IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008HCV04637

BETWEEN	GARTH BURTON	CLAIMANT
AND	THE JAMAICA BISCUIT CO. LTD.	DEDENDANT

Mr. Shawn Kinghorn instructed by Kinghorn and Kinghorn for Claimant

Mr. David Johnson instructed by Samuda and Johnson & Defendant

Employers Negligence – Vicarious Liability –Safe System of Work

Heard: February 2, 3 and 23, 2011

Straw J.

1. The claimant is an assistant line operator employed to the defendant and has been employed to the said company since 1998/99.

2. The defendant company operates a factory and is in the business of making and manufacturing biscuits for sale.

3. On December 7, 2006, two of the claimant's fingers were amputated while he was engaged in the process of clearing a machine referred to as a cutter on Band plant number two at the company's premises. He is suing the defendant on the basis, firstly, of vicarious liability i.e., his injuries occurred due to the negligence of the defendant's servant and/or agent. Secondly, he is suing the defendant for negligence as an employer

and alternatively, for breach of an express or implied term of the contract of employment that the defendant would take all reasonable care to execute his operations in the course of its trade in such a manner so as not to subject the claimant to reasonably foreseeable risk of injury, and that in breach of the said contract, the defendant has exposed the claimant to reasonably foreseeable risks of injury.

Agreed Facts

4. Both parties agree substantially on the facts surrounding the incident which are outlined below:

- On December 7, 2006, the claimant was assigned to Band plant number one as the assistant operator. He was on the 10:00 p.m. to 6:00 a.m. shift. His duties included pushing out the dough, putting it into the hopper and then pressing the button to close the gate, sending up the dough and dumping it. His duties also included clearing the cutter if it was jammed.

- The Band plant is normally operated by the operator and an assistant. At some point during the shift, the claimant was called to Band plant number two by a co-worker, Cleveland O'Hara, the assistant operator for the said plant to assist in clearing that cutter as the dough was not running smoothly through that section of the machine.

- On each Band plant machine, there are 16 emergency buttons. There is also a control panel, 6 to 7 feet from the cutter section of the Band plant with an emergency or kill switch. There are also other buttons on this panel that can shut down particular areas of the Band plant. However, once the emergency switch is engaged, the Band plant is totally shut down. It can only be restarted by discharging the emergency switch and pressing a button.

- If the cutter is jammed, the equipment should be shut down immediately by pressing the nearest emergency button.

- At the particular time, Mr. Burton stopped the machine. Both parties disagreed as to the method he used to do so. The claimant instructed Mr. O'Hara not to restart the machine until he told him to do so. While he was in the process of clearing the cutter with his hands in the cutter area, Mr. O'Hara restarted the cutter section. As a result, the claimant's index fingers were cut off.

- Since the incident, the defendant has changed the system in relation to rectifying problems that might occur. The control panel now has locks on it. The person who turns it off, locks it and keeps the key so that no one else can access it. This is described as the lock out/tug out system.

The Claimant's Account

5. The claimant contends that he shuts down the entire operation for the Band plant by engaging the kill switch on the control panel. He further contends that while he was clearing the cutter, he heard Mr. O'Hara moving towards the control panel but he paid no attention to him as he had instructed him not to turn it on until directed.

He is contending, and there is no evidence to contradict him, that Mr. O'Hara accidentally and negligently turned on the machine.

6. His evidence that he had engaged the emergency switch is inconsistent with evidence contained in his witness statement. In that statement, he stated that he went over to the control area of the machine and shut down the cutter section by pressing the stop button. He further stated that there was no need to use the button that shuts down the entire machine as it was just the cutter area that had the problem. He explained that the system of work was so designed that one could shut down the cutter section independently of the other work areas so that one could fix the problem in the particular area without shutting down the entire operation.

7. According to the claimant, the emergency or kill switch would be used in the most extreme emergencies and that it was standard procedure merely to switch off the power in the area of the cutter to deal with the problem of blockage.

Mr. Burton's evidence is as follows:

> "This is what I was taught and instructed to do by the company and for the 11 years I have been working --- this is what I did. --- I still work for the

> company and this is the procedure that the workers undertake when there is a problem with the machine and this is done to the company's knowledge."

8. The claimant was confronted with these inconsistent statements. However, he denied that he only shut down that area of the plant where the cutter operated and stated that that it was the normal procedure to shut down the entire plant by pressing the kill switch.

9. At the time of the incident, the supervisor on shift was sleeping.

The Defendant's Account

10. The defendant company has called no witnesses as to material facts surrounding the injuries received by Mr. Burton. It is being contended, however, that Mr. Brown breached the safety procedure by failing to engage the kill switch.

11. Mr. Lennox Nelson, the Process Implementation Coordinator was the Production Coordinator in December 2006. He explained that the claimant breached the safety procedure as described above and stated that once the kill switch is engaged, power can only be returned to the Band plant by disengaging the kill switch and then pressing a green button. He further stated that the pressing of this button signals an alarm for 36 seconds to indicate that the plant is about to start.

According to Mr. Nelson, this alarm system existed in 2006 as it is on the equipment from the time it is brought into the plant.

12. Mr. Nelson also stated that once the cutter is jammed, the person who is to clear the blockage must engage the emergency or kill switch and the same person would also disengage the said switch.

It is to be noted that Mr. Burton said he knew nothing of this pause and alarm after the kill switch is disengaged before the machine becomes active.

13. Mr. Nelson stated that the procedure was not breached because Mr. O'Hara turned on the machine, but it was breached by the failure of the claimant to engage the kill switch.

14. If this were a mystery movie, one could say that 'the plot thickens,' because Mr. Dennis McDonald, a second witness called by the defence has contradicted both Mr. Nelson's and the claimant's evidence in relation to the standard procedure.

15. Mr. McDonald is the Production Coordinator for the company. It is important to note that in December 2006, he was the Production Supervisor with responsibility of a Safety Coordinator. His duties as a supervisor, included establishing and implementing safety procedures and if there were safety breaches, to address and correct them. He also gave evidence that the production supervisor on the shift has ultimate responsibility for the safety of employees and that there are safety personnel throughout the plant along with team leaders that are placed on the line and are responsible for ensuring that procedures are upheld.

16. According to Mr. McDonald, once the cutter is jammed, the equipment should be shut down immediately by pressing the nearest emergency button. This is done by either the operator or the assistant. One then makes an assessment of the cutter, releases the emergency button, clears the blockage and resumes production. However, once the machine stops, one should make observation to the cutter area before restarting the machine.

17. Mr. McDonald further stated that if a worker, who is on the operating side of the machine, restarts the machine while another worker is clearing the machine, he would have breached the safety procedure. The operating side is the area nearest to the control panel.

18. Mr. McDonald confirmed the evidence of Mr. Nelson that there is an alarm system on the Band plant and in the event that the unit shuts down, the alarm will be heard when the plant is re-engaged. However, Mr. McDonald emphasized that 'this is not for when the cutter is jammed.'

19. In relation to the established safety procedure, Mr. Nelson stated that employees are fully briefed before they begin working with the company. He further explained that the safety procedures are reinforced by warnings and signs located in the factory and by the safety supervisors.

In the area where Mr. Burton worked, Mr. Nelson recalls only two signs 'Don't put your hand there' and 'Emergency Shift.'

Analysis of the Evidence

20. Based on Mr. McDonald's evidence alone, the court would be entitled to make a finding that Mr. O'Hara breached the safety procedure when he went towards the control area and turned on the button controlling the cutter area. He would therefore have been negligent in carrying out his duties.

However, if the court accepts the evidence of the claimant and Mr. Nelson, the standard procedure would have been to engage the kill switch.

A relevant question would therefore be whether Mr. Burton actually engaged the kill switch.

On a balance of probabilities, based on his inconsistent evidence, I am not able to make a finding that he did. However, this is not the end of the matter.

21. The court draws the inference from the evidence of Mr. McDonald that even if the standard procedure was to engage the kill switch, it has not been carried out by the workers. He was the production supervisor at the time and he did not know of the system being in operation. Certainly, he would not have insisted that the system as described by Mr. Nelson and Mr. Burton be put into use.

This view is further fortified by the fact that Mr. Burton did not know about the alarm system. I accept his evidence on the point. Mr. McDonald stated that the alarm system was only triggered after the entire operation had been shut down and then restarted and this was not the case when the cutter was jammed. The court is also of the view that the fact that Mr. Burton has not worked on the Band plant since December 2006 may be a contributing factor in relation to the material inconsistency in his evidence.

22. The court also makes the finding that there were no signs in the area to remind the workers that the kill switch was to be engaged in order to clear the cutter.

I am therefore of the opinion that, even if the standard procedure in place was to engage the kill switch, the defendant was negligent in maintaining and reinforcing the said safety procedure.

The Law

23. In **Wilson & Clyde Coal v English** 1938 AC 57, Lord Wright defined the employer's common law duty to his employee as threefold:

> *"The provision of a competent staff of men, adequate material, a proper system and*

effective supervision. This is fulfilled by the exercise of due care and skill."

24. In the present case, the claimant contends not only that the defendant is liable for the negligent act of its servant, Mr. O'Hara but also that the company failed to provide a safe system of work, failed to implement a safe system which would prevent the claimant sustaining injury and failed to modify, remedy and/or improve a system of work which was manifestly unsafe.

25. A safe system of work has been described by Lord Greene MR in **Speed v Thomas Swift & Co. Ltd.**, 1943 KB, 557 (at pages 563-564) to include the physical lay out of the job, the setting of the stage, the sequence in which the work is to be carried out, the provision of warnings and notices and the issue of special instructions and where necessary, modifications or improvements to circumstances which arise.

26. Counsel for the defendant, Mr. Johnson, has submitted that on the evidence of the defence witnesses, all that was reasonable was done and the introduction of the new system since December 2006 is in keeping with Mr. Nelson's evidence of the company's continuing approach to improving safety.

27. In considering whether the defendant had established a safe system of work in December 2006, the court bears in mind that an employer must take into account the fact that workmen are often heedless of their own safety (**General Cleaning Contractors Ltd v Christmas** 1953 AC 180 pg 189 – 190 per Lord Oaksey).

28. In devising a safe system of work, the employer must take steps to ensure that the system of work is complied with and that the necessary safety procedures are observed.

In **Walter Dunn v Glencore Aluminium Jamaica Ltd.,** SCCA 2005 HCV 1810, my brother, Brooks J, found an employer liable for not providing a safe system of work by failing to enforce compliance with a particular safety rule.

29. The system established by the employer should so far as possible minimise the danger of a workman's own foreseeable carelessness (See **General Cleaning Contractors**, supra).

30. The claimant has a duty to prove on a balance of probabilities that the injury was caused by the negligence of the defendant.

Reasons for Judgment

31. Although there is a material inconsistency in the evidence of the claimant as to the standard safety procedure, the court draws these reasonable inferences on the totality of the evidence:

i The evidence as to whether the claimant actually engaged the kill switch is unreliable.

ii However, if Mr. McDonald's evidence is to be believed, then Mr. Burton would not have breached any known safety procedure by failing to engage the kill switch.

iii. The negligent act of Mr. O'Hara would therefore be the proximate cause of the injury. The defendant would be vicariously liable for the negligent act of its workmen.

v. Even if the court were to accept the evidence of Mr. Nelson and Mr. Burton in relation to the standard procedure, then this court finds that the defendant failed consistently to enforce compliance of this safety procedure.

This finding is based on the evidence as summarized below:

a. Mr. Burton is not aware of the pause and alarm system. I accept his evidence that he is not aware of it.

b. Mr. McDonald, who was the Production Supervisor at the time with responsibility for implementation and establishing safety procedures, was not aware of this safety procedure in relation to the clearance of the cutter. His evidence is to the contrary and he expressly stated that the alarm system is not used for the clearing of the cutter.
There is no evidence then of enforced compliance.

c. There are no signs to the effect in the area, and the supervisor on duty would not be automatically alerted if there is a blockage. He would have to be 'on line' to have knowledge of this.

d. At the time of the incident, the supervisor, according to Mr. Burton was asleep. There is no evidence to contradict this.

vi. On the totality of the evidence, the court finds that the defendant failed to ensure compliance with the standard procedure as stated by Mr. Nelson and Mr. Burton. The defendant would therefore be liable for its failure to maintain compliance with a safe system of work.

Contributory Negligence

32. There is one final issue for the court's consideration. Mr. Burton's inconsistent evidence has prevented the court from making a finding that he engaged the kill switch as he stated. However, even if it could be argued that he failed to follow procedure, the mere fact that an employee disobeys an order does not necessarily deprive him of the protection of his employer's duty, though he may of course be guilty of contributory negligence (**Rands v McNeil**) 1955 1QB 253; **Walter Dunn** (supra).

In disobeying the standard procedure as stated by Mr. Nelson, should Mr. Burton share the burden of liability? This issue does not arise if the standard procedure is as described by Mr. McDonald.

The court has to consider whether Mr. Burton's act of non-compliance is 'a risky thing' in disobedience of orders (See **Smith v Chesterfield & District Co-operative**

Society Ltd 1953 1 ALL ER 447; **Desnoes & Geddes Ltd v Gary Stewart** SCCA No. 74/2002).

33. The evidence is that there has to be some manipulation of the jammed cutter by hand in order to clear it. The cutter section had been turned off. It was a 10:00 p.m. shift. There is no evidence that there was anyone else present in the work area save Mr. Burton and Mr. O'Hara. Mr. Burton said he had given strict instructions to Mr. O'Hara not to turn on the machine until he gave him such instructions.

34. Mr. O'Hara knew that Mr. Burton was attempting to clear the cutter, indeed he had asked for his assistance. I do not find that Mr. Burton could have reasonably foreseen under these circumstances that Mr. O'Hara would have turned on the cutter. I do not find that he engaged in risky behaviour. He is therefore not guilty of contributory negligence.

General Damages

35. There are broad principles that must be considered by the court in assessing damages for claimants in personal injury cases.

The claimant must be compensated for pain and suffering both physical and mental. This is both subjective and objective (**CH West & Sons Ltd v Shepherd** (1963) 2 All ER, 625).

The court will therefore give consideration to the nature and extent of injuries sustained the gravity and extent of resulting physical disability and the effect on pecuniary prospects. The court will also take into consideration previous awards in comparable cases in order to arrive at a fair and just award.

The Nature and Extent of the Injuries

36. The claimant suffered the following injuries as a result of the incident:

1. Amputation of the left index finger through the proximal interphalangeal joint. There was no distal neurological or vascular function.

2. Amputation of the right index finger at the level of the distal interphalangeal joint.

3. Comminuted distal phalangeal fracture of the right index finger.

37. Doctor Venugopal stated that due to the crushing nature of the injury and the location of the amputation, the fingers were not considered suitable for re-plantation.

The claimant was last seen by the above-named doctor on August 10, 2007. At that time, he complained of intermittent pain in the distal stumps, however, this did not interfere with his daily activities and there was normal range of function in the preserved joints.

38. Doctor Chambers stated that he saw him on March 12, 2008, and he had no complaints. According to Dr. Chambers, the injury is non-progressive i.e., it will neither get better or worse.

Both Dr. Venugopal and Dr. Chambers assess his injury to be 14% whole person impairment. Dr. Venugopal states that he has lost 9% of his right hand function and 16% of left hand function which is 25% combined hand impairment and this corresponds to 14% Whole Person Disability.

The Gravity and Extent of resulting Physical Disability

39. The effect of the injury on the claimant is two-fold. He suffered intense pain while awaiting surgical intervention at the hospital and also after surgery. The claimant

reports that he was in shock and has been depressed since the incident. He has stated that he is embarrassed by the appearance of his hand.

In terms of his employment, the claimant has stated that he has been relieved of his duties as a shift-general assistant as he is no longer able to do this job. He now works at the defendant company in a job with a lower status i.e., washing up equipment and other dirty jobs used in the production process.

However, he is now also operating the forklift periodically.

Psychological Impact

40. As a result of the shock and depression experienced by the claimant, he visited Doctor Wendel Abel, a psychiatrist on May 22, 2009, two-and-a-half years after the incident.

Doctor Abel states in his medical report that Mr. Burton was suffering from post traumatic stress disorder and major depression. According to Dr. Abel, the symptoms associated with these disorders began immediately following the incident and that the timing and content clearly suggested that they are related.

41. He was last reviewed on February 23, 2010. It was the doctor's opinion that the current symptoms were resolving but that the injuries have impacted negatively on Mr. Burton's ability to function. He considers the claimant's areas of functional impairment to include the following:

- Activities of daily function impaired
- Recreational function impaired
- Role function impaired
- Career goals blighted

Doctor Abel states as follows:

> "The fact that he has lost his fingers and can no longer function as a machine operator and undertake some activities of daily living has impacted on his self image, his self perception, how he sees his future and prospects for future employability."

42. The claimant stated that he still experienced pain occasionally and that if he bounces his hands it hurts and that the stumps are extremely sensitive to touch. In his own words:

> "This accident has left me less than I use to be. I continue to be affected by it and I want to put it behind me."

Doctor Abel placed the claimant on anti depressant medication for one year and referred him to a physiotherapist for rehabilitation.

43. He has also stated that the claimant will require psychotherapy. Doctor Abel was unable to say (at the time of trial) what his mental state would preclude him from doing on the job.

Evidence of Defence Witness in Relation to the Mental State of the Claimant

44. The witness, Mr. Dennis McDonald does support the evidence in relation to the psychological impact on Mr. Burton. He stated that Mr. Burton appeared to suffer mentally and that they coached and counselled him on the job.

Mr. McDonald's evidence also supports Doctor Abel's findings that Mr. Burton's symptoms were resolving.

Mr. McDonald stated as follows:

> "---- mental state appears to have improved gradually and I have observed that in the last six months his overall demeanour has improved significantly. He seems to be more confident and engaging in positive discussions."

45. Mr. McDonald also stated as follows at paragraph 6 of his witness statement:

> "I was most impressed with Mr. Burton's deportment in a meeting in early November 2010 with the Operation's Manager as his points were well organized and he executed accordingly."

It is abundantly clear therefore, that the injuries had a tremendous psychological impact on the claimant. His witness statement speaks to it, also Doctor Abel's medical report and the evidence of Mr. McDonald.

Application to Amend Particulars of Claim

46. In his written submissions, Counsel for the claimant has applied to amend the Particulars of Injuries pleaded to include Post Traumatic Stress Disorder and Major Depression.

Rule 20.4 of the Civil Procedure Rules (2002) allows a statement of case to be amended after the Case Management Conference with the permission of the court. The application, albeit at the end of the hearing of all the evidence, is being made within the relevant limitation period for the cause of action.

47. In **Gloria Moo Young et al v Geoffrey Chong et al**, SCCA 117/99 delivered on March 23, 2000, Downer JA, in considering an appeal against the trial judge's decision to allow an amendment to the defence, stated as follows:

> *"--- the amendment granted may be permissible if –*

1. *necessary to decide the real issues in controversy, however, late;*

2. *it will not create any prejudice to the appellants, and is not presenting a new case to the appellants;*

3. *is fair in all the circumstances of the case and*

4. *it was a proper exercise of the direction of the learned trial judge on the state of the evidence.*

However, late the application for amendments, it should be allowed in the above circumstances if it will not injure or prejudice the applicants' opponent."

48. This court considers all the circumstances of the present case as well as the fact that Dr. Abel was present in court and cross-examined by Counsel for the defendant, Mr. Johnson. Both counsel have also addressed the issue of an award for post traumatic stress and depression in their written submissions. In light of the above and in keeping with the overriding objective of the Civil Procedure Rules (CPR) (2002) to deal with cases justly, the amendment is granted.

General Damages

49. Award for Pain and Suffering and Loss of Amenities.

The claimant referred the court to several authorities in relation to an award under this head. These include: **Joseph Poyser v Michael Wallance et al**, Khan 6, pg 97; **Michael Jolly v Jones Paper Co. Ltd. et al**, Khan 5, pg 120 -121.

The defendant relied on the cases of **Icilda Lammie v George Leslie**, Harrisons, pg 291; **Leslie Gunnis v Claredon Sugar Co.**, Khan 5, pg. 115.

In **Poyser** (supra), the claimant suffered trauma to the chest, abdomen, left fifth digit finger, fracture of left fifth metacarpal head, ruptured spleen and acute abdomen. There was no long term disability expected.

The court does not consider this case to be helpful in relation to the present case under consideration.

50. In **Michael Jolly** (supra), the claimant suffered laceration along the dorsa ulna aspect of the forearm, laceration of the right forearm and hand, severed extensor tendons of right middle, ring and little fingers at their muscular – tendinous junction.

The extensor tendons were repaired and the claimant started physical therapy to improve extension of his fingers but there was marked stiffness of joints of the middle, ring and little fingers.

51. The injuries were received on May 16, 1994 and on October 2, 1996, the examinations revealed *inter alia* a 2 cm deficit in the circumference of the right forearm, slight radial deviation of the wrist, grade 5 power in the right hand. He was assessed with 12% impairment of the right hand as it relates to residual stiffness in the joints of the three fingers. This corresponds to 7% impairment of the whole person. The updated award for pain and suffering is $2,738,222.41 (using the February CPI of 167.1).

52. There are several issues the court has to bear in mind. Mr. Jolly essentially suffered injury to three fingers on his right hand. None were amputated. His residual deficit is 12% to the right hand and 7% Whole Person Disability (WPD).

In the present case, Mr. Burton's index fingers on both hands were amputated. The impairment to the right and left hand is 9% and 16% respectively. The WPD is 14%.

In **Icilda Lammie** (supra), the claimant lost all of her phalanges of the left index and middle fingers. She therefore lost two fingers on the left hand. She was awarded $35,000.00 in September 1989. The updated award is $1,162,976.87.

53. In **Leslie Gunnis** (supra), the claimant suffered amputation of the fifth digit of the right hand through proximal phalanx as well as a fracture of the proximal phalanx of the ring finger, fracture of the proximal phalanx of the middle finger. He was left with deformity of the index, middle and ring fingers. There is no evidence of the Whole Person Disability. However, it is clear that the injury to the right hand was severe.

The award of $366,913.00 in April 1997 is updated to $1,436,277.75.

54. The court bears in mind that Mr. Burton no longer has one whole functioning hand. He has to live with the embarrassment in relation to his physical appearance.

However, there is no issue with decreased power or stiffness to any of his hands. There is occasional pain and sensitivity to the stumps. On hindsight, it would appear that the award in the **Icilda Lammie** case was somewhat low. In the **Jolly** case, although the WPD is lower than in the present case, there are greater complications to the one injured hand. Although comparisons must be made, the court has to consider all the circumstances of the particular case, subjective and objective, in order to arrive at a just award that is neither too low or disproportionally high.

In all the circumstances, the court will therefore make an award of $2,500,000.00 under this head.

Award for Post Traumatic Stress and Major Depressions

55. Counsel for the claimant is relying on the cases of **Angelita Brown v Petroleum Co. of Ja. Ltd. et al**, Khan 6, pg 174, and **Celma Pinnock v The Attorney General**, Khan 5, pg. 289.

In **Angelita Brown**, the claimant suffered severe burn injuries when a cylinder exploded at her work place. Doctor Abel made a diagnosis of major depression – moderate and post traumatic stress disorder. The updated award under this head is $550,000.00.

Doctor Abel also found that she was able to function on the job but that the incident had impacted her ability to undertake some role functions such as cooking and the disfigurement to her nostrils and upper and lower limbs had affected her body image and was a source of emotional distress. Her injuries had clearly affected her enjoyment of life.

56. The court does not find the case of **Celma Pinnock** to be helpful on the point as the injuries suffered by that claimant were purely psychological due to a vaginal search.

In reaching a decision on an award, the court considers the evidence that Mr. Burton's symptoms are resolving and therefore awards $500,000.00 under this head.

Cost of Future Care

57. The evidence of Dr. Abel is that Mr. Burton will require psychotherapy and medicinal drugs for a year amounting to $520,000.00 to treat his psychological symptoms.

Doctor Abel has also referred him to a physiatrist, Dr. Dawson for rehabilitation. He gave a rough estimate of the cost of this treatment as between $600,000.00 to $700,000.00.

While it would have been appropriate for the claimant to have produced an invoice from the said Dr. Dawson, the court bears in mind that Dr. Abel is an expert, who has treated and assessed Mr. Burton. It cannot be said that he lacks credibility and is guilty of throwing figures in the air without any substance. The court will therefore accept his evidence in relation to the cost of rehabilitation. The sum of $600,000.00 is therefore awarded.

58. The claimant is also requesting the sum of $165,000.00 for the cost of refashioning the stump of his right finger on the basis of Exhibit 7. Exhibit 7 is an invoice dated August 15, 2008 from Dr. Devon Osbourne, a surgeon/urologist who states that the procedure is necessary as the pressure of the bone on the skin is causing pain. Mr. Burton's witness statement speaks to the stumps being extremely sensitive to touch. However, he has not stated that he visited Dr. Osbourne or obtained an invoice from him.

Counsel for the defendant has submitted that Mr. Burton made no such complaints to Dr. Chambers on March 12, 2008. However, Dr. Abel's report states that Mr. Burton discussed the issue with him on February 1, 2010.

The court considers that is not unusual for certain symptoms to manifest after a period of time. Exhibit 7 was tendered and admitted into evidence and was agreed to by the defendant. The sum will therefore be allowed.

The total award for future care is therefore in the amount of $1,285,000.00.

Loss of Earning Capacity

59. Mr. Burton has continued his employment with the company since the incident in December 2006, although he can no longer function as a shift general assistant. He describes his position as one of a lesser job in terms of status much to his shame and embarrassment. He is, however, still being paid at the same level. He is also, occasionally, being assigned to drive the forklift. The witness for the defendant, Mr. McDonald explained that this assignment is actually a higher position than that of a shift general assistant.

He has also stated that the company considered it prudent not to put Mr. Burton back at the Band plant where he had suffered a traumatic experience. The issue that has arisen is whether there should be an award for loss of earning capacity and how it should be computed.

60. The claimant is to be compensated under this head if there is a substantial or real risk and not merely a fanciful risk that he will lose his present employment at sometime before the estimated end of his working life (See **Moeliker v Reynolle** 1977 1 All ER). He is presently 33 years old and, all things being equal, he could be expected to have at least 25 years on the job market.

Mr. Kinghorn, counsel for the claimant, has submitted that there is no guarantee that the company will continue to employ his services.

61. The court bears in mind that his physical incapacity will neither decrease nor increase. If he does lose his present job, he would be thrown on the job market and would not be able to compete with others who are not similarly challenged.

The court also bears in mind that he is holding his own on the job and in fact, has been assigned occasionally to operate the forklift. The possibility of upward mobility still exists. Mr. McDonald's assessment of him accords with the view of this court that, in spite of the psychological symptoms and physical challenges, the claimant is strongly motivated to work. He is making every effort to live a productive life.

62. Mr. Kinghorn has asked that the court award a lump sum of $1,500,000.00. Counsel for the defendant has submitted that no award should be made as the defendant has continued to keep the claimant in its employ for the past four (4) years and there is little risk, if he performs his duties satisfactory that he will lose his present employment.

If it is not a fanciful risk that the claimant will lose his job at sometime and be thrown on the job market, the court must assess if the risk is high or low. If the claimant is working at the time of trial and the risk of losing his job is low or remote, a lump sum award is appropriate (See **Ashcroft v Curton** 1971 1WLR 1731).

63. In considering all the circumstances, I have come to the conclusion that there is a real but remote risk.

A lump sum of $500,000.00 is awarded under this head.

The claimant has claimed the following as Special Damages:

Medical Expenses	-	$4,120.00
Household Expenses	-	31,500.00

In relation to the medical expenses he has supplied four (4) receipts totalling $3,720.00.

In relation to the household expenses, he has told this court that he lived with his children's mother, Nicole Smith in Spanish Town at the time of the incident. This is actually inconsistent with his witness statement where he stated that he lived in Shenton,

Bog Walk but would spend time with Ms. Smith at her home in Spanish Town and that she would also visit him at his home.

64. At any rate, he stated that when he was injured, she undertook the responsibility of coming to his home, washing, cooking, and cleaning for him from December 2006 to May 2007.

He stated that the cost to pay someone would be $1,500.00 per week. He has further stated that the sum of $31,500.00 is owing to Ms. Smith as at the time of the incident she left her job where she had been taking care of some children to look after him.

Although there is an inconsistence in relation to the living arrangement, I would expect that Ms. Smith's services would have been of value and necessary as a result of the injuries he received.

65. Mr. Burton was allowed to return to work after January 30, 2007 on partial duties based on Dr. Chambers' report. It is certainly not clear therefore why Ms. Smith's assistance would be needed up to May 2007. However, I bear in mind that he was also mentally affected by the trauma of the injury.

66. I will therefore allow the claim for household expenses from December 7, 2006 to March 16, 2007 which is 14 weeks at $1,500.00 per week. This is a total of $21,000.00.

The total of Special Damages is $24,720.00 with interest at 3% from December 7, 2006 to March 23, 2011.

Costs to the claimant to be agreed or taxed.