IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV04117/2006

BETWEEN	RAY McCALLA	CLAIMANT
AND	ATLAS PROTECTION LIMITED	1st DEFENDANT
AND	RINGO COMPANY LIMITED	2ND DEFENDANT

Oraine Nelson instructed by K. Churchill Neita & Co. for the claimant

Ms. Jacqueline Cummings and Aon Stewart instructed by Archer Cummings & Company for the first defendant

Heard: February 5, & March 9, 2010 & May 6, 2011

Negligence – Employer's liability –safe place of work- safe system of work- employee security guard- duties performed on third party premises – injury of employee by criminals on premises – whether employer liable

McDONALD-BISHOP, J

1. This case deals with the broad issue of an employer's liability to his employee for injuries sustained as a result of the criminal acts of a third party over which the employer had no control. It also addresses, in, particular, the issue of the employer's duty to his employee while the employee is carrying out his contractual duties on the premises of a third party.

THE FACTS

2. The facts that have emerged from the unrefuted evidence may be summarized as follows: On or around August 1, 2004, Ray McCalla, the claimant, was employed to Atlas Protection Limited, the

first defendant, as an unarmed security guard. The first defendant was at the time, and still is, engaged in the business of providing security services in Jamaica. The claimant was assigned static duty between 7:00 p.m. on July 31, 2004 and 7:00 a.m. on August 1, 2004 at premises located at 21 Hagley Park Road, Kingston 10. Those premises housed a factory owned and operated by Ringo Company Limited, the second defendant. The second defendant was at the time carrying on the business of food and juice manufacturing. The claimant was the only security guard assigned to perform duties at that location during that period.

3. At about 2:40 a.m., the claimant was seated in the guard room having just completed patrol of the premises. He was making entries in the log book. While seated around the desk, he saw the guard room door suddenly swung opened and a masked assailant entered armed with a machete. The assailant, whom he could not recognize, immediately proceeded to start chopping him with the machete. He eventually managed to disarm his attacker during a struggle that took them to the outside of the premises. The attacker escaped towards the back of the premises and has not been seen by the claimant since.

4. The claimant received injuries to his head and hands with the major injury being an incomplete severance of his left hand at mid - palm level. He managed to go to the front of the premises to get help and he was eventually assisted by police personnel to the Kingston Public Hospital. He was hospitalized and treated. He was subsequently taken to the Medical Associates Hospital where he underwent further treatment to include emergency surgery.

THE CLAIM

5. The claimant has laid the blame for this attack, and the consequential injuries and losses he allegedly sustained, at the feet of both defendants. He has alleged in his statement of case that the

injuries he sustained were caused by the negligence of either the first or the second defendant or both of them. His particulars of negligence, as pleaded, has detailed the bases on which he is alleging that the defendants are liable in negligence. He seeks damages, interest and costs as pleaded.

6. Both defendants were duly served with the claimant's statement of case. However, the second defendant has failed to acknowledge service and to file a defence to the claim. On March 14, 2007, an Interlocutory Judgment in Default of Acknowledgment of Service was entered against it with damages to be assessed. Damages have not been assessed but at the commencement of this trial, Mr. Nelson advised the court that the claimant is no longer pursuing the claim against the second defendant. Accordingly, the proceedings are now between the claimant and the first defendant.

7. The claimant's allegation of negligence on the part of the first defendant is particularized in its statement of case in the following terms:

(i) Failing to have any or any sufficient regard for the safety of the claimant while engaged upon work.

(ii) Failing to avert a reasonable foreseeable risk to the claimant's safety by providing him with adequate materials for the safe performance of his duty, in particular, a panic button.

(iii) Failing to inspect the said premises and take adequate precautions to ensure that they were reasonably safe and practicable for the purposes for which the claimant was engaged.

(iv) Allowing and/or permitting the claimant to carry out security services at the second defendant's premises which was poorly and/ or inadequately lit thereby increasing the risk of danger and injury to the claimant.

(v) Failing to provide adequate and/or sufficient personnel to carry out the assigned tasks, having regards to the large size /area of the second defendant's premises.

(vi) Allowing and /or permitting the claimant, an unarmed security guard, by himself, to carry out the assigned tasks without accompaniment and /or assistance.

(vii) Failing to heed the complaints made by the claimant to his supervisor, agent and/or servant of the first defendant as well as management about the unsafe state of the second defendant's said premises.

(viii) Failing to ensure that the second defendant's premises were sufficiently and adequately equipped with the necessary security features in particular a panic button and to reduce the risk of injury to the claimant.

THE DEFENCE

8. The first defendant has denied the claimant's allegation of negligence against it and has, in the alternative, pleaded contributory negligence. It contends that the claimant was under an implied duty to exercise reasonable care, skill and judgment in the exercise of his duties and was aware of the risks and dangers that his employment as a security guard entailed. He was negligent for the following reasons:

(i) Failing to follow the prescribed system of work when exercising his duties, in that he was required to be on alert and utilize the prescribed procedures in cases of emergency.

(ii) Failing to inspect, examine and/or properly patrol the compound so as to ensure that it was properly secured, thereby exposing himself and others to the risk of harm and injury.

(iii) In neglecting to properly inspect, examine and/or properly patrol the compound the claimant failed to, if at all, exercise the requisite degree of skill, care and judgment that was expected of a security officer contracted to keep the compound secure from would-be intruders.

(iv) Failing to observe and/or keep a proper look out, if any or at all, on the compound so as to detect unusual movement or the presence of unauthorized persons.

(v) Failing to be on alert for obvious dangers given that the very nature of his duties required him to be on alert for unauthorized persons or activities.

THE ISSUES

9. The issues to be determined on the question of liability are, of course, grounded in the tort of negligence on which the claim is based. Therefore, for the claim to succeed, it must be established by the claimant to the requisite standard that the first defendant owed a duty of care to him at the material time; that there was a breach of that duty by the first defendant; that the injury he sustained was a foreseeable consequence of the breach of duty; and that the injury, in fact, resulted from that breach.

10. It may be stated then that for the claimant to successfully establish the first defendant's liability in negligence on the particular facts of this case, the following questions must be asked and answered in the affirmative:

(1) Whether the first defendant owed a duty of care to the claimant at the time of the alleged incident.

(2) Whether the scope of any such duty of care, if any was owed, extended to the claimant performing his assigned tasks on the premises of a third party.

(3) Whether the duty of care, if any was owed, extended to the protection of the claimant from criminal acts of third parties on those premises.

(4) Whether there was a breach of any duty of care owed by the first defendant to the claimant.

(5) Whether it was foreseeable that such a breach, if any, would have caused or resulted in the injury suffered by the claimant.

(6) Whether a breach of duty did, in fact, result in the injury suffered.

Whether first defendant owed a duty of care to the claimant

11. There is no dispute that the relationship of employer and employee existed between the first defendant and the claimant at the material time. It is also not in dispute that the claimant did, in fact, sustain the injury complained of and that at the time, he was on the second defendant's premises in connection with his employment.

12. It is well settled at common law that an employer owes a duty of care to his employees to take reasonable care for their safety. The duty is not an absolute one and can be discharged by the exercise of due care and skill: Davie v. New Merton Board Mills Limited [1959 1 All E.R. 346. This duty to take reasonable care for the employee's safety is personal and non-delegable. It is also said to be stricter than the duty to take reasonable care for oneself, and it exists whether or not the employment is inherently dangerous. See: Speed v. Thomas Swift & Co. Ltd [1943] K.B. 557, per Goddard L.J.

13. The duty has customarily been captured under four headings. These are: (1) to provide a safe place of work, including a safe means of access; (2) to employ competent servants; (3) to provide and maintain adequate plant and equipment; and (4) to provide a safe system of work. However, it

was stated in Wilson v. Tyneside Window Cleaning Co. [1958] 2 Q.B. 110, 123-124, that although a master's duty to his servant may be divided into these categories, it is a single personal duty that is owed by the employer. That duty, which is applicable in all the circumstances, is for the employer to carry on his operations so as not to subject those employed by him to unnecessary risk of harm. An unnecessary risk of harm has been defined as "*any risk that the employer can reasonably foresee and which he can guard against by any measures, the convenience and expense of which is not entirely disproportionate to the risk involved*": Harris v. Brights Asphalt Contractors Ltd. [1953] 1 WLR 341, 344.

Whether duty of care extended to the claimant performing duties on premises of a third party

14. As the facts have revealed, the claimant was not assigned to perform his contractual duties on the first defendant's premises but on the premises of the second defendant, a third party. This now brings into focus the question whether the first defendant's duty of care as stated extended to the claimant performing duties on those premises. It has been settled beyond question that the general duty of an employer to his servant, namely to take reasonable care for his safety, does not come to an end merely because the servant had been sent to work at premises which are occupied by a third party and not by his employer: See General Cleaning Contractors v. Christmas [1953] A.C. 80; Tyneside Window Cleaning Co. [1958] 2 QB 110.

15. Lord Denning, in Smith v. Austin Lifts Ltd. [1959] 1 WLR 100 at 117, stated the position thus:

> *"Notwithstanding what was said in Taylor v. Sims & Sims it has since then been held, I think rightly, that employers who send their workmen to work on the premises of others cannot renounce all responsibility for their safety. The employers still have an overriding*

duty to take reasonable care not to expose their men to unnecessary risk. They must, for instance, take reasonable care to devise a safe system of work: See General Cleaning Contractors v. Christmas and if they know or ought to know of a danger on the premises to which they send their men they ought to take reasonable care to safeguard them from it. What is reasonable care depends, of course, on the circumstances: See Wilson v. Tyneside Window Cleaning Co."

16. The duty on the employer to ensure the safety of his employee remains throughout the whole of the course of the latter's employment but what will vary in each case is the degree of care to be taken by the employer. The fact of the matter, therefore, is that the first defendant's duty to the claimant to take reasonable care for his safety existed and continued whilst he worked on the second defendant's premises. What is to be considered is the degree of care that was required to be exercised on the part of the first defendant to ensure the claimant's safety while he performed his duties on those premises. So, the fact that the first defendant was not in control of those premises will arise as a material consideration in determining the question whether in all the circumstances it had discharged its common law duty of care.

Whether the duty of care extended to the protection of the claimant from the criminal acts of a third party

17. The claimant's case has gone further. He has averred that the first defendant, in breaching the duty of care owed to him while he performed duties on the second defendant's premises, had exposed him to unnecessary risk of harm from criminal intruders. He alleges that assault by intruders was a foreseeable risk of his employment which the first defendant had failed to take reasonable steps to guard against. The question that now arises from this is whether an employer's duty of care extends to protecting the employee from the criminal acts or omissions of third parties over which he, the employer, has no control.

18. Mr. Nelson, in advancing the claimant's case, cited the case of Williams v. Grinshaw (1967) 112 S.J. 14, in which an employee was injured by criminals during the course of her employment, as authority for the proposition that an employer does owe a duty of care to his employees to protect them from criminal assaults. In that case, Phillmore, J, following Houghton v. Hackney Corporation (1961) *The Times*, 18 May, stated that there was a duty on the defendants not to expose the claimant to unnecessary risks including risk of injury by criminals. The learned judge, however, concluded on the facts of that case that, given the circumstances in which the claimant was carrying out her tasks, it had not occurred to her employers that any unreasonable risk was being run. The learned judge concluded that the precaution taken by the defendants was reasonable and so they could not be said to have failed in their duty to use reasonable care for the safety of their employee.

19. In forging his argument on behalf of the claimant that the first defendant's duty of care extended to protecting the claimant from the criminal acts of intruders on the second defendant's premises, Mr. Nelson also relied on the dictum of Marsh, J in the unreported judgment of Leslie Powell v. Guardsman Ltd. Suit No. C.L. P 049 of 1999 delivered October 31, 2007. The learned judge stated:

> *"Where the injury or damage is caused by a third party, as a general rule, a person ought not to be held liable in negligence for the third party's act or omission. However, in particular circumstances (eg. master and servant) or where the contract governing the relationship between the parties provide for it, a person may be held liable in negligence to another for the act of a third party. There must be, however, a high degree of foreseeability that the damage or injury caused by the third party would occur as a result of the act or omission of the person on whom falls the duty of care. The standard of proof is on a balance of probability and the onus of proof is on the claimant. "*

20. On the basis of this, Mr. Nelson argued, that there was a high degree of foreseeability that the claimant could be injured by criminals while he performed his duties and so the first defendant's duty of care to ensure his safety extended to those acts. I find that there is merit in Mr. Nelson's arguments.

21. It is undeniable that in 2004, the job of guarding commercial premises at nights in the corporate area would have carried with it the risk of encounter with criminal elements. Intrusion on the second defendant's premises by unauthorized persons at nights was thus a highly foreseeable occurrence with the risk of criminal assault and injury of the claimant, who was guarding those premises, an equally highly foreseeable one. It was, therefore a risk, being one that was highly foreseeable, that the first defendant would have had, or ought to have had in its contemplation.

22. I have noted, within this context, that the first defendant, in response to the claim, has raised the point that the job of security guard is inherently dangerous and that the claimant was fully aware of the risks involved. This cannot, without more, absolve the employer of his responsibility to take reasonable steps not to expose the employee to risk of harm from the acts or omissions of others that were reasonably foreseeable. The accepted principle of law is that an employer owes a duty of care to this employee even if the job is inherently dangerous. However, he is not liable to his employee for any damage suffered arising out of the ordinary risks of the service but where one employment happens to be more dangerous than another one, a greater degree of care must be taken by the employer.

23. The principle that has been deduced from the authorities, as to the degree of care required, is that if it is the kind of job where the employer cannot eliminate the risk, what the employer is required to do is to take reasonable care to reduce the risk as far as is practicable. However, if it is not at all

reasonably practicable for the employer to eliminate or diminish the risk, then it is a risk which is an ordinary incidence of the job and the employer cannot be held liable for injuries caused as a result. In such circumstances, the argument that the claimant accepted and is paid to take the risk could well succeed. See Hurley v. J. Saunders & Co. Ltd [1955] 1 All E.R. 833, 836, per Glyn-Jones, J.

24. It may be said, then, in summary, that the risk of harm to the claimant by criminal intrusion on the premises of the second defendant was a reasonably foreseeable risk of his employment. From this, it stands to reason that the first defendant's duty of care to the claimant did extend to protecting him, as far as skill and care would reasonably permit, from the criminal acts of third parties while he performed his duties on the second defendant's premises. For the first defendant to be absolved of any responsibility, it must be found that it had taken all steps that could reasonably have been taken, in the circumstances of the case, to ensure the safety of the claimant, the inherent dangerous nature of his job notwithstanding. In particular, it must be found that there was nothing more that could reasonably have been done by the first defendant, in all the circumstances, to either eliminate or to diminish the risk of injury to the claimant at the hands of the intruder.

25. Whether the first defendant had managed to sufficiently discharge the duty owed to the claimant, in law and in fact, is what remains to be determined. This necessitates an examination of the whole circumstances of the case within the framework of the applicable law. For, as Wolfe, J.A. (as he then was) reminded in United Estates Ltd. v. Durrant (1992) 29 JLR 468, 470, the question as to whether an employer has discharged his duty of care has to be determined by a consideration of all the circumstances.

ANALYSIS OF THE EVIDENCE AND THE LAW

Whether the first defendant failed in its duty owed to the claimant

26. An examination of the claimant's case reveals that his primary contention is that the first defendant failed in its singular duty owed to him to take reasonable steps to ensure his safety by failing to provide, what would, in essence, amount to a safe place of work and a safe system of work. I will examine each duty in turn.

Place of work

27. The duty of employers to provide a safe place of work was explained by Goddard C.J. in Naismith v. London Film Productions Ltd. [1939] 1 All E.R. 794 as being to make the place of employment as safe as the exercise of reasonable skill and care would permit. It is not merely to warn against unusual dangers known to them. The duty to provide a safe place of work is, therefore, fulfilled by providing a place as safe as care and skill can make it, having regard to the nature of the place and the risk to which the employee is exposed. The immediate question is whether the first defendant failed to provide a safe place of work as the exercise of care and skill could make it as the claimant alleges.

28. In relation to the place of work, the claimant's complaint against the first defendant is on several bases. His averments are that the first defendant (1) failed to inspect the premises and to take adequate precautions to ensure that they were reasonably safe and practicable for the purposes for which he was engaged (2) permitted him to carry out his duties at the premises which was poorly and or inadequately lit thereby increasing the risk of danger and injury to him (3) failed to heed his complaints that were made about the unsafe state of the premises; and (4) failed to

ensure that the premises were sufficiently and adequately equipped with the necessary security features to reduce the risk of injury to him.

29. In supporting his claim in this regard, the claimant gave detailed undisputed evidence as to the layout of the premises which has been duly noted for these purposes but for the sake of brevity will not be recited. He has also given a detailed account of the distances between various points on the premises which has not been refuted and so stands as unchallenged. Again, that evidence has been duly taken into account in my analysis but, also, for the sake of brevity, I do not consider it necessary to particularize it at this juncture.

30. Suffice it to say that the undisputed evidence is that the premises were secured by high perimeter fencing and/ or walls with guard barb wire fence on top to the sides and back and a chain link fencing at the front. At the front there was a grilled gate about 8 feet high with the guard house to the far right of the premises. The factory building was high and wide and was reinforced with features to include, shutters, grills, metal doors and an electronic security system set up by King Alarm. The distance from the back of the premises to the front was about 400 feet and there was a passage to the left leading from the front to the back of the premises which provided the only means of access to or from the back of the premises.

31. Speaking of the King Alarm system that was there, the claimant stated that there was an alarm system on a door to a small building attached to the factory building. There was, however, no alarm system to the rear or to the left of the building which made it difficult for him to be alerted if an attempt was being made to enter the building from those two areas.

32. As to the lighting, the claimant's evidence is that there were no flood lights on the premises as the first defendant has asserted. He said while in some areas the lighting was sufficient for him to see, there were some areas where he had to use a flash light to aid with visibility. This was due to the fact that three lights on the premises were not working on or around the time in question. According to him, the lights out of order were: the one located in the passage to the left of the premises leading from the front of the premises towards the back; one at the back; and one about thirty feet from the guard house on the right. The light at the back was controlled by sensors and would come on whenever there was movement around the back. That sensor light had been out for 4-5 months prior to the night of the incident and so the back of the premises was in complete darkness on the night in question. The right of the premises at the front was also in darkness as a result of the light at that point not working.

33. The claimant said he had made several complaints to the first defendant's supervisor, Mr. Harrison, and a supervisor of the second defendant about the problems with the lighting but that up to the night of the incident, his complaint was not addressed.

34. He stated that there was, at the material time, a bus parked to the front of the premises that obstructed his view of the passageway that extended from the front to the back of the premises. He was not able to see anything in that passage from the guard house. His contention is that given the layout of the premises, even without the obstruction caused by the bus, he did not have, and could not have had, all areas within his view and surveillance at the same time.

35. As to the state of the door of the guard house in which he was attacked, the claimant said that there was no latch on the door that would allow him to lock the door from the inside. In these conditions, he said, he was required to work for twelve hours and his duties as a night security

guard was to check the doors and patrol the premises without any security aid such as a baton, canine or firearm.

36. In seeking to show that the claimant's claim ought not to succeed on this limb, the first defendant relied on the evidence of Mr. Vinton King, its General Manager of Operations, who sought to show that the place of work was ensured to be safe by the first defendant. Mr. King said that before placing a security guard at those premises, he conducted an assessment to ascertain the perceived vulnerability of the premises or perceived threat to them. As he explained, that was, basically, looking at the ease of penetration of the premises. He said that having done this inspection and preliminary assessment, he was satisfied that the premises were safe for an unarmed security guard to work there.

37. Mr. King's assessment of safety was based on the layout of the premises and the fact that they were secured in the manner already indicated. He, however, pointed out further that the premises at the time he inspected them were well lit by flood lights and that he was almost certain there was a latch on the door of the guard house. He also based his assessment of the safety of the premises on the electronic security system that he said was provided by King Alarm. In his words:

> *"The surrounding fencing, walls and the electronic security detection system provided by King Alarm Limited along with the constant and alert presence of a responsive security guard with a vhf radio and panic button, we estimated would have provided adequate security to the premises of our customer, Ringo Company Limited.",*

38. He explained that the first defendant provided the presence by placing a security guard at the premises while King Alarm provided rapid response and electronic detection as security for the

premises. He maintained that given all this, the premises were safe and the claimant was thus injured as a result of his failure to be alert and to take reasonable care for his own safety.

39. In determining whether the place of work was reasonably safe or not, it is duly noted that the parties are in conflict with each other in respect of things pertaining to the state of the premises. The resolution of this issue as to the condition of the premises rests on credibility. It does appear to me, having examined the evidence in its totality and having taken into account the demeanour of the witnesses, that the claimant's version that some lights were not working and that he had reported the situation to the defendants seems to be more acceptable as true, on a balance of probabilities.

40. I have arrived at this conclusion based on the fact that the claimant had more intimate dealings with the premises, having been posted there for some time prior to the incident and was there on the night of the incident. He had patrolled the premises and so would be in a better position to see and to know the conditions that obtained there than the first defendant's witnesses would. None of the first defendant's witnesses, from all indications, had patrolled the expanse of the premises themselves on the night of the incident or at any time close to the night of the incident. Mr. Johnson, the first defendant's security night manager, said that after the incident, he went to the premises and they were well lit. There is no evidence that Mr. Johnson carried out a thorough inspection of the entire premises at that time to be in a proper position to say all the lights, especially the light to the rear, were properly working. I accept that the last inspection carried out by the first defendant was in November 2003.

41. Furthermore, the claimant said that he had advised a supervisor of the first defendant about the problem with the lighting about 4-5 months prior to the incident. There is nothing from the first

defendant refuting the claimant's evidence that he had reported the matter to the person he named. There was therefore no up-dated inspection for the purposes of risk assessment on or around the night of the incident as a result of the complaint made. I find in the light of all this that the first defendant is not placed in a favourable position to reliably tell me that that all the lights on the premises were in good working condition and that every point on the premises was adequately lit on the night the incident occurred. As such, I conclude that the first defendant is not placed in a position to establish to my satisfaction that there was no adverse change in the claimant's working environment on the night in question.

42. Similarly, from the evidence it is clear that the first defendant's witnesses are not in a position to say affirmatively that the electronic detection or surveillance system put in by King Alarm was adequate and/ or was working properly at the material time. Mr. King was clear in pointing out that the King alarm system was complementary to the claimant's presence as a security deterrent, yet he was not in a position to say how the system was configured on the premises. When asked under cross-examination whether there were sensor beams in the passage to the left of the building, he stated in response that he only had a general observation of an alarm placed to the back and front of the building but that as to whether they were overt or covert, he could not speak to that. Also, on this point, Mr. Johnson in his evidence had stated that it was King Alarm that had put in the security system and that he was not in a position to say where it covered.

43. All Mr. King was able to say on this point as to whether the King Alarm system was working properly on the night in question is that following the incident, no report was received from King Alarm that there was any breach in its security system. I am being asked to find that the fact that no report had been received by the first defendant from King Alarm is to be taken as going to the truth of what is being asserted that the surveillance system was properly functioning or adequate. I

refuse to make such a finding. Mr. King's assertion really amounts to 'negative hearsay'. There is no evidence from King Alarm or anyone else to speak to the efficacy of the system that was put in place. I have therefore accorded no weight to Mr. King's assertion that the King Alarm surveillance system was functional merely on the fact that no report was received from King Alarm of a breach in its system.

44. My reluctance to accord any weight to Mr. King's assertion that the King Alarm system was adequate is also prompted by the unchallenged evidence that the claimant did receive injuries on the premises at the hands of an intruder and that up to the time the police came, no one from King Alarm had arrived on the premises. The incident had also occurred and yet there is no video footage or anything that purportedly emanated from surveillance equipment that could be used by the first defendant to ascertain what, in fact, happened on the premises. Given that up to the end of the incident, King Alarm had not visited the premises, the question does arise as to what system was on the premises in general (as distinct from the factory building), to provide surveillance, to detect intruders, and to alert King Alarm for appropriate response independent of the claimant. I am led on the evidence to believe the claimant that the King Alarm system did not effectively cover the entire span of the premises.

45. Also, Mr. King was not in a position to say definitively whether there was a latch on the guard house door. His equivocal response in this regard coupled with his inability to speak to the scope of the King Alarm system has raised serious questions in my mind as to the nature, quality and sufficiency of the inspection of the premises on which the decision was based to place an unarmed guard there. I have formed the view that there could not have been any thorough inspection of the premises by the first defendant at the time of the risk assessment to ensure that all things were adequate and working properly for the safety of the security guard who was going to be placed

there as distinct from the security of the building itself. Indeed, Mr. King's testimony itself has clearly and strongly suggested that the inspection carried out was to satisfy the first defendant that the client's factory building would be properly secured rather than that the guard who would be placed there would be safe while carrying on duties on the outside of the premises.

46. I will repeat what he said in his evidence- in- chief as contained in his witness statement that has led me to such a view: He stated:

"(23) *The surrounding fencing, walls and electronic security detection system provided by King Alarm…..we estimated would have provided adequate security to the premises for our customer, Ringo Company Limited."*

Then at paragraphs 27 and 28, he continued:

"(27) *At all material times Mr. McCalla knew or ought to have known that this job was one of danger and risks and it was his sole responsibility to protect himself from harm*

(28) The primary responsibility of Atlas Protection Limited is to our customers and clients and the protection of their lives and property." (emphasis added)

47. I believe that this evidence speaks for itself in providing a clear insight of the views held by Mr. King as to the duty of the first defendant towards the claimant on those premises. The claimant's safety clearly never factored prominently, if at all, in the contemplation of the first defendant in providing services on the second defendant's premises. The duty was obviously taken to have been owed only to the client to make the premises safe rather than also to the claimant to take steps to ensure his safety while he worked on those premises.

48. I accept that the lighting and the electronic security system was inadequate on the night of the incident and that the first defendant had failed to heed the complaint of the claimant concerning

what he saw as an unsuitable condition existing on the premises. In failing to take steps to address the situation, the first defendant, in my view, had failed to conduct a thorough risk assessment of the premises by sufficiently taking into account aspects that would have impacted on the safety of the claimant on the premises while he carried out his duties.

49. I accept, therefore, as the claimant contends, that the first defendant failed to sufficiently and properly inspect the premises to ensure that they were adequately and practicably equipped with appropriate security features that were reasonably necessary to reduce the risk of harm to the claimant.

50. The ultimate question now to be considered is whether the inadequacy of the lighting, the inadequacy in the electronic detection system, and the failure of the first defendant to thoroughly inspect the premises served to render the place of work unsafe. In looking at whether the place of work was rendered unsafe for the claimant's conduct of his duties, I think it useful to commence by taking into account what the claimant was required to do. Part of his duties, as Mr. King explained, was to secure the premises from unauthorized entry and exit; to provide a security presence on the compound; to make patrols of the facility while observing the doors and windows of the factory; to report unusual occurrences; and to make a log of his findings.

51. It is clear from this précis of the claimant's duties that good and adequate lighting on the premises was a crucial requirement for the carrying out of such duties at nights. It must be accepted, based on common human experience, that darkness provides the perfect cover for someone to conceal himself from view. It means that the claimant would have had to be provided with adequate lighting in order for him to effectively patrol the premises and to properly detect the presence of unauthorized persons.

52. The need for functional and adequate lighting, particularly the sensor lights at the rear, is even more starkly manifested on what the undisputed evidence has disclosed that the claimant would not have been in a position, at any one time, to see all strategic points on the premises. As Mr. King himself agreed, when the claimant was in the guard house making an entry in the log book, he could not see the rear of premises or, indeed, all points of the premises. He conceded that a breach of the premises could have occurred without the claimant's knowledge.

53. What this means, in effect, is that when the claimant was at a given point, intrusion could have occurred at some other point and the intruder could conceal himself in darkness thereby keeping out of the view of the claimant or moving from one point to another where the claimant would not have been able to see. Inadequate lighting, and in particular the malfunctioning of the sensor lights at the back of the premises, must have had an adverse effect on the claimant's working environment by diminishing the ability to properly detect intrusion. That would, in turn, increase the degree of penetrability of the premises.

54. Similarly, the inadequacy of the King Alarm system would have had the same effect on the claimant's place of work. With the claimant not being able to properly detect intrusion at all points on the premises, a properly installed system, with wider surveillance coverage, geared at the general premises rather than just alarms attached to the factory building itself would have been more effective. There should have been, as Mr. Nelson argued, some other means by which an intrusion on the compound could have been detected from the point of entry given that the claimant would not at all times be in a position to see that. He was authorized to go in the guard room at intervals and it is accepted that when he was there, a breach of the premises could have occurred without his knowledge. Where then was the King Alarm system to fill this void? Evidently, the type

of system in place was not enough to provide such coverage in order to supplement and complement the claimant's duty to detect unauthorized persons.

55. From Mr. King's evidence, the existence of the electronic detection system and the lighting conditions, as he found them to have been, had influenced his findings that the premises were secured on which to place one unarmed guard. It must then follow that any adverse change or any inadequacy in any one of those variables that had influenced such a decision must, inevitably, render the premises less secured than when it was first adjudged to be safe.

56. When all things are considered, such as the nature of the duties being undertaken by the claimant at the material time; the time he was required to work which was during darkness for the most part; the size and layout of the premises he was guarding; that he was working alone; and that he was not able to see everywhere on the premises all at once, it must have been foreseeable that an inadequate or defective electronic surveillance system and poor lighting would increase the penetrability of the premises. It would have also been equally foreseeable that increased penetrability would, in turn, have carried with it a greater risk of harm to a lone unarmed, security guard. I find that the place of work was not practicably secure for the purposes for which the claimant was engaged.

57. Of course, Mr. Stewart has not failed to point out that it was the second defendant who was responsible for the lighting and conditions of the premises and King Alarm for the electronic system and that the claimant has accepted those facts. He argued that given those circumstances, there was nothing that the first defendant could have done about the premises. I have not lost sight of the fact that the conditions existed on the premises of a third party and so the question as to

whether that might have prevented the first defendant from carrying out its duty, as a prudent employer, must be considered.

58. In considering the degree of care required on the part of the employer when the work is being performed outside his premises, I am guided by the words of Lord Justice Pearce in Wilson v Tyneside (1958) 2 KB 110, at 122, that:

> *"Precautions dictated by reasonable care when the servant works on the master's premises may be wholly prevented or greatly circumscribed by the fact that the place of work is under the control of a stranger. Additional safeguards intended to reinforce the man's own knowledge and skill in surmounting difficulties or dangers may be reasonable in the former case but impracticable and unreasonable in the latter. So viewed, the question whether the master was in control of the premises ceases to be a matter of technicality and becomes merely one of the ingredients albeit a very important one, in a consideration of the question of fact whether, in all the circumstances, the master took reasonable care. "*

59. It cannot be a simple excuse for the first defendant to say that the place of work was outside its occupation and control and that it had no say in what conditions obtained there. The first defendant still had a duty that was personal and non-delegable to ensure the claimant's safety on those premises as far as skill and care reasonably permitted. In speaking of the nature of the duty cast on the employer to ensure a safe place of work on the premises of a third party, the learned authors of Charlesworth on Negligence 6th edn., para. 11-14, by reference to some relevant authorities, helpfully gave the following pointers that have served as a useful guide in my deliberations.

(1) The performance of the duty to provide a safe place of work may become impracticable where it is in the occupation or under the control of another. So, the employer in order to fulfill his duty to provide a safe system of work should go and inspect those premises to find out whether they are

reasonably safe for the work to be done on them before sending his men to work there. (McDowell v. F.M.C. (Meat) Ltd. (1968) 3 K.I.R. 595).

(2) In those cases which call for such a preliminary investigation, where the resulting inspection reveals a danger, that is out of the employer's hands to remedy, it may be sufficient for the employer merely to warn the workmen of its existence. (Smith v. Austin Lifts)

(3) There are instances where the risks are too great or the giving of a warning is insufficient for the employer to merely warn the workman of its existence, so that a prudent employer ought not to permit his servant to work there until the premises have been rendered safe by the occupier. (Smith v. Austin Lifts)

(4) If on inspection of the premises, there is seen a danger against which the employer can take positively reasonable steps to protect his workmen, he must take such steps in order to discharge his duty of care. (Smith v Austin Lifts)

(5) If he fails to do so, the fact that the servant knowingly incurs the risks raises only the question and concerns the degree of his contributory negligence. (A.C. Billings & Sons. Ltd. v. Riden [1958] A.C. 240)

(6I It is no answer to a claim under this head to say that the plaintiff had made no complaint about the safety of his place of work. (McCafferty v. Metropolitan Police District Receiver [1977] 1 W.L.R. 1073)

60. The foregoing principles show that there are several ways in which steps may be taken by an employer to reasonably ensure the safety of his employee on the premises of a third party. In this case, it is accepted by the first defendant that before placing an employee on premises, it would inspect the premises and carry out a risk assessment. It follows that, in so doing, the likely risk to an employee working on those premises should factor in the deliberations, if the duty to take reasonable steps for the employee's safety is to be discharged. Therefore, for the first defendant to be taken to have discharged its duty properly, it must be found on the evidence that, in all the

circumstances, it did all that it could reasonably have done to ensure the safety of the claimant on those premises taking into account the nature of his job and the risk of harm to which he was exposed.

61. In my view, the first thing that the first defendant could have done towards reasonably discharging the duty would have been to assess the quality, scope and adequacy of the detection system upon its first inspection of the premises. The fact that Mr. King and/or Mr. Johnson cannot say whether the system was overt or covert or where on the premises it covered is taken to mean that the first defendant was not properly informed about the system when it decided to place an unarmed guard there in reliance upon it. It does seem that the first defendant allowed the claimant to be placed there on the basis of what it viewed as a back- up -system, the efficacy of which it did not have sufficient knowledge and information about.

62. Secondly, following the claimant's report as to the conditions of the premises, the first defendant did nothing about the report. It would have been within its power and competence to re- inspect the premises for the purposes of an up-dated risk assessment in the light of the reported changing conditions. Upon inspection, if that risk of danger from greater penetrability of the premises were seen to exist, then it would have also been within its competence and authority to speak to the second defendant to rectify the situation. It could have made recommendation that necessary corrective measures be taken and/or that alternate arrangements be put in place for the guarding of the premises. If the second defendant failed to heed those recommendations, then the first defendant would have had the option to remove the claimant from that location until or unless the weaknesses were remedied.

63. In my view, the omission on the part of the first defendant to embark on such a course of action are together of sufficient weight to support a finding that the first defendant failed to act as a reasonable and prudent employer who had the responsibility to reasonably ensure the safety of his employee. Accordingly, I find that the first defendant breached the duty owed to the claimant to provide a safe place of work. The fact of the claimant's knowledge of the dangerous nature of the job and that he continued to work in the adverse conditions does not take away from this finding. He had no free choice in the matter. He had made complaints about the condition of the premises and that shows that he recognized he and the property he was guarding were placed at risk and required measures to be taken by his employer to address the state of the premises to, at least, diminish that risk.

64. I must say at this point, however, that this finding that the first defendant had failed to provide a safe place of work has been partially influenced by the system of work that was in place. For, as will be shown, the system in place at the time did affect the safety of the place of work. I will now move to my analysis and findings with respect to this system of work.

Whether first defendant failed to provide a safe system of work

Safe system of work

65. The claimant's averments with respect to matters that would conveniently fall within the system of work are as follows: (1) failure to provide adequate material and security features for the safe performance of his job and to reduce the risk of injury to him, in particular a panic button; (2) failing to provide adequate or sufficient personnel to carry out the assigned tasks, having regard to the

large size of the premises; and (3) allowing the claimant, as an unarmed security guard, by himself to carry out the assigned tasks without company or assistance.

66. The duty owed by an employer to his employees to provide a safe system of work is a duty to take reasonable steps to provide a system which will be reasonably safe having regard to the dangers necessarily inherent in the operation. See Wilson v Clyde Coal Co. Ltd. v. English [1938] A.C. 57. The system of work, as explained on authority, would entail the physical layout or organization of the work; the way it is intended the work is to be carried out; the giving of adequate instructions, especially to inexperienced workers; the provision in proper places of warnings and notices; the sequence of events; the taking of precautions for the safety of the workers and at what stages; the number of such persons required to do the job; the parts to be taken by the various persons doing the job; and the time at which they shall do their various parts: See Charlesworth on Negligence, 6th edition, para, 1053; Speed v Thomas Swift and Co. Ltd [1943] KB 557, 563-564.

67. The first thing to note in looking at the system of work in the instant case is that the claimant was an unarmed guard who was required to work at nights for twelve hours without any company or assistance. He was required to do so in circumstances where the penetrability of the premises was heightened by inadequate lighting; an equally inadequate detection system; and his inability to have full view of the premises at any given time, as I have already found. In the light of the condition of the place of work, as it existed then, the question now is: was the system of work that obtained one that was reasonably safe, as far as the exercise of skill and care could make it?

68. One aspect of Mr. Nelson's submission in this regard is that the claimant should have been provided with a firearm. The response of the first defendant is that the claimant was not certified to be issued a firearm. Given that the claimant was not permitted to carry a firearm, then I cannot say

that one should have been given to him. What is clear is that being without a firearm, he did not have one of the most effective weapons normally used in the security industry to counter threat of attack.

69. It was further contended on the claimant's behalf that without a firearm, he should have been given a canine. The defence sought to explain this away by averring that the operations at the factory, as a food manufacturing plant, rendered canine protection inappropriate. Furthermore, an armed guard and canine would cost more and they were giving the client what was requested and contracted for, that being an unarmed guard. From the first defendant's perspective therefore, canine protection was out of the question. It follows then that without firearm and canine protection, some other effective means of protecting the claimant from the foreseeable risk of harm should have been devised. The question now is: was that done?

70. The first defendant had averred in this regard that it had issued the claimant with a handheld vhf radio for communication with the home base, and a baton and that he was also given a panic button by the second defendant through King Alarm. The claimant has accepted that he was issued a radio but denied he had been issued a baton or a panic button. The resolution of this conflict as to what security aid was provided to the claimant rests on the credibility of the parties. It is noted that the defendant who has asserted that such devices and materials were issued to the claimant has provided no formal evidence in terms of any company records to show what was issued to the claimant to carry out his duties. There is nothing showing that the claimant had signed for anything issued to him by the first defendant or that when he left the company, he handed back these items and that had been acknowledged by the first defendant. All I am left to rely on is mere word of mouth. I believe that in a proper and formal organizational structure, which I believe ought to have been in place at the first defendant's operations, record of items issued to

security guards to carry out their duty would be documented. It would have been within the power and competence of the first defendant to create such records. This would be in the interest of greater accountability. It is rather unfortunate that such records are notably absent in this case.

71. Inasmuch as it seems incredulous that a person could be asked to provide security for premises at nights without even a baton for protection, I find I believe the claimant the he was issued none. My belief is strengthened by the absence of any positive proof from the first defendant as to what was provided to the claimant for the execution of his duties. There is also a ring of sincerity in his assertion that he had never seen a panic button while working on the premises. Therefore, I reject the bald assertion of Mr. Johnson that he had seen the claimant with a panic button and told him to put it in his pocket and that on the morning after the incident, he saw both a baton and the panic button on the floor in the guard house.

72. I must say, however, that even if I were to have found that a baton and a panic button were provided to the claimant, I fail to see how those items would have been effectual in detecting the unauthorized entry of an intruder while the claimant was in the guard house as he was at the time of the attack. Also, while a baton could have been used to ward off an attack and assist the claimant in defending himself, I doubt its effectiveness as a defence tool in the circumstances of this case in the light of the unexpected attack and the manner of its execution. It would appear from what the claimant has said that even if he had a baton, he would not have had the time and opportunity to retrieve it because he said that after the door flung open and he looked up, his assailant was already over his head with the machete. The only thing he had time to do was put up his hand in a defensive stance.

73. In relation to the panic button, I will go further and state that that was a device evidently designed to alert King Alarm that the guard was in trouble for appropriate response. For it to have been effective in saving the claimant from harm, the claimant would have had to first have time and opportunity to detect the danger and to alert King Alarm before the attack on him. The claimant, on the unrefuted evidence, was not afforded such an opportunity to detect and then to communicate anything. He was immediately attacked without any prior warning. So, even if he were to have used a panic button, it would have to be after he had already been attacked and he would still have had to wait some time for assistance to arrive. His attacker, by then, would have had ample opportunity to accomplish his mission before help could arrive for the claimant. I have arrived at a conclusion then that even if a panic button were provided to the claimant, it would have been ineffectual in protecting him from the sort of attack that took place in all the circumstances. It would appear from this analysis that nothing would materially turn on any failure on the part of the first defendant to provide such devices on the issue of liability.

Inadequate personnel

74. The claimant has averred that he should have had company or assistance given the following circumstances: (1) he was unarmed; (2) the location of the guard room to the factory building; (3) the relatively large size of the plant; (4) the absence of any properly functioning alarm/ security features at the side and rear of the building; and (5) the time he was required to be on location. He maintained that all these, when added together, served to increase the level of risk to his security. He argued that given that state of affairs, at least, two security guards should have been assigned to the premises.

75. As noted before, the first defendant placed the claimant alone on the premises based on its assessment following an inspection that the premises were safe for a lone unarmed guard to work. This was based on the fact that it was satisfied that there was, *inter alia,* a properly functioning and adequate back- up electronic security system provided by King Alarm. However, the evidence advanced by the claimant and which has been accepted by the court, is that, in actuality, the King Alarm system was not adequate to augment the claimant's lone presence. The system that was in place did not afford adequate coverage of the premises for effective detection. This is partly evident from the fact that with the claimant in the guard room at the relevant time, his assailant was on the outside of the premises and had managed to enter the guard room without any detection by any electronic security system. He executed his attack and there is no evidence of King Alarm arriving at the premises up to the time the police had arrived.

76. I will go even further to say that, in any event, even if the King Alarm system were functioning properly, it was evidently an 'off- property' response system that was in place. Mr. King did, in fact, give a fair idea of the system that the first defendant relied on to keep the claimant safe. According to that system, the claimant would have to have had an opportunity first to detect an intrusion. Then, he would have had to wait for that to be communicated, be it through appropriate signals to King Alarm or directly by him through radio contact with the home base. When the detection was communicated by whatever method, the claimant would then have to have time and opportunity to get to the guard room to lock himself in. After that, the claimant would still have to await assistance from King Alarm or his home base which would, in the ordinary course of things, take some time.

77. It is evident from Mr. King's description of the system in place that no provision was made to deal with protection of the claimant from a threat to life and limb that was unexpected, immediate, pressing and fierce as the attack on him was on the morning in question. There was no 'on-

property- protection' or 'on-property- assistance' mechanism in place to deal with any intrusion and or threat of harm from intruders. It is said that the claimant's duty was to prevent unauthorized entry and exit. The question really is: how would he manage to successfully do that, without risk of injury to him, in the event he was confronted by an armed intruder or several intruders seeking to enter the property? Given the system that the first defendant is saying was in place, the claimant could only seek help from off - property persons and await their arrival for assistance. There was nothing in the system being relied on by the first defendant that point to provision having been made for the claimant to protect himself from an immediate and imminent attack. Simply to say he should radio for help or press panic button for help and then go to the guard room and lock himself in discloses a degree of shortsightedness as to the drawbacks inherent in such a system.

78. That system was based on a faulty assumption that the claimant would have had ample time and opportunity at all times to observe an intrusion, to call for help, then to seek cover and await help to arrive. It also was based on a faulty premiss that the guard door had a latch that would enable the claimant to lock himself on the inside. I believe the claimant that there was no latch. Although Mr. King was the one who pointed out the system in place to include the defendant locking himself in the guard house as part of the method of protection available, he was not in a position to say, for sure, that there was a lock on the guard room door. This is taken to mean that in his assessment of the premises, he did not make sure that there was even proper facility for the claimant to seek refuge in the event of an attack. It also strengthens my finding that the inspection carried out was insufficient. All this, to my mind, has managed to show up the unreasonableness and weakness of the system that was being relied on by the first defendant for the protection of the claimant.

79. The unreasonableness of this system of work becomes even more potent when one takes into account the first defendant's repeated assertions that the job required the claimant to be alert and

its evident reliance on this requirement for alertness. Mr. King has indicated from the very start that with *"the surrounding fencing, walls and electronic security detection system provided by King Alarm along with the constant and alert presence of a responsive security guard with a vhf radio and panic button,"* he had estimated that adequate security would have been provided to the premises of the customer. In cross-examination, Mr. King stated categorically that 90% of a security guard's duty is to be observant and that even with the best walls and best fences, a security guard still has to remain vigilant and focused at all times.

80. This would mean that when the claimant was placed on those premises, he was considered to be a security guard who would have been responsive, alert and vigilant at all times. However, it is duly noted in this regard that the evidence given on behalf of the first defendant is that the claimant, on occasions prior to the incident, had failed to follow instructions, to be responsive and to be alert while on duty. He had actually been fined on one occasion for leaving his post without authorization. What all this has thrown to light is that the claimant had a special weakness, peculiarity, vulnerability or susceptibility that was known to the first defendant prior to the night of the incident. He would have been an employee who would have been known by the employer to have shortcomings that could affect his competence to properly and safely carry out the sort of duties he was assigned.

81. The settled principle of law is that the duty owed by the employer to his employees is owed to each particular employee. It follows that the employer must take into account any peculiarity, weakness or special susceptibility of the servant about which he, the employer, knows or ought to have known. Therefore, where an employee is known to possess a characteristic which renders him weak, incompetent or otherwise vulnerable and susceptible, then a higher duty of care is exacted

from an employer towards him in such circumstances. See ***Charlesworth on Negligence*** para. 1035.

82. So, where it is, indeed, a known fact that a particular employee might not be alert, responsive or has the propensity not to adhere to instructions, then the risk of injury as a result of that employee's own weaknesses and shortcomings is foreseeable. In such circumstances, the employer, in devising a system of work within which that employee is to operate, must take into account those weaknesses on the part of the employee which would affect his safety. Not only would there be need for the provision of adequate supervision but the overall system of work should be designed with those shortcomings in mind and reasonable steps taken to reduce the risk of injury from the employee's own foreseeable weaknesses. If the system is not already in place, then the existing system should be modified to take account of that deficiency.

83. In examining the instant case against that background, it is seen that the first defendant would have had knowledge of what it viewed as the claimant's shortcomings while he worked alone at nights. That knowledge would have rendered it foreseeable that the claimant might not adhere to instructions to contact the home base or to be alert or responsive while he worked for twelve hours. He was working at a time and for a duration when the failure to be alert because of the possibility of falling asleep on the job was a foreseeable one. Although there is no evidence to prove conclusively that the claimant failed to be alert on the night in question that resulted in injury to him, the fact that it he was known to have weaknesses which could have affected his responsiveness should, nevertheless, have alerted the first defendant that the claimant was not suited to work on his own at night for twelve straight hours. That would mean that a proper system should have been devised with that in mind. Therefore, it could not avail the defendant to simply say the claimant failed to be alert, even if that were so.

84. Even though there is no evidential link between the incident and the known weaknesses of the claimant, there is still legitimate grounds to argue that based on the knowledge of the first defendant, a greater degree of care was required on its part to safeguard the claimant from unnecessary risk of harm which was a foreseeable consequence of the claimant's own susceptibilities and weaknesses. On that basis alone, the circumstances would have required a system in which the claimant should, at least, have had proper and competent accompaniment and adequate supervision while on duty to protect him even from his own incompetence. See Byers v. Head Wrightson Co. Ltd. [1961] 1 WLR 961.

85. I must say, however, that even if the claimant were the most alert, it is my view that given the state of the premises and the deficiencies in the system of work that existed, proper and competent accompaniment from additional and or differently trained security personnel on the premises, equipped with effective protective devices, could have served as a stronger deterrent to intrusion or could have provided assistance to the claimant during the attack. This could have served to, at least, minimize the risk of harm to the claimant even if it could not eliminate it.

86. It is established as the guiding principle that if the risk is one that cannot be eliminated or diminished by the taking of all reasonable steps by the employer, then it is an ordinary risk of the employment for which the employer ought not to be held liable. However, if the danger could have been eliminated or diminished by the taking of reasonable steps, then the failure of the employer to take such steps would be a breach of his duty of care.

87. It is my view that the first defendant, knowing what it knew and by permitting the claimant as an unarmed guard to work in the conditions that existed and under the system that existed, could have done something more to seek to minimize the risk of harm to him. It could have taken steps to

design a system for his immediate protection and defence on the property rather than one merely geared at assistance from off property in times of trouble. The deployment of additional personnel to assist the claimant in guarding the premises at nights, given all the circumstances of the case, was one avenue that could have been pursued by the first defendant. Another, which would have even been more radical, would have been to remove the claimant from those premises given his known shortcomings and weaknesses and to re-assign him elsewhere or at a different time of day. The fact that the first defendant failed to take any steps towards this end shows that it had not taken all reasonable steps that could have been taken to eliminate or, at least, minimize the risk of harm to the claimant.

88. The fact that the second defendant only required and paid for one unarmed guard cannot be the answer for failure on the part of the first defendant to pursue such options. It is my view that it would have been within the power of the claimant, had it carried out a thorough and proper risk assessment of the premises upon its first inspection or upon a re-inspection, to make recommendations to its client as to the need for additional personnel or differently trained personnel to guard the premises in the light of the deficiencies that existed. The first defendant has failed in the first place to carry out such a thorough inspection or a re-inspection upon receiving the complaints from the claimant and has failed to make any recommendations to the second defendant to improve the state of the premises in an attempt to eliminate or diminish the risk of harm posed to the claimant.

89. Further, I am not satisfied on any cogent evidence that the convenience, cost and expense of deploying additional or differently trained personnel to assist and accompany the claimant would have far outweighed, or was entirely out of proportion to, the risk of injury posed to the claimant. The fact that the first defendant could have done something more, that was reasonably within its

power and competence to do, has led me to find that the claimant in all the circumstances was not exposed to the ordinary risk of his employment. He was exposed to a risk that the first defendant could reasonably foresee and which it could have guarded against by measures, the convenience and expense of which was not entirely disproportionate to the risk involved. The claimant was, therefore, exposed to unnecessary risk of harm. Accordingly, I find that the first defendant had not taken all reasonable steps to ensure the safety of the claimant by providing a safe system of work having regard to the dangers necessarily inherent in its operations and the unsafe state of the premises.

90. The circumstances of this case are clearly distinguishable from what obtained in Leslie Powell v. Guardsman Ltd. in which the system of work was found by the court to have been reasonably safe. In that case, the claimant was himself an armed guard assigned to Cremo Limited and while seated with his back to a wall, he was shot and injured by a stray bullet coming from the other side of the wall. A part of his contention that the defendant failed to provide a safe system of work was that that there was not a full complement of staff as one armed guard was absent. An unarmed guard had replaced the armed guard.

91. Marsh, J found that the claimant himself was armed and that even with one guard absent, there were at least three other armed guards on the premises at the material time. He found that the system in place was to cover the premises with armed guards in the areas where guards were to be placed. This was found by the learned judge to have been a safe system of work. He concluded that there was no evidence that the danger from an independent third party could have been prevented by the defendant in the light of the system of work in place. He found that the claimant had accepted the ordinary risks attached to his employment and was less than vigilant and so in all

the circumstances, the defendant was not held liable. The same conclusion is not open to me on the facts of the instant case for obvious reasons.

92. Having examined the facts of this case against the background of the applicable law and with the aid afforded by the helpful submissions of both counsel, I am led to a conclusion that the first defendant failed to take reasonable care for the safety of the claimant while he performed duties on the premises of the second defendant. There was thus a breach of duty of care owed to the claimant sufficient to go towards grounding liability in negligence.

Whether breach of duty foreseeable cause of damage

93. The final issues to be examined in seeing whether there is liability in negligence are whether the injury caused to the claimant was a foreseeable consequence of the defendant's breach of duty of care and, if so, whether the breach, in fact, resulted in the damage complained of. Having examined the evidence, I find that the attack and injuring of the claimant on the premises of the second defendant by intruders were a reasonably foreseeable consequence of the first defendant's breach of duty of care to take reasonable steps for his safety. What would have been foreseeable was damage resulting from criminal assaults while he worked on the premises. So it does not matter the form the assault took. As long as the damage which occurs is the same kind as that which was foreseeable, it does not matter that the precise sequence of events leading to the damage was not foreseeable. See Hughes v. Lord Advocate [1963] A.C. 837.

94. This principle has reduced to being irrelevant the contention on behalf of the first defendant that there is no established motive for the attack or no evidence of any connection between the attack and the claimant's duty to guard the second defendant's premises. The fact that there is no

evidence that the factory was broken into or of an attempt to do so is wholly immaterial. No one knows the motive for the attack. It might have been connected to his employment; it might not have been. That does not matter. The fact is that the intruder chose to, and did, attack and injure the claimant at his place of employment while he was acting within the scope of his employment. That was a foreseeable occurrence; that is what matters. I have concluded that the attack and resultant injuries were rendered possible and attainable by the first defendant's breach of duty.

95. I find that apart from the claimant's averment that the first defendant was negligent for failure to provide a panic button as a security device, I am prepared to hold that the other aspects of the particulars of negligence as pleaded by the claimant have been made out on the evidence against the first defendant on a balance of probabilities. All the omissions, when combined, lead to one thing and that is the failure of the first defendant to discharge its duty of care to take all reasonable steps to ensure the safety of the claimant, as far as the exercise of care and skill permitted. There is thus a clear nexus between the damage suffered by the claimant and the breach of duty of care on the part of the first defendant. The breach of duty did, in fact, result in damage. The first defendant is, therefore, liable to the claimant in negligence.

Whether there is contributory negligence

96. The first defendant has pleaded that there was contributory negligence on the part of the claimant. Mr. Stewart has relied heavily on the fact that the claimant was an experienced security guard who was trained to be alert and so had a responsibility to be alert and vigilant for his own safety. He relied on Qualcast (Wolverhampton) v. Haynes *[1959] A.C. 743* and Leslie Powell v. Guardsman in urging the court to find that the claimant, being an experienced security guard and

having been trained to be alert, had himself failed to exercise the necessary skill and care while on duty thereby resulting in the harm to him.

97. Without repeating the facts of those two authorities, I will just simply say that having examined the circumstances of those cases in this regard, I find that they prove wholly unhelpful to the first defendant in advancing its case that the claimant was somehow responsible for his own injury. In those cases, apart from the noted experience of the employees, the court also found that the employers had done all that could have been reasonably done by them to ensure the safety of their employees. As stated before, the same thing cannot be said of the first defendant in this case. As such, the experience of the claimant, while a relevant consideration, cannot, in the absence of other evidence, be used in the circumstances of this case as a basis to find that the claimant was injured as a result of his own fault.

98. I find that there is no evidence that would indicate failure on the part of the claimant to be alert or vigilant on the night in question. His unrefuted evidence is that when he was attacked, he was awake and in the guard house just having patrolled the premises and had gone there to make his entry in the log book. The claimant's evidence is that he heard no one. There is nothing to refute this, either directly or inferentially. Mr. King had said that if the claimant were alert he would have heard footsteps approaching the guard house even if the intruder were barefooted. I do not think it necessarily follows that failure on the part of the claimant to hear footsteps means, automatically, that he failed to be alert. The failure to hear sounds can be the result of so many variables so that to pin it down simply to lack of alertness could be highly speculative and so could prove unfair to the claimant.

99. On top of this, the first defendant cannot assert, and has not asserted, that the claimant had no right to be in the guard house. It is its evidence that in between patrol breaks, the claimant was expected to go in the guard room and also that he was required to make entries in the log book as part of his duties. It is also the evidence that the log book entry could have been done in the guard room. The claimant was, therefore, on the unrefuted evidence, doing what he was authorized to do and was, as such, acting within the scope of his employment at the time of the attack. So, the fact that the claimant might have been tardy on previous occasions does not, by itself, provide the factual basis from which a reasonable and inescapable inference can be drawn that he failed to be alert at the material time so as to ground contributory negligence.

100. The only thing that seemed as conduct that would be adverse to the claimant is that he did not call the home base after he said he had patrolled the premises as he was required to do. Even if this is taken as a failure to carry out instructions, the question is whether it can be taken as something that was a cause of the attack on him. There is no evidential basis on which such a finding may be made. I find it difficult to come to a finding on the evidence that the claimant was injured as a result of his failure to be alert or as a result of him failing to have regard for his own safety. In the end, I find that there is no evidence to support a finding of contributory negligence on the part of the claimant.

101. The claimant is thus entitled to recover damages for the negligent omission of the first defendant to take reasonable care for his safety. Judgment will, therefore, be entered for the claimant. I will now proceed to assess the damages to which he is entitled.

QUANTUM OF DAMAGES

102. The claimant is now around thirty four years old. His evidence as to the injuries he sustained is that he was chopped in the head and on both hands. His left palm was almost cut in two and was barely being held in place by veins. He bled profusely. He was in severe pain, felt very weak and was eventually hospitalized. On the way to hospital, he was in severe pain. At the Kingston Public Hospital (KPH), his wounds were cleaned which produced even more pain and the left hand was burning. The wounds were dressed and he was given pain killer to ease the discomfort. He was later taken to Dr, Grantel Dundas at the Medical Associates Hospital who examined him and then performed emergency surgery on his left hand. After the surgery, he remained a patient at the medical Associates Hospital where he was kept on drip and painkillers. He underwent physical therapy for six months which was attendant with pain. The claimant has furnished no medical report from the KPH or the Medical Associates Hospital confirming the injuries he presented with at those institutions and the course of treatment.

103. The fact that he received injuries to his hand and received medical attention at hospital is, however confirmed by the exhibited medical report of Dr. Mark Minnott, Consultant Orthopedic Surgeon, to whom the claimant was subsequently referred. The evidence shows that before the claimant completed the physical therapy under the supervision of Dr. Dundas, he was referred by Dr. Dundas to Dr. Minnott who first saw him on December 29, 2004. Dr. Minnott's medical report confirms that the claimant had surgery at the Medical Associates Hospital that comprised of open reduction and internal fixation with k-wires and reconstruction of tendons and nerves of the left hand.

104. On presentation to Dr. Minnott, the claimant had difficulty with his grip. On evaluation of him, Dr. Minnott found that stiff metacarpal interphalangeal joints were his most significant problem which was associated with stiffness at the wrist. As a result, he underwent further surgical procedure in January, 2005. That procedure involved lysis of adhesions at the level of the wrist. He was then sent to occupational therapy and advised to do therapy until his next visit to Dr. Minnott in July 2005. That would have made roughly five months or so of further therapy.

105. Dr. Minnott opined that the claimant sustained a severe injury to his left hand as a result of the machete wound injury. The injury, which was an incomplete severance of the hand at mid-palm level, resulted in temporary disability lasting at least a year. On Dr. Minnott's findings, the claimant had healed with a permanent impairment of 27% of the upper limb and 16% of the whole person.

106. The claimant himself, at trial, indicated that the hand is still not back to normal. He still suffers pain in the hand occasionally. When the time is cold or whenever it rains, he feels an intense pain in it. He has to take pain killers for relief. He has difficulties lifting little objects over 10lbs and there is a tendency for things to fall from his hand as it is weak. He does not have full grip strength and he is unable to make a complete fist as his fingers are bent at an angle. He has difficulty doing anything physical even to hold a broom.

107. The claimant also said that dressing himself, particularly buttoning his shirt, has become difficult and frustrating for him as he has difficulty holding small objects. He has to find a place to rest the hand whether he is standing or sitting. He has difficulty driving standard cars as the changing of the gear affect the hand. He is also no longer comfortable playing football which he would do on Saturdays in his community. He now rely mainly on his right hand to carry out simple tasks as any pressure on the injured hand sends pain to his shoulder.

108. As a result of these injuries, he claims for special damages, general damages to include loss of future earning capacity and for future care. I will begin with the claim for special damages.

SPECIAL DAMAGES

109. Under the heading of special damages, the claimant claims over $1,019,000 (including sums for items specified as continuing). Each item will be dealt with separately. The law pertaining to the recovery of special damages is by now trite and I do approach my task, in assessing damages under this head, by bearing in mind the relevant principles of law.

110. Medical Report: The claimant has claimed the sum of $10,000 as the cost for the medical report he obtained from Dr. Minnott. That sum having been pleaded has been properly proved by the receipt exhibited and is, therefore, allowed.

111. Cost of transportation: The claimant has claimed the cost of transportation to and from physiotherapy. This claim is pleaded as totaling $49,000. In evidence the claimant admitted there was an error in the computation. His evidence is that he attended physiotherapy three days per week for nine months and paid $250.00 by taxi per round trip. He is, however, claiming for seven months at 250.00 per day for three days per week making it a claim for $21,000.

112. Although there is no receipt tendered in proof of this payment, and I am mindful that special damages must be proved strictly, I do accept that the claimant attended physiotherapy as a result of the injuries. I accept that he travelled by hired transportation but received no receipt. The sum claimed seems reasonable and there being no submissions from the defence in relation to this item, the sum of $21,000 would be allowed.

113. Loss of earnings: The claimant has pleaded as loss of earnings the sum of $690,000 for the period August 1, 2004 to October 2006 and continuing. The evidence, however, disclosed that he resumed work in August 2005 and so any claim for loss of earnings would have been from August 1, 2004 to July, 2005. What is pleaded, he says, is erroneous. His claim is, therefore, for $330,000 representing a salary of $15,000 per fortnight for the period stated. There is no pay advice slip exhibited but the medical report shows that the claimant was temporarily incapacitated for almost one year and that he indicated that he would return to work after July, 2005. The absence of a pay advice slip is not taken as being fatal in this case as the claimant's salary would have been within the peculiar knowledge of the first defendant as his employer and payer. Furthermore, the defendant has not refuted the evidence that the claimant was unable to work and that his salary was $15,000 per fortnight.

114. There is nothing, however, to say whether this was his gross or net salary. I have treated it as being his gross income. As such, the portion of the salary that would have been exempted from tax between August 2004 and July 2005, of somewhere in the region of $120,000 is allowed. A rough discount of 33% is made on the taxable portion of the salary for statutory deductions. This would make the award to be made for loss of earnings $260,700.

115. Cost of extra help: The claimant has made a claim for the cost of extra help being the sum of $270,000 and continuing. The evidence in support is that following on his discharge from hospital, he moved in with his girlfriend and her mother (whose names he gave) who both assisted in taking care of him. He said he was unable to assist himself due to the stiffness in the hand and the wounds that took a long time to heal. The assistance included doing his laundry and ensuring he was tidy. He did not pay but he valued their services at $2500.00 per week. He seeks payment for

their services from August 2004 – July 2005 and from then until date of trial as up to then he still required extra help.

116. The claimant has brought nothing confirming that these persons helped him, but given the nature of his injury and the medical evidence confirming his incapacity for at least a year and his residual impairment, I accept that he would have needed assistance in the manner alleged and did receive such gratuitous assistance. In Kemp & Kemp, Quantum of Damages Volume 1 page 114, it is stated:

> "*If services which are reasonably required by a disabled plaintiff are rendered for him gratuitously by a wife, relative or friend, the person rendering such services is entitled to be compensated: the plaintiff can recover damages for the value of the services and must hold such damages in trust for the person who rendered the services for him…. It is not necessary that the plaintiff should have entered into a binding legal agreement to pay for the services."*
>
> (See *Cunningham v. Harrison* [1973] 3 W.L.R. 97*;* *Donnelly v. Joyce* [1973] 3 W.L.R.514 and Hunt v. Severs [1994] 2 A.C. 350.)

117. I accept that the claimant would have had to hire paid service had it not been provided gratuitously by his girlfriend and her mother. The value of the services rendered would be the proper and reasonable cost of supplying that need. Where the caregiver has given up paid service, then the measure would be the value of the paid services given up. Where none had been given up, it still does not preclude an award. The court will still have do its best to value the service by assessing what would have been the reasonable cost of supplying that need and give the caregiver a fair recompense.

118. The claimant has indicated $2500 as the value placed on such services. He has furnished no evidential basis for the figure proposed. His care at that stage would comprise both nursing care and domestic assistance. There is no evidence that anyone gave up paid work to attend to him. In my attempt to see whether that value is a reasonable value of the services rendered, I have sought guidance from the minimum wage rates of pay for the period between August, 2004 and March, 2010. Having taken everything into consideration and allowing a discount off what would have been the commercial rate for such services, I find that for the gratuitous services rendered for the almost one year up to July, 2005, the sum of $2000 per week is reasonable. This is considered to be so in light of the fact that the claimant was temporarily disabled and would have required greater assistance while undergoing therapy and recovery. I would award the sum of $88,000 for the 11 month period at $2000.00 per week.

119. From August 2005, the claimant was able to return to work. I form the view that the nursing element of his care would have been greatly diminished or would have ceased altogether. He would, by then, need more by way of domestic assistance with his household chores than nursing care. I would not take the services required by him then to have been as extensive as in his pre-recovery stage. An average figure that I would take as representing a reasonable sum for gratuitous service from August 2005 to date of trial would be $1200 per week. That would be for approximately 265 weeks to the date of trial being taken as February 5, 2010. On the basis of this computation, he would be entitled to an award in the sum of $318,000 for the cost of care from August 2005 to date of trial. The total awarded for cost of extra care is, therefore, $406,000.

120. Accordingly, the total sum awarded for special damages is $697,700

GENERAL DAMAGES

Pain and suffering and loss of amenities

121. It is accepted, given the nature and extent of the injuries sustained; the course of treatment undergone, the pain and suffering the claimant had to endure in the immediate aftermath of the incident and subsequently and the pain he will have to endure in the future, that he ought to be substantially compensated as far as money can do so for pain and suffering. I also accept that he has suffered loss of amenities as a result of the injuries he sustained and the nature and gravity of his resultant impairment. That has affected his ability to enjoy some simple pleasures of life. He ought, therefore, to be awarded substantial damages for loss of amenities.

122. I am mindful, however, that the principle governing the question of award of damages under this head is to seek to compensate the claimant in order to restore him, as far as money can do so, in the position he would have been in if the tort had not been committed. The award of damages must not be extravagantly or meanly assessed; I must apply a standard of moderation and fairness in the interest of both parties in order to arrive at a reasonable and not an excessive or inadequate award. See Warren v. King [1963] 3 All E.R. 521, 526 as endorsed by Harrison, J.A.in Monex Limited v. Derrick Mitchell and Anor. S.C.C.A. No. 83/96.delivered December 15, 1998.

123. Mr. Nelson has relied on two cases in seeking to assist the court as to an appropriate award for pain and suffering and loss of amenities. The first case is Leroy Mills v. Roland Lawson and Anor Suit No. C.L. 1987/M497 (reported in Harrisons', Assessment of Damages for Personal Injuries, pg. 290). The claimant in that case was a 43 year old mechanic. He suffered injuries to his fingers, toes and elbow when he fell from a bus. These injuries included fractures and

laceration. He ended up with a deformity in the right index finger and reduced power in the right hand. He was assessed with a resultant permanent partial disability of the upper right limb assessed at 20%. There is no record of the assessment of his disability in relation to his whole person. It was the opinion of the orthopedic surgeon that he would have difficulty using tools in trade as a mechanic. He was awarded a sum for pain and suffering and loss of amenities of $50,000 in 1989 that would equate today to approximately $1,624,000.

124. The second case is Michael Jolly v. Jones Paper Co. Ltd. & Christopher Holness Suit No. C.L. 1996/ J 014 (Khan's Recent Personal Injury Awards, vol. 5 at page 120). That claimant, a young right- handed sideman, suffered injuries when his employee's truck overturned. He suffered lacerations to his forearm and hand and severed extensor tendons of the right middle, ring and little fingers at the musculo-tendinous junction. He had surgical intervention for repairs of the extensor tendons. Post operatively, volar plaster cast was applied and he was discharged form hospital. He had physical therapy to improve extension of his fingers but there was stiffness of the joints in the middle, ring and little fingers. Two years after the accident, the claimant underwent further procedures on his three fingers and a programme of intensive physiotherapy started. The claimant was not able to complete the programme due to financial constraints. He was eventually assessed with 12% impairment of the hand based on the stiffness of the three fingers which was 11% of the upper extremity or 7% of the whole person. An award was made of $800,000 in 1998 which translates into approximately $2,465,000 today.

125. Mr. Nelson submitted, after a comparison of the cases, that the award in this case should be in the region of $2,815, 000. He based his argument for a higher award on the ground that the injuries to the claimant were more severe, with the hand being partially severed; the nature of the treatment,

to include multiple surgeries and the higher impairment of the affected extremity. No submission was made on the first defendant's behalf on this point.

126. I am mindful that the injuries and the effect on the victims are not identical and so each case must be examined on its own facts having regard to awards in comparable cases. I will use the two cases cited as a guide in terms of the range in which an award for an injury like that suffered by the claimant should fall. When the circumstances of this case are considered, I find that the claimant's injuries were more serious, his treatment more extensive and his impairment slightly higher. I have taken into account that there is no indication that it was the claimant's dominant hand that was injured that would impact more on his functionality as perhaps it would be in the case of Jolly. I consider an award of $2,650,000 as being fair and reasonable for pain and suffering and loss of amenities.

Loss of future earning capacity

127. The claimant, in his particulars of claim, seeks an award for what is termed loss of future earning capacity. He claims this award on the basis that due to the results of the injuries, it has become difficult for him to find employment now that he is thrown on the labour market. This means, in essence, that from the claimant's particulars of claim he is seeking an award for loss of earning capacity/ handicap on the labour market as distinct from loss of future earnings.

128. Mr. Nelson has submitted that the claimant should be granted an award for loss of future earnings on the basis of the application of the multiplier/multiplicand approach. In using the claimant's salary of $15,000 when he was employed to the first defendant as the multiplicand, he urged that a multiplier of 11 be applied which would bring an award for loss of future earnings to $4,290,000.00.

129. There is authority for the principle that loss of future earnings is different from handicap on the labour market or loss of earning capacity. Loss of future earnings, as explained, is a real assessable loss that has to be proved by evidence while handicap on the labour market/ loss of earning capacity is a compensation for the physical handicap produced by the injury which has affected or is likely to affect the claimant's prospect of employment on the labour market. See for instance the dictum of Harrison, J.A. in Monex v Derrick Mitchell and Anor (supra) by which I am guided.

130. The legal principles pertaining to an award of damages for loss of earning capacity/ handicap on the labour market is by now well settled on the various authorities and may also seem as being now trite. As such, I do not consider it necessary to restate the principles at this time suffice it to say that they have been borne in mind in considering the claim. Having taken the relevant principles into account, I have conducted an enquiry into the evidence of the claimant as to the effect of the injuries on his employment and pecuniary prospects.

131. The evidence is clear that the claimant had been temporarily incapacitated for one year due to the injuries and that he returned to work in August 2005. His evidence is that following on his recovery, he started working with his brother who was an electrician but there is no indication as to what his post- accident earnings were when he resumed work. He has not indicated when it was that he stopped working and the salary he was in receipt of when he stopped. Indeed, there is nothing to say he will never be able to secure employment at the same, or higher, rate of pay. Simply put, there is no proof of loss that will continue for the rest of the claimant's life that would form a sound evidential basis for a future loss to be assessed. To award him a sum which would represent an annualized sum of diminution in earning or loss of future income based on a multiplier/ multiplicand

approach is not considered appropriate on the state of this evidence. Therefore, I cannot accept Mr. Nelson's submission that there be an award of $4, 490,000 for loss of future earnings.

132. There is no medical evidence furnished that indicate specifically the impact of the claimant's injuries on his ability to work in the future. There is therefore nothing from the doctor saying definitively that the injuries are likely to affect him or will not affect him. I conclude, nevertheless, that even though the doctor has not proffered any opinion on this aspect, it does appear to me from the nature of the injury and the resultant impairment, that the claimant may be believed when he said the injury has affected his ability to keep and to find a job.

133. What the evidence does show is that the claimant had to give up employment as a result of his impairment and that he has been thrown on the job market and is now having difficulties finding appropriate employment as a result. This is, in effect, saying that he has been hampered on the job market as a result of his injuries. I accept then that the claimant has been thrown on the job market as a result of his injuries to compete with able-bodied men of his training and standing. Furthermore, it is safe to conclude, that even if he should manage to secure employment at some point in the future, there is a real risk that he will be thrown back on the job market at some point for the rest of his working life to compete with persons with no, or less, bodily impairment. I am of the view, then, that there is proper evidential foundation for the claimant to be awarded damages for handicap on the labour market/ loss of earning capacity.

134. I consider a lump sum award under this head as being more appropriate. It has, however, been said that for such an award by this method, there is no conventional approach. It has been indicated that the English approach in seeking to arrive at a fair lump sum is to award a figure representing a year to a year- and -a -half salary (See Craig Osbourne, ***Civil Litigation, Legal***

Practice Course Guides 2005-2006). However, there is no hard and fast rule. A judge dealing with such question will just have to do his best to assess the plaintiff's handicap, as an existing disability, by reference to what might happen in the future. An attempt will have to be made to weigh up the risks, chances and contingencies of life in the circumstances of the case in an effort to arrive at a reasonable sum. Having done so in this case, I would award the sum of $700,000 for handicap on the labour market/ loss of earning capacity.

Cost for future help care

135. The claimant has claimed, as part of his damages, cost for future help. This is connected to the claim under special damages for the cost of extra help from the time of the incident until date of trial. His basis for such a claim is that prior to the incident he would do his household chores but has been affected in carrying out certain chores as a result. The assistance would include doing his laundry and other household duties due to the reduced functioning in the hand.

136. It is accepted given the nature of the claimant's injuries and the resultant impairment that he would need assistance to do tasks which he once could do himself before the injuries. The employment of hired help to do such work or to have it done gratuitously is a need occasioned by the first defendant's breach. It is accepted law that the loss of ability to do work in the home for the future is a recoverable head of damages and includes services such as general housekeeping, gardening and maintenance. See: Daley v. General Steam Navigation Co. Ltd. [1981] 1 WLR. 120. The claimant is, therefore, entitled to recover damages for such domestic assistance in the future once the need is proved to exist.

137. The question would be the quantum to be awarded under this head. Having not been assisted with a useful guide by counsel, I have resorted to the use of the minimum wage for household help as a guide. The minimum wage for household help as of January 2010 stands at $4010.00 for a 40 hour week. Having assessed what I would consider to be the future needs of the claimant in this regard, I doubt the claimant would require such long term assistance as help for a 40 hour week. I think a figure of $1800 per week would be reasonable. I would use a multiplier of 10 in the light of the claimant's age and the various contingencies of life in seeking to come to a fair award under this head. I would award the sum of $936,000 for future care.

138. For general damages the award would be as follows:

- Pain and suffering and loss of amenities - $2, 650,000
- Handicap on the labour market - $700,000
- Cost of future help - $936,000.00

JUDGMENT

139. Judgment is accordingly entered for the claimant against the first defendant as follows:

(1) Special damages:

- $$697,700 with interest thereon at 3% per annum as of August 1, 2004 to May 6, 2011.

(2) General damages:

- Pain and suffering and loss of amenities - $2,650,000 with interest thereon at 3% per annum from November 30, 2006 to May 6, 2011.
- Handicap on the labour market/loss of earning capacity - $700,000
- Cost of future care - $936,000

(3) Costs to the claimant to be taxed, if not agreed.