[2010–12 Gib LR 254]

ROBLES v. ATTORNEY-GENERAL

SUPREME COURT (Dudley, C.J.): January 20th, 2012

Employment—safety—safe system of work—employer's duty to ensure safe system of work—employer fully liable for injury arising from failure to provide safe system of work, to conduct risk assessment and to train and instruct employee properly—no contributory negligence of employee, notwithstanding safety signs and that goggles provided but not worn, if prevailing workplace culture to disregard health and safety

The claimant brought proceedings against the defendant to recover damages for personal injury sustained in the course of his employment.

The claimant sustained a serious eye injury whilst cutting wooden wedges with a circular saw in the course of his employment as a carpenter with the defendant. His primary role had been to fit panels and undertake minor masonry work rather than operate woodworking machinery and he was not given any specific machine training or health and safety instruction. No risk assessment had been conducted for machine work and the prevailing culture was to disregard health and safety. Protective goggles had been provided to employees and a sign displayed indicating that they should be worn. However, in practice the goggles were rarely worn and were treated as unnecessary. At the time of the accident, the claimant had not been wearing the goggles provided and a piece of wood had been ejected from the circular saw at speed, causing a serious and permanent loss of vision in his right eye of 75–85%. The claimant received treatment in London and his wife and children joined him there whilst he recovered. Thereafter, he was able to return to work. At the time of the accident he had been the highest earning carpenter employed by defendant, working overtime to gain a bonus, and continued to receive his basic salary in the interim between his injury and return to work. He commenced proceedings for damages.

The claimant submitted that he should receive substantial damages because (a) his injuries had been caused entirely by the negligence of the defendant in failing to provide a safe system of work, undertake a risk assessment and to train and instruct him properly for carpentry work, and his failure to wear protective goggles had not, in such circumstances, been contributory negligence; (b) his children's travel expenses were reasonable and mitigated the alternative costs of child-care; (c) his past earnings bonus-loss should be calculated by reference to the wage or bonuses he

had earned before the accident; and (d) a *Smith* v. *Manchester* award should be made to reflect the risk of him being out of work in the future.

The defendant submitted in response that (a) it had given adequate guidance for the claimant to be reasonably safe and the claimant was negligent in failing to wear the protective goggles provided; (b) his children's travel expenses were unreasonable; (c) his past earnings bonus-loss should be calculated by comparison with the highest paid carpenter after the accident, to reflect the cap on bonuses introduced after the accident; and (d) as the claimant was in permanent and pensionable employment with no real risk of being made unemployed, no *Smith* v. *Manchester* award should be made.

Held, awarding substantial damages:

(1) The claimant's injuries had been entirely caused by the defendant's negligence in failing to provide a safe system of work for those using woodworking machinery, failing to undertake a risk assessment and failing to train and instruct the claimant properly for carpentry work. There was no contributory negligence against which the defendant could off-set its liability, as the claimant's failure to wear the protective goggles provided resulted from the absence of suitable training and a working environment in which the prevailing culture of the workplace was to disregard health and safety considerations, notwithstanding the signs put up by the defendant to indicate that goggles should be worn. On the basis that the loss of vision in one eye was 75–85%, general damages for pain suffering and loss of amenity would be assessed at £23,000, approaching the upper end of the damages bracket recommended by the *JSB Guidelines* for serious loss of vision in one eye (paras. 25–29; paras. 31–35).

(2) The claimant's travel expenses were recoverable. It was reasonable to allow him to recover the cost of his children joining him in England during his treatment, which had mitigated what would have been the greater cost of obtaining child-care for that period (paras. 36–38).

(3) As the claimant had continued to receive his basic salary after the accident, his loss of past earnings would be limited to recovery of the overtime bonuses he had lost. On the evidence that he had been the highest paid carpenter prior to the accident, damages would be assessed on the basis that but for the accident he would have continued to be the highest earner. However, calculating that loss based on the claimant's average weekly wage at the time of the accident or the percentage of his basic salary comprising the bonus would result in an overestimate, as a cap on bonuses had been introduced after the accident. The most accurate calculation would be to ascertain the difference between the earnings of the claimant after the accident and those of the highest paid carpenter, and award the difference as loss of earnings (paras. 39–43).

(4) No *Smith* v. *Manchester* award would be made, as the claimant was in permanent and pensionable employment with no real risk of being made unemployed (paras. 44–45).

Cases cited:
(1) *Baker* v. *T. Clarke (Leeds) Ltd.*, [1992] P.I.Q.R. P262, *dicta* of Stuart-Smith, L.J. applied.
(2) *Smith* v. *Manchester Corp.* (1974), 17 K.I.R. 1; 118 Sol. Jo. 597 distinguished.

Ms. C. Pizzarello for the claimant;
S.P. Triay and *Ms. L. Sanguinetti* for the defendant.

1 **DUDLEY, C.J.:** In this action, the claimant ("Mr. Robles") claims damages against his employer for personal injury which he sustained on February 19th, 2004 when, in the course of his work as a carpenter, he cut wedges on a circular saw and a piece of wood was ejected at high speed and hit his right eye.

Background

2 At the time of the accident Mr. Robles was 35 years of age. He was first engaged by the defendant at its Building and Works Department in 1988 as a labourer and was promoted to carpenter in 1994. It is clear from his evidence that for the purposes of becoming a carpenter he did not receive any formal training or apprenticeship but simply learnt on the job. Of particular significance is Mr. Robles' evidence, which is not materially contradicted, that he never received any training or instruction in relation to the use of woodworking machinery or of the dangers inherent in their use, but that notwithstanding he used the circular saw because he was expected to. That testimony is supported by a document dated May 19th, 1994 entitled "Application for a Trade Test," which suggests that for the purposes of qualifying as a carpenter Mr. Robles was merely required to fit door frames and doors, partitions and ceilings. The thrust of the evidence by Mr. Fa, who was the testing officer, was that he did not think that any machinery was used in the context of the trade test.

3 That evidence is capable of being contrasted with that found in the witness statement of Mr. Joseph Perera, who was called by the defendant. Mr. Perera was at all material times the PTO/Depot Manager at the Ragged Staff Depot and had been since 2000. According to him—

> ". . . whilst learning the trade of a carpenter Clive Robles would have been taught by his immediate supervisor, other joiners and his instructor how to operate the circular saw and how to cut wedges and make up the necessary templates."

Given that Mr. Robles passed his trade test in 1994 and that Mr. Perera was employed by the defendant in 2000, his evidence is only capable of being categorized as an assumption and, although possibly a legitimate assumption, it is not one which in the absence of documentation evidencing training is capable of undermining Mr. Robles' evidence.

4 According to Mr. Robles, he discharged his duties primarily on sites undertaking the fitting of panels and minor masonry work rather than working with woodworking machinery at the depot. Drawing the distinction between the duties of carpenters and joiners he testified that prior to the incident, because of the nature of his duties, he had very rarely had to cut wedges. The distinction between carpenters and joiners was also taken up by Mr. Perera, whose evidence I understood as being that although there was no formal distinction between carpenters and joiners, the former worked on sites whilst the latter worked at the depot making furniture and the like.

5 According to Mr. Robles, he was, as part of a rota, responsible for the cleaning of the woodworking machines at the depot. Mr. Perera's evidence was that those duties, which were remunerated by way of a monthly bonus payment, included not merely the cleaning, but also the maintenance, of the circular saw. Premised upon that assertion, the defendant would have the court draw the inference that Mr. Robles was familiar with the operation of the circular saw. However, when cross-examined, Mr. Perera was unable to provide any record of training being provided to Mr. Robles in respect of the operation or maintenance of the circular saw and limited himself to saying that Mr. Robles had been instructed by a Mr. Frendo, who had informed Mr. Perera accordingly. Surprisingly, Mr. Perera did not know what training Mr. Frendo himself had received and Mr. Frendo did not provide a witness statement or testify. In the absence of any documentation evidencing training in respect of the maintenance of the machinery, I prefer Mr. Robles' evidence that he was tasked with the cleaning, but not with the maintenance, of the circular saw.

6 As regards training in health and safety, it was Mr. Robles' evidence, which was not contradicted, that the only training he ever received was a one day course in basic safety at work in 1998, which training was not specific to his area of work. Notwithstanding the absence of such training, according to Mr. Perera, Mr. Robles was one of the most safety conscious of his employees and it was a familiar sight to see him going about his business with his safety goggles.

7 According to Mr. Robles, despite making verbal requests for safety prescription spectacles these were not provided, whilst the safety goggles provided did not fit over his prescription lenses. According to Mr. Perera, the reason why these had not been provided was because Mr. Robles had been told to make the request in writing. Whether such an approach was reasonable does not strictly fall to be considered because, for reasons I shall turn to in due course, there is no causative link between the failure to provide safety prescription spectacles and the injury sustained by the claimant.

8 The existence at the time of the accident of such a culture is also

evident from the evidence of Mr. Roy Torres, the defendant's health and safety monitor at the Building and Works Department. In relation to safety goggles, Mr. Torres' testimony was that the goggles provided to workers "cover sufficiently to enable them to wear their own prescription glasses under them." Mr. Torres was, however, incapable of explaining that evidence when confronted with user information for certain goggles warning that their use over ophthalmic spectacles may allow for the transmission of impact and create a hazard to the wearer. Whilst, of course, his explanation that specifications for goggles vary must evidently be right, he was unable to say whether or not those in fact provided to Mr. Robles were subject to such a caveat.

9 The defendant's approach towards health and safety is, on one view, exemplified by the training afforded to Mr. Torres himself. Although appointed to that post in 2004 (and previously acting in that post for a year), Mr. Torres' health and safety training was, at the time, very limited and based largely on his own experience as a carpenter; he did not undertake further specific training or studies in health and safety until 2008. It is of some significance that Mr. Torres was unaware of the training provided to carpenters on the use of woodworking machines or health and safety.

10 It is fair to say that Mr. Torres did, however, endeavour to bring about something of a change of ethos at the Ragged Staff Depot and in November 2003, some three months before the accident, he gave instructions for the removal of what he described as a "pornographic mosaic" and its substitution with health and safety signage, including a sign by the circular saw stating: "Eye protection must be worn in this area."

11 Despite the signage, it is apparent that there was no real effort on the part of the defendant's management to ensure that eye protection was worn by employees using the woodworking machines. That much is in my view clear, given that no training, instruction or guidance was provided to employees in tandem with the placing of the signs. This was despite the fact that, according to Mr. Torres, there was a culture of not using eye protection and that, whilst some operatives may have been given a verbal reprimand, no-one was disciplined for failing to use it. Mr. Perera's evidence that Clive Robles was one of the more safety conscious employees, and that it was a familiar sight seeing him "going about his business with his safety goggles" highlights the culture of disregard towards health and safety by employees and management; otherwise, to have a worker going about his business with his goggles would not have elicited the reaction that this was an employee particularly conscious about safety. If carpenters and joiners had used eye protection routinely when using woodworking machinery, then the exception would have been the employee who went about his business without goggles rather than the converse.

The accident

12 It is not in dispute that on Thursday, February 19th, 2004, Mr. Robles was working at the Ragged Staff Depot, where new offices were being built. According to Mr. Robles, that day he had been involved in fitting window frames and polythene sheeting in the east side of the building. He had not required wedges for that job because he had cut the frames to fit. Because it was feared that it would rain, Mr. Robles' supervisor, Joseph Luis Alsina ("Mr. Alsina") was asked to do an after-hours job which should have been undertaken by another team. That job also involved fitting timber frames and polythene sheets on some five windows on the other side of the building directly above the after-hours emergency office.

13 That task was to be undertaken by Mr. Robles, Mr. Alsina and a Mr. Martinez. Of the three, only Mr. Robles was a carpenter. Although only a very peripheral issue, in contrast to Mr. Robles' evidence, according to Mr. Alsina both Mr. Robles and Mr. Martinez used protective goggles when fitting the frames. Curiously, although in the immediate area, Mr. Alsina himself did not find it necessary to wear goggles. Although of no consequence in relation to the use of goggles when operating the circular saw, I prefer the evidence of Mr. Robles that the goggles were not used because it was not practical for the type of work being done. If Mr. Alsina had considered it necessary that goggles be worn he would also have worn them himself, given that he was in the immediate vicinity.

14 Given that the frames were not cut properly, Mr. Robles required timber wedges to secure the frames to the openings in the wall. With Mr. Alsina's permission he went to get some. According to Mr. Alsina, who testified for the defendant, he assumed that Mr. Robles would get some pre-cut wedges from the workshop, although when cross-examined it was his evidence that Mr. Robles had said that he was going to the workshop to cut the wedges he needed. However, both Mr. Robles and Mr. Alsina were in agreement that 4 wedges were required per window and that therefore a total of some 20 wedges were needed.

15 Not in dispute was that Mr. Robles went to the workshop and proceeded to cut the wedges on the circular saw freehand, pushing the wood straight through the machine. Mr. Robles' evidence was that he was uncertain whether or not the guard was fitted to the saw but was certain that he did not wear his goggles for the purpose of undertaking the cutting. Significantly, he conceded that for the purposes of cutting the wood he did not require his spectacles, and it therefore follows that he could have worn the goggles. Given that concession, the failure by the employer to provide Mr. Robles with safety prescription spectacles had no causative effect, although it serves to evidence the defendant's attitude towards health and safety.

16 Unfortunately, on cutting the first wedge a piece of wood shot up and

struck him with force against his right eye, consequent upon which he has suffered serious loss of vision in that eye.

17 Although suggested by counsel for the defendant that it was somehow unreasonable of Mr. Robles to have used the circular saw to cut the wedges, given the evidence of Mr. Perera, who testified that if he required 20 wedges he would cut them with a machine rather than with a handsaw, it is an issue which requires no further consideration.

18 The day after the accident, Mr. Torres examined the machine. He found the guard was fitted and that no one admitted to using the machine after the accident. On balance I find that Mr. Torres found the circular saw in the state it was in at the time of the accident. Although Mr. Torres found that the machine was working properly, he accepted that it was a very old model and that it was somewhat cumbersome to adjust the guard. In the absence of an explanation as to how the accident had happened, he requested its disconnection. In an accident report produced by him on March 4th, 2004, he concluded that the accident could have been avoided. As he put it in the report: "The timber wedges should have been cut using a template which is pressed against the fence. The top guard should have been lowered to the thickness of the piece of timber. The employee should have worn his eye protection."

19 Mr. Torres also undertook a risk assessment in respect of the use of the circular saw on that date, which it is not in issue had never previously been undertaken, and made the following recommendations:

> "(1) The circular saw has to be re-sited to an enclosed site as woodworking machinery. We cannot have working benches beside the machinery.
>
> (2) Only competent carpenters should use the circular saw.
>
> (3) Carpenters should be re-trained in safe working practices when using woodworking machines.
>
> (4) Only carpenters should be allowed to enter the carpenters' workshop.
>
> (5) The circular saw has to be provided with a certified extraction system.
>
> (6) A competent person must service the circular saw.
>
> (7) Specific signs should be displayed above the machine, *e.g.* remember to position the guards and PPE required.
>
> (8) Any cutting operation should be accompanied as required.
>
> (9) A competent person should be assigned responsibility for the

machines, so that every cutting operation is performed through him. This person would be in the workshop at all times."

The priority for these steps was marked as "immediate."

20 In the joint statement produced by the experts instructed by the parties, they identified the areas of agreement as follows:

"4 At the time of his accident, Mr. Robles was attempting to cut a number of timber wedges using a circular saw. Mr. Robles was injured when a piece of timber was ejected from the machine.

5 On the evidence of Mr. Robles, he attempted to cut the timber 'freehand,' that is, he did not use a jig or a push-stick to cut timber wedges as he should have done. The use of such devices provides greater control over the workpiece and reduces the risk of it being ejected from the machine.

6 The circular bench saw in question had originally been fitted with a crown guard and a riving knife (as required by the Factories (Woodworking Machinery) Regulations 1956 for Gibraltar) but it is unclear if they were in place at the time of the accident. Experts acknowledge that regulations will ultimately be matters for the court.

7 The photograph taken by Mr. Torres on the morning immediately after Mr. Robles' accident, shows that the saw blade, crown guard and riving knife were all present but incorrectly adjusted. The saw blade was set too low, as was the riving knife. The crown guard was set too high.

8 Presuming the saw had not been interfered with before Mr. Torres' inspection the following morning, Mr. Robles had been using the saw in an unsafe manner (by not correctly adjusting the machine's safety devices).

9 Had the riving knife and crown guard been correctly adjusted, it is unlikely that the piece of timber would have been ejected from the machine and projected towards Mr. Robles.

10 Mr. Robles had been provided with personal eye protection. The type (*i.e.* safety goggles or safety spectacles) and condition of the eye protection provided is unclear.

11 Mr. Robles admits that he was not wearing any eye protection or his own prescription spectacles at the time of his accident.

12 Had Mr. Robles been wearing the correct eye protection, it is unlikely that he would have suffered an injury to his eye when the timber was ejected from the machine.

13 No evidence has been provided relating to Mr. Robles' level of

training in the use of the circular bench saw. Mr. Robles should have received training in the use of such a machine.

14 No formal record, prior to the date of the accident, of a risk assessment in relation to the use of the circular bench saw has been provided. A risk assessment, regarding the use of a circular bench saw, should inform the user of the importance of wearing suitable eye protection and correctly adjusting the machine's safety devices."

21 In their joint statement they identified no areas of disagreement. However, in cross-examination there were some nuances which require some further consideration.

22 Mr. Nicholas Davison, the expert instructed by the defendant, opined in his report, which he adopted as his evidence, that in his view—

". . . Mr. Robles was either insufficiently trained and instructed to use the machine, or he was a competent man (with 10 years' carpentry experience) who was suitably and sufficiently trained to use the machine, yet knowingly neglected to put into practice the training and instruction provided to him . . . If it is correct that Mr. Robles was insufficiently trained to use this machine, it is possible that he has been using the same unsafe method of operation . . . for the duration of his employment as a carpenter (a period of approximately 10 years) without suffering injury. In my view, that is unlikely."

He continued:

"If Mr. Robles had accomplished the task [cutting wedges] on a number of previous occasions . . . he would have had an opportunity to determine for himself the behaviour of machine/workpiece and should have noted that his operating method was unsafe."

23 What, in my view, Mr. Davison fails to take account of is the fact that Mr. Robles discharged his duties as a carpenter on work sites and therefore had limited exposure to the use of the woodworking machines.

24 It is self-evident that, if Mr. Robles had been wearing suitable eye protection at the time of the incident, the risk of his suffering injury to his eye would undoubtedly have been reduced or indeed altogether removed. However, the experts were not agreed on the need to use eye protection for the purposes of the cutting operation undertaken by Mr. Robles. Mr. Davison was of the opinion that it was accepted practice that protection was required when a high-speed blade was used, given that the guard does not cover the whole area so as to completely remove the risk of impact. In contrast, the claimant's expert, Mr. John Glubb was of the opinion that traditionally, when working with timber, eye protection has not been required. He accepted, however, that such a requirement was properly a matter for the employer.

25 The upshot of the evidence is that there were three immediate causative factors which led to Mr. Robles sustaining injury to his eye: (a) his failure to use a jig or a push stick; (b) his failure to adjust the riving knife and crown guard; and (c) his failure to wear his goggles. The issue before me is whether the defendant bears responsibility for Mr. Robles adopting the practices which he did, and if so whether any contributory negligence can be attributed to the claimant.

26 Without any hesitation I conclude that the defendant failed to provide a safe system of work, not merely by failing to assess the risks involved in the use of woodworking machinery, but more fundamentally by failing to provide Mr. Robles with any training or instruction on their use. Therefore no responsibility can properly be attributed to Mr. Robles for failing to use a jig or properly adjusting the riving knife and crown guard.

27 Mr. Robles' failure to use the goggles notwithstanding the signage requires separate consideration. In *Baker* v. *T. Clarke (Leeds) Ltd.* (1), an English Court of Appeal case involving the failure to adopt proper precautions and the employer's duty to warn an experienced employee, Stuart-Smith, L.J. said ([1992] P.I.Q.R. at P267) that—

> ". . . it is not necessary in my judgment for an employer to tell a skilled and experienced man at regular intervals things of which he is well aware unless there is reason to believe that that man is failing to adopt the proper precautions or, through familiarity, becoming contemptuous of them."

28 Respectfully, that must be right. But the corollary is that where there is a prevailing culture of disregard towards health and safety, an employer cannot oust his responsibility with the mere assertion that the employee was skilled and experienced. In the present case, there was a culture of not using eye protection. Replacing the "pornographic mosaic" and substituting it with eye protection signage was, in the absence of training instruction and policing of that requirement, wholly insufficient. In those circumstances, to attribute any responsibility to Mr. Robles would, in my view, be grossly unfair.

29 For these reasons, I find the defendant wholly liable for the injury sustained by Mr. Robles.

Damages

30 Apart from general damages, Mr. Robles seeks past loss of earnings, travelling expenses, the cost of medication and future treatment costs. Although in his amended schedule of losses he had also sought future loss of earnings, that claim was abandoned at trial and in its stead a *Smith* v. *Manchester Corp.* (2) award was sought. Other than for the claim for medication in the sum of £340 and for future treatment in the sum of

£1,590, which are accepted, the defendant disputes the amounts claimed under the other heads.

Pain, suffering and loss of amenity

31 As a consequence of the injuries sustained, Mr. Robles underwent two operations at Moorfields Eye Hospital and had to attend multiple outpatient appointments. Each party relies upon its own expert's report, with neither having been called to testify. Although a joint statement by the experts is not available, the differences in their opinions are rather limited. According to the report by Mr. Alan Mushin, Consultant Ophthalmic Surgeon, relied upon by Mr. Robles, he has a permanent visual defect in his right eye whereby he has lost 80 to 85% of all useful vision and his complaints of poor vision, trouble from bright lights and headaches on prolonged use of computer and reading are said to be justified and permanent. Although there is no risk to his good eye, on account of the injuries sustained to his right eye, the expert opines that Mr. Robles should never be permitted to work with moving machinery.

32 The report compiled by the defendant's expert, Mr. Thomas Williamson, Consultant Ophthalmologist, puts the loss of vision at approximately 75% of central vision and approximately 50% reduction in sensitivity in peripheral vision. He opines that it is likely that it is a permanent loss of vision, depth perception and partial loss of visual field. There is no apparent criticism of Mr. Robles' loss of confidence in using machinery and ability to do fine work by virtue of the loss of depth perception. In line with the claimant's expert, Mr. Williamson also opines that there is the risk of further sequelae affecting the vision in that eye.

33 Not in issue is that the injury sustained by Mr. Robles falls within para. 4(A)(f) of the Judicial Studies Board's *Guidelines for the Assessment of General Damages in Personal Injury Cases*, 10th ed. (2010): "Cases of serious but incomplete loss of vision in one eye without significant risk of loss or reduction of vision in the remaining eye, or where there is constant double vision." The damages bracket stands at £15,500 to £25,750.

34 Counsel have referred me to a number of relevant awards reported in *Kemp & Kemp*. I must admit to some difficulty in that in some of the cases relied upon the visual acuity is measured by way of a fraction. Ms. Sanguinetti in her submissions sought to explain the nature of these measurements and cross-reference these to the findings in the reports. In 2004, Mr. Mushin described/measured Mr. Robles' visual acuity "counting fingers, improving with +11DS and pinhole to 6/24 part eccentrically," whilst when Mr. Williamson examined Mr. Robles in 2008 he found "6/24 vision in the right eye N48." Without the benefit of the oral evidence of the experts who could have properly explained these findings and the significance of "+11DS," the use of a "pinhole" or the meaning of "N48," I am

loth to rely upon the fractions as comparators but rather rely upon the percentile references in their reports.

35 Premised upon a loss of vision in the region of 75–85%, and the other factors which I have previously touched upon when reviewing the experts' reports, I am of the view that the appropriate award, whilst not at the very top of the scale, certainly approaches it and I assess damages in respect of the injury in the sum of £23,000.

Travelling expenses

36 The claimant seeks £8,442.50 in respect of this head, of which £2,442.50 is attributed to flights and £6,000 is attributed to accommodation and expenses whilst in the United Kingdom. It is somewhat unfortunate that the claimant offers no receipts to substantiate the expenditure.

37 In cross-examination, Mr. Robles testified that the claim for flights related to fares paid in respect of his three young children, who accompanied him and his wife on various occasions, as their own flights were paid for by the Gibraltar Health Authority. The defendant suggests that such expenditure was unreasonably incurred by Mr. Robles. I disagree with such a proposition. It was perfectly reasonable for Mr. Robles to be accompanied by his wife and, in those circumstances, had the children remained in Gibraltar there could properly have been a claim for the cost of professional live-in care for the children. Essentially, therefore, there has been a mitigation of loss.

38 As regards the generic £6,000 claim, in the context of 18 trips to the United Kingdom the sum sought is in my view so eminently reasonable as to make it justifiable even in the absence of documentary evidence.

Loss of earnings

39 Despite the plethora of material available, the most troublesome head of damage which falls to be considered is past loss of earnings which, given that at all times Mr. Robles continued to receive his basic salary, arises consequent upon his inability to work overtime and extra hours in order to earn a bonus. The claimant's case is that prior to the accident he was continuously the highest earner when compared with other carpenters in the defendant's employment. The calculations provided by counsel for Mr. Robles show that by August 2008 no loss was being suffered, from which I draw the inference that by then he had reverted to being the top-earning carpenter. For Mr. Robles, it is therefore said that but for the accident there was a transitional period when he was not the highest earner and that, on a balance of probabilities, but for the accident he would have continued to be the highest earner. For the defendant it is said that despite the accident, other than for a period when he was on desk duties, Mr. Robles remained amongst the top five earners. It is, therefore, submitted

that it is only in respect of that limited period that Mr. Robles should be compensated.

40 It is clear from the evidence that, as put by Mr. Torres, Mr. Robles was "a keen and hard worker." That, in combination with his earning capacity prior to the accident and his reverting to that position by August 2008, leads me to draw the inference that but for the accident it is likely that he would have maintained the highest earning capacity from the date of the injury to August 2008.

41 The issue which arises is the basis upon which such loss is to be calculated. Three alternatives are advanced:

(a) calculating loss on the basis of the average weekly wage at the time of the accident and then extrapolating it into the future taking account of annual salary increments;

(b) calculating the average bonus and overtime as a percentage of the basic salary and using the percentages to calculate the loss; and

(c) ascertaining the difference between the moneys earned by Mr. Robles and the highest paid carpenter.

42 The first two options would undoubtedly result in an overestimation, not least because at one stage a 43% cap of annual basic salary was fixed in respect of bonus payments, albeit not necessarily enforced in all cases. Therefore the 2003/2004 figures are not capable of extrapolation. In the circumstances, I am of the view that the most accurate way in which this head of damage can be calculated is by establishing the differential throughout the relevant period between Mr. Robles' gross income and that of the defendant's highest paid carpenter and thereafter apply a 25% reduction to that sum to take account of tax deductions.

43 I ask counsel to calculate the damages awarded under this head in the manner directed. In the event that they cannot agree upon the calculations I shall hear submissions in that regard.

Smith* v. *Manchester award

44 The claim for future loss of earnings having been abandoned, Ms. Pizzarello in its stead sought a *Smith* v. *Manchester Corp.* (2) award. Mr. Robles is in permanent and pensionable employment with the defendant and has been since 1988 and it is further apparent that he is highly regarded by his superiors. I am of the view that there is nothing to suggest any real risk of the claimant being thrown on the labour market and, therefore, there is no evidence to justify such an award.

45 Orders accordingly. Unless they are able to agree, I shall hear the parties as to the calculation of loss of earnings, interest and costs.

Orders accordingly.

[2010–12 Gib LR 267]

IN RE WIDEN

SUPREME COURT (Dudley, C.J.):February 6th, 2012

Bankruptcy and Insolvency—enforcement of foreign insolvency proceedings—foreign revenue law—rule against recovery of foreign tax debts abolished, by Council Regulation (EC) No. 1346/2000, art. 39, if enforcement sought of foreign collective insolvency proceedings in other Member States

The foreign official receiver of an estate sought to recover assets from the estate in order to ensure the enforcement of foreign tax liabilities.

The applicant was the Swedish official receiver of the estate of the deceased, having been appointed by the Swedish court in Swedish collective insolvency proceedings. The deceased was the beneficial owner of shares in a Gibraltar company that were held by trustee companies. He had also been a signatory of three bank accounts in Gibraltar, of which, following his death, the trustee companies had *de facto* control. The applicant sought to recover the deceased's assets, which related to the enforcement of Swedish tax liabilities.

The applicant submitted that he should be able to recover the assets because (a) Council Regulation (EC) No. 1346/2000, art. 39 had, in insolvency proceedings involving persons resident in Member States, abolished the rule against the enforcement of foreign tax debts and precluded any public policy objection to enforcement; (b) he was entitled, by art. 18, to exercise the powers given to him by Swedish law, including the power to recover assets; and (c) alternatively, the court should act in aid of the foreign insolvency proceedings, under the Bankruptcy Act 1934, s.98(2) or the Mutual Legal Assistance (European Union) Act 2005.

The trustee companies remained neutral as to the outcome, but submitted that *ex post facto* approval should be given to their disclosure of certain information about the deceased to the applicant.

Held, allowing the application:

(1) The applicant would be entitled to recover the assets of the