense	700.00
Cost of crutch	50.00
Travel costs	6,300.00
Extra help	1,800.00"

On the issue of special damages, Mr. Givans argued that the award of $508.850.00 was not in keeping with the respondent's evidence. The loss of earnings of $80.00 weekly for 181 weeks was pleaded in the statement of claim and an amendment thereto was granted for loss of earnings for a further 52 weeks. He urged that the amount which ought to have been awarded for the combined period of his disability should be $18,640.00.

Where a claimant seeks to recover special damages he must strictly prove his loss. It is not sufficient for him to put before the court, particulars, asserting that the amounts stated are his loss and request that he be awarded those amounts as damages. In the case of **Bonham-Carter v. Hyde Park Hotel Ltd.** (1948) 64 T.L.R. 177 at page 178, Lord Goddard C.J. said:

> "On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it."

The foregoing observation of Lord Goddard C.J., was cited with approval by Hercules J.A. in this Court in the case of **Murphy v. Mills** (1976) 14 JLR 119.

Although Mr. Givans submitted that the respondent was granted an amendment to the claim to include loss of earnings for a further 52 weeks, the records do not disclose that such amendment had been granted despite an application by the respondent for an amendment of the particulars of special damages to include loss of earnings of $4,000.00 from November 11, 1994 to January 17, 2001.

In making his award, the learned trial judge did not state what items of special damages he allowed. The respondent testified that he earned $80.00 weekly. There is no proof that he earned any sum in excess $80.00 weekly. His witness a Mr. Delroy Lobban, a welder who worked with Tank Weld, Desnoes and Geddes and also privately, gave evidence of his Mr. Lobban's income over the period 1981 to 1999. The respondent, at the time of his injury was an apprentice welder. Mr. Lobban stated that one graduates as an apprentice to become a grade B welder and finally, advances to grade A status. Although the respondent has been working as a welder since late 1999, there is no evidence as to when he became a welder or his rating as a welder. His income would therefore have to be restricted to $80.00 weekly. He was incapacitated for 253 weeks, his income for that period ought to have been assessed at $20,240.00.

The costs of medical expenses amounting to $8,850.00 were defrayed by the respondent's mother and the appellant. He said the cost of the crutches was $60.00. There was no evidence in support of the amounts paid by his mother, or by him, or in support of the claim of $1,800.00 for the cost of extra

help. He would not be entitled to recover these sums. The award of $508,850.00 for special damages cannot stand. The award for Special Damages is reduced to $20,240.00.

The final ground of appeal was as follows:

> "7. The Learned Trial Judge erred in awarding $1,600,000.00 for pain and suffering as this sum was manifestly excessive."

Mr Givans submitted that the sum for $1,600,000.00 awarded for pain and suffering and loss of amenities was excessive and, reviewing comparable awards, the amount ought to be reduced.

The object of an award to a claimant who has suffered injury is for compensation. Although the object is one of adequate compensation for the victim, such compensatory award must not be excessive. An Appellate Court is loathe to disturb an award of damages by a trial judge unless such award is inordinately excessive or unreasonably low.

In making an award, the procedure to be adopted by the trial judges was outlined by Birkett, L.J. in **Rushton v National Coal Board** [1953] 1 ALL ER 314 at 317 when he said:

> "The courts have been compelled by the logic of circumstances to decree that their only possible course in cases of personal injury is to award damages in money, and, that being so, it is useful to look at comparable cases to see what other minds have done and so gather the general consensus of opinion as to the amount which an injured person in the present state of society ought to be awarded."

This method was approved in **H. West & Son Ltd. and Anor v. Shephard** [1963] 2 ALL ER 625, and **Wright v. British Railways Board** [1983] 2 ALL ER 698 .

In challenging the award Mr. Givans cited the following cases: **Tyrone Morrison v. The Attorney General for Jamaica & Anor,** Khan's Personal Injury Awards Volume 3 page 40; and **Sharon Barnett v. Rosemarie McLeod** Khan's Personal Injury Awards Volume 3 page 33.

Mr. Campbell referred to several English and Jamaican cases but unfortunately, none of these could have been utilized. The English cases are with respect to injuries to the neck, the shoulder blade, the vertebrae and the ribs. The Jamaican cases are with reference to injuries to the tibia and fibula, which are parts of the leg, not the foot.

The case of **Morrison v. The Attorney General** (supra) offers no assistance, as the injuries and resultant disability sustained by the plaintiff Morrison were dissimilar to those of the respondent in the case under review.

Sharon Barnett's case (supra) does offer some guidance. The plaintiff Barnett suffered a fracture of the right talus (ankle), superficial abrasions with swelling and tenderness on the right shoulder, left scapular region, left knee, right ankle, back of left shoulder, swelling over the left occiput of skull and tenderness in the abdomen. Her disability amounted to 21% of the right lower limb which converts to 8% of the whole person. In November 1988 she was

awarded $60,000.00 for pain and suffering and loss of amenities. This would convert to $839,560.38.at the date of trial.

Another case which offers some assistance is that of **Isiah Marriott v D & K Farms & Evan Phipps,** Harrison's Assessment of Damages for Personal Injuries at page 382. In that case the plaintiff sustained fractures and dislocation of the bones of the right foot and toes, laceration to the right foot, abrasions to the right elbow developing into a partial right wrist drop. His resultant disability was 10% permanent partial disability of the right foot with arthritic changes. In July, 1991 he was awarded $120,000.00 for pain and suffering and loss of amenities. At the date of trial this sum would convert to $399,708.45.

The respondent in the present case suffered compound fracture of the right foot, compound fracture of the right ankle joint and talus bone. He sustained permanent partial disability of 40% of the right lower limb.

In light of the cases, the award made to the respondent does not fall within the parameters of comparable awards. This would warrant the adjustment of the sum assessed. The award would therefore have to be reduced. However, taking into account the fact that the resultant disability of the respondent far exceeds those in the cases to which reference has been made, an award of $1,200.000.00 would be adequate compensation to the respondent for his pain and suffering and loss of amenities.

Mr. Givans questioned the award for cost of future surgery. However no grounds of appeal were filed to challenge this award. The sum of $60,000.00 granted for future medical expenses for corrective surgery remains.

The appeal is dismissed as to liability and allowed in part as to damages. Judgment is entered for the claimant/respondent as follows:-

Special damages

Loss of income with interest thereon at the rate of 6% per annum from November 18, 1987 to September 20, 2002	$20,204.00

General Damages

Pain and suffering and loss of amenities with interest thereon at the rate of 6% per annum from January 18, 1994 to September 20, 2002	$1,200,000.00
Handicap on the labour market	416,000.00
Future medical expense	60,000.00

Costs to the respondent to be agreed or taxed.

FORTE, P.

ORDER

Appeal dismissed as to liability and allowed in part as to damages. Judgment is entered for the claimant/respondent as follows:

(i) Special Damages

Loss of income with interest thereon at the rate of 6% per annum from November 18, 1987 to September 20, 2002	$20,204.00

(ii) General Damages

(a)	Pain and suffering and loss of amenities with interest thereon at the rate of 6% per annum from January 18,1994 to September 20, 2002	$1,200,000.00
(b)	Handicap on the labour market	416,000.00
(c)	Future medical expenses	60,000.00

Costs to the respondent to be agreed or taxed.