Judgment 4/2009 **Buckley v Ronez Ltd – Royal Court (Civil Action File 1186) – 19 January 2009**

Personal Injury claim – Safety of Employees (Miscellaneous Provisions) Ordinance, 1952 – Health and Safety at Work (General) (Guernsey) Ordinance, 1987 – Deputy Bailiff retired with Jurats and delivered the reasoned judgment of the Court – injuries sustained by quarry worker – requirements of the 1952 and 1987 Ordinances held to be strict and absolute – relevance of injuries to subsequent compulsory redundancy - proper approach to assessment of loss of earnings – Smith v Manchester award

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1186

The 19th Day of January 2009 before Richard John Collas Esq., Deputy-Bailiff and Derek Martin Le Page and Michael Henry De La Mare Esquires, Jurats

BUCKLEY
Plaintiff

v

RONEZ LTD
Defendant

In the action of the Plaintiff against the Defendant in the terms attached hereto the Court having on the 8th, 9th, 10th, 11th and 23rd of December 2008 tried this action Advocates L Strappini and M Dunster appearing for the Plaintiff and Defendant respectively the Court this day handed down judgment in the terms attached hereto and found that:

a. The Defendant is not liable to the Plaintiff for the First Accident, for which he was solely responsible.
b. The Defendant is liable for the Second Accident.
c. The injuries suffered by the Plaintiff are as agreed by the medical experts save that, on a balance of probabilities, the degenerative changes in his spine would not have developed symptoms to the extent that he would have had to retire from Ronez before normal retirement age.
d. The Plaintiff ceased to be the operator of the drop ball crane because of his bad back. As a result he suffered a loss of overtime from 9 March 2004 until the August 2004 vacation when the drop ball stopped being used.
e. The Plaintiff suffered a loss of earnings, as a result of his injuries, commencing in November 2004 when he underwent the decompression operation on his lumbar spine and continuing until April 2005 when he resumed part-time work and May 2005 when he resumed full-time work. He was on full sick pay so his loss was confined to overtime.
f. The Plaintiff would have been made redundant on 27 September 2005 even if he had not been injured.
g. The Plaintiff would not have resumed work as a full-time ceramic tiler.
h. The Plaintiff could however do part-time tiling if he wanted.

i. The Plaintiff is not otherwise disadvantaged in the labour market as a result of his injuries.

j. The loss of pension benefits claimed by the Plaintiff is not recoverable as it resulted from the redundancy and was not caused by his injuries.

k. The Plaintiff's loss is :

Loss of earnings to date of trial	£11,663.15
Loss of future earnings	£21,822.04
General damages for pain, injury and loss of amenity	£10,000.00

l. The Plaintiff is awarded damages in the sum of £43,485.19

AND The Court gave liberty to the parties to apply to address it on the issues of costs and interest. These and any other such applications arising from the judgement are to be tabled forthwith and no later than the Interlocutory Court on 6 February 2009.

S M D Ross
Her Majesty's Deputy Greffier

Approved Judgment
19 January 2009

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

BUCKLEY

Plaintiff

-V-

RONEZ LTD

Defendant

Date of hearing: 8th, 9th, 10th, 11th & 23rd December 2008

Judgment handed down: 19th January 2009

Before:

Richard John Collas Esq., Deputy-Bailiff
and Derek Martin Le Page and Michael Henry De La Mare Esquires, Jurats

Advocate for Plaintiff **L Le R Strappini**
Advocate for Defendant: **M G A Dunster**

Cases & legislation referred to:

1. The Royal Court (Reform) (Guernsey) Law, 2008
2. The Safety of Employees (Miscellaneous Provisions) Ordinance, 1952
3. The Health and Safety at Work (General) (Guernsey) Ordinance 1987
4. The Quarries (Safety) Ordinance 1954
5. *Galashiels Gas Co Ltd v O'Donnell [1949] A.C.275*
6. *Hamilton v National Coal Board [1960] A.C.633*
7. *Reilly v Beardmore & Co 1[1947] S.C. 275*
8. *British Transport Commission v Gourley [1956] 185*
9. *Parry v Cleaver [1970] A.C 1*
10. *Flowers v George Wimpey & Co Ltd [1956] 1 Q B 73*

Introduction

1. The Plaintiff was born on 7 June 1955. He was employed by the Defendant as a Quarry Operative from 25 July 1994 until he was made compulsorily redundant with effect from 27 September 2005. He claims to have been injured at work on two different occasions, on 18 February 2002 ("the First Accident") and again on 8 April 2003 ("the Second Accident"). He says that each accident was the result of failings on the part of the

Defendant amounting to breaches of the common law duty of care, of implied terms of his employment contract and of certain statutory duties owed to him as an employee.

2. The Plaintiff alleges that if he had not suffered the injuries, he would not have been made redundant or, alternatively, if he would anyway have been laid off, he could have obtained work as a ceramic tiler that would have been better paid than his current, clerical job. As it is, he has a permanent back injury that incapacitates him both at work and also out of work in everyday life and at leisure.

3. The Defendant denies liability for the two Accidents. It also denies, or at least puts the Plaintiff to proof, that the alleged loss and damage results from the Accidents, as claimed by the Plaintiff.

Royal Court (Reform) (Guernsey) Law, 2008

4. Pursuant to Section 14(2) of The Royal Court (Reform) (Guernsey) Law, 2008 ("the 2008 Law"), the Deputy-Bailiff did not sum up to the Jurats in open Court, but instead retired with the Jurats.

5. When we retired, the Deputy Bailiff reminded the Jurats of their respective roles; the Deputy-Bailiff as the sole judge of questions of law and procedure; and the Jurats as the sole judges of questions of fact. Their findings of fact are highlighted in bold type in this judgment.

6. Unusually in this case, one of the Jurats unfortunately had to withdraw on the last day of the hearing because he was unwell. The parties elected to continue with only two Jurats rather than adjourn for an unknown length of time. The two continuing Jurats are in full agreement on all the factual issues so there was no need for the Deputy-Bailiff todecide any factual issues.

7. The Jurats were directed to take account of all the evidence presented to the Court; the oral evidence of the Plaintiff and the Defendant and their respective witnesses; and the documents produced to the Court. It was for the Jurats, and not the Deputy-Bailiff, to decide what evidence they accept and what evidence they reject or of which they are unsure.

8. Although the Deputy-Bailiff reminded the Jurats of aspects of the evidence, he directed them that if he appeared to have a view of the evidence, or of the facts, with which they did not agree, the Jurats were to reject his view. The Jurats were directed to take account of the arguments and speeches they had heard, although they were not bound to accept them. The Jurats were further directed that they were entitled to draw inferences, that is to come to common-sense conclusions, based on the evidence that they accept but that they may not speculate about what other evidence there might have been or allow themselves to be drawn into speculation. Where there was conflicting evidence, the Jurats considered carefully the credibility of each of the witnesses.

9. The Deputy-Bailiff directed that the standard of proof is the civil standard of the balance of probabilities and that to establish something on the balance of probabilities means to prove that something is more likely so, than not so. The burden of proof is on the Plaintiff.

10. This is the reasoned Judgment of the Court as required under Section 16(1) of the 2008 Law.

The First Accident - The Fall

11. The First Accident occurred at about 7.35 a.m. on 18 February 2002, just after the Plaintiff had arrived at work for the day. He was walking up the steps to go into the lunch hut when he tripped and fell forward into the hut.

12. The approach to the lunch hut is via a flight of five steps made out of concrete breeze-blocks and through a door that opens outwards. At the time of the Accident there was no handrail on the steps although two rails were later fitted, as shown in the photograph at Tab 3 of the Court bundle.

13. The Plaintiff said the steps were damp from the morning dew. In re-examination he was asked to describe exactly how the accident occurred. He said he walked on to the first or second step. He opened the door with his right hand. It opened outwards. He walked up the steps and went to grab the door with his right hand to close it. The next thing he knew was that he was on his backside. He caught his left upper thigh on a fixed bench as he fell to the floor.

14. He said that he lost his footing on the steps and that if there had been a handrail, he would have held on to it with his left hand. It would have steadied him and it would have prevented his fall. His lunch was in a bag he was carrying on his back so his left hand was free, by his side.

15. The fall was witnessed by another employee who was in the hut, Mr Ernie Guilbert. He saw the Plaintiff fall into the hut and he told the Plaintiff to report it.

16. Two reports were completed; one was an internal report and the other was made to the States' Health and Safety Executive (Tab 8, pages 1-4).

17. After the First Accident, the Plaintiff was off work for three weeks.

18. He said that the safety rails appeared some time thereafter, after someone else had also tripped but no other witness knew of any other person tripping on the steps apart from Mr Guilbert who tripped once as a result of his own fault, he said.

19. Mr Paver, who was the Quarry Manager until he retired in November 2003 said he never tripped on the steps and did not think they were dangerous. No one had complained to him about any danger, had they done so, he would have done something about the steps. After the Plaintiff's First Accident, he arranged for handrails to be fitted.

20. He said he was responsible for putting the lunch hut where it was and it had been there for some 30 or 35 years before he retired in 2003. The hut was raised up on blocks for two reasons: to keep it dry as there can be a lot of water flowing into the quarry; and because, when it was put there, the surface was uneven with some rock 12 to 18 inches high.

The First Accident – The Cause

21. **The Jurats decision is that the Plaintiff has failed to prove that a handrail would have prevented the accident (if a handrail had been there at the time). The Plaintiff's evidence was that he was about to grab the door when he fell. He had walked up the steps and it is likely that he was at, or close to, the top of the steps. He was reaching behind him with his right hand in order to close the door. The Jurats believe he may have been looking over his right shoulder and therefore not looking where he was putting his feet. It is likely that he was turning or twisting his body to the right so as to grab the door or the door-handle. The top of the hand rail, if it had**

been there, would not have been alongside his left hand but behind it. So, the Jurats are not persuaded that he would still have been holding the handrail at the moment of his trip. The Jurats' conclusion that he was twisting, or turning, his body to the right is supported by the evidence that his left thigh took the impact of the fall and also that he landed on his backside. A person who trips while walking up a flight of steps does not normally land on his backside.

22. **The Jurats have considered each of the breaches of duty pleaded by the Plaintiff at paragraph 6 of the Cause. They are of the view that the steps were of sound construction and properly maintained. They had been there for some thirty years, in constant use, and no previous accident had been reported. The only evidence of a previous fall was that of Mr Guilbert who said he was at fault.**

23. **The Jurats accept the evidence of Mr Paver who was responsible for erecting the lunch hut that it was necessary to mount it on blocks for the reasons he gave.**

24. **The steps were made of concrete breeze blocks so each step was six inches high. There is no evidence that they were too steep. The Jurats do not accept that the steps were rough, irregular or otherwise such as to cause people to trip, slip or lose their footing. Breeze blocks provided an appropriate surface that was likely to be safer than, for example, a rendered finish.**

25. **A warning sign would not have prevented the accident. The Plaintiff would have become familiar with it over the years as he had used the steps on very many occasions.**

26. **The Jurats have therefore concluded that the Plaintiff has failed to show that the Defendant was responsible for the First Accident.**

27. It is not strictly necessary to decide whether Ronez was in breach of section 11(2) of The Safety of Employees (Miscellaneous Provisions) Ordinance, 1952 ("the 1952 Ordinance") in not providing a handrail on both sides of the steps. However, as the issue was discussed at the hearing the Court has considered it. The answer turns on whether the steps are a "staircase". The Deputy-Bailiff directed that where the word is used in the 1952 Ordinance, it is to be given its ordinary meaning.

28. **In deciding that meaning, the Jurats had regard to the Dictionary definitions produced by Advocate Strappini. They noted that it was clear from the language of section 11(1) that a staircase could be outside, as well as inside, a building. Having regard to the normal meaning of a "staircase", the view of the Jurats is that the flight of steps is not a staircase. That view is supported by the fact that all the witnesses referred to them as steps and no one called them a staircase.**

29. The Jurats have also considered whether the Defendant was in breach of section 11(1) of the 1952 Ordinance on the basis that the section imposes a strict and absolute duty on the Defendant similar to the Ordinance of 1954 considered below.

30. **The Jurats are not persuaded that the cause of the accident was that the steps were not of sound construction or not properly maintained.**

31. **Consequently, the Plaintiff was solely responsible for the First Accident.**

The Second Accident

32. The Second Accident occurred when the Plaintiff was operating the drop ball crane close to the quarry face. The crane dropped a heavy steel object weighing several tons (and known as a ball although it was not spherical) from a great height onto freshly quarried granite boulders in order to break them into smaller sizes for crushing. Occasionally, and unpredictably, the ball bounced forwards on hitting a boulder. The crane operator had to apply a brake in order to prevent the whole of the cable that held the ball from running off the drum. When he did so, the bouncing ball pulled the jib of the crane forward and the rest of the crane also lurched forwards before it jolted back again. As it did so the operator could be thrown out of his seat.

33. The seat was supported by springs in order to help absorb the shock of these violent movements. It is L-shaped and sits within another L-shaped frame. The back of the seat was attached to the frame by high tension springs. The base of the seat was separated from the base of the frame by an empty gap of about six inches.

34. Six months earlier, in about September 2002, the Plaintiff noticed the seat had cracked and he reported it. The Plaintiff and Mr Paver disagreed in their evidence as to the length of that crack but both agreed it was not more than half way along the seat. **The Jurats consider that the discrepancy between them is not significant.**

35. The seat was repaired by welding along the angle of the "L". The Plaintiff was not satisfied with the repair because a steel bar was inserted under the seat, preventing any "give" on the seat. He asked for the bar to be removed, and it was. He did not operate the crane until he was happy with the repair. Thereafter he checked the seat every time he used the crane, he saw no further damage and he was happy to continue using the machine. He said he would not have operated the crane if he had any concern as to its safety.

36. Mr Paver said that no employee was ever required to operate a piece of plant if they were not happy with it. Both he and Mr Roussel, the Operations Manager, said that Ronez regarded health and safety issues as important and as managers it was one of their main concerns. Mr Paver said that any employee's concerns about health and safety would be reported to him to investigate and to decide what action, if any, to take. If the employee was dissatisfied, the employee could report the matter to the shop steward. All employees were required to belong to the Transport and General Workers' Union.

37. On the day of the Second Accident, the Plaintiff checked the crane for defects, as he always did before operating it, and saw nothing untoward. He paid particular attention to the seat; he saw the weld and did not see any new cracks.

38. He was operating the crane when the drop ball shot forward, the crane moved forward and then jolted back. As it did so, the seat cracked along the welded joint and it came apart. The base of the seat crashed down onto the base of the supporting frame, six inches below, and the Plaintiff fell with it, landing heavily on his backside. His immediate fear was that he had broken his back. The pain was acute; he described it as at 8 or 9 on a scale of 1 to 10. He stayed still for some five minutes or so before he then slowly began to move. He did not continue working but went home where he took a pain-killer and an anti-inflammatory tablet and applied some heat to his back.

39. The Second Accident occurred outside normal working hours because that was the only time when the drop ball crane was operated due to the hazardous nature of the work. Another employee was present as the "baby-sitter" whose job was to keep watch from the

top of the quarry so as to make sure that no one entered the area of the operation. (The baby-sitter did not give evidence).

40. The Plaintiff reported for work the next day as he thought he would be able to work through the discomfort. He reported the accident and an internal company report form was completed by Mr Paver (Tab 8, pages 5 and 6).

41. The seat was again repaired by welding and he continued operating the crane until a new seat arrived which shows the Plaintiff was satisfied with the weld at that time.

42. There was conflicting evidence as to when the new seat was ordered and Advocate Strappini submitted that Mr Paver, a witness for the Defendant, changed his evidence on this issue. The Plaintiff said it was ordered after the Second Accident. A statement prepared for Mr Paver by the Defendant's English solicitors was disclosed to the Plaintiff for the purpose of this hearing. It is dated 16.9.08, and signed by Mr Paver under the words "I believe that the facts stated in this witness statement are true". In it he said that after the Second Accident was reported to him:

> *"I recall going to inspect the crane. It appeared to me that the weld which connects the back rest to the seat itself had snapped. A new seat was ordered and fitted."*

43. Advocate Strappini argued that the statement clearly showed the chronology was that the new seat was ordered after the Second Accident which contradicted Mr Paver's evidence-in-chief where he said that he wanted to order a new seat after the first crack was reported to him in September 2002.

44. The Deputy-Bailiff directed the Jurats that they may take into account the fact that Mr Paver made the statement dated 16.9.08 when considering whether he is believable as a witness. However, the statement is not evidence of the truth of this, or any other, matter except for those parts of it which Mr Paver has said in evidence are true.

45. The Court has listened again to the relevant part of Mr Paver's evidence-in chief. He Paver said that after the first crack was reported, they looked into buying a new seat; it was difficult to find a seat because the machine was old and neither the manufacturer nor its distributors had a seat in stock. Also, he wanted to find a seat that was more sprung as the previous seat was old-fashioned and he described it as a pretty solid affair. He told two of his staff to look for a seat and he chased them but it took time to find a new seat. He said in his evidence that they worked on it from the day they knew the old seat had gone and he added the words "a new seat was on order". He also wrote at the foot of the Injury & Incident Investigation Report HS2 (Tab 8, page 6) "new seat on order". In cross-examination he said he did not know exactly when the order was placed.

46. **The Jurats are satisfied that Mr Paver issued an instruction to his staff to look into acquiring a new seat after the first crack had been reported to him. In his mind, as Quarry Manager, it was then "on order" although there was a delay in finding a suitable seat, placing the order and having it delivered and he does not know the date on which the relevant member of staff placed the actual order. The Jurats conclude that, contrary to the submission of Advocate Strappini, there was no material discrepancy in Mr Paver's evidence that would undermine his credibility.**

47. A new seat arrived a number of weeks after the Second Accident and it was fitted to the crane. Mr Paver said it came from the manufacturer of the crane, RB, and not from JCB. Mr Roussel, in his evidence, estimated the cost of a seat to be £500 to £1,000 based on his experience of purchasing a seat for an excavator.

48. Mr Paver and Mr Roussel were both cross-examined about the appropriateness of welding the cracked seat. Neither they nor the Plaintiff saw anything wrong with it. There is a lot of metal machinery and equipment in the quarry and it is normal to carry out repairs by welding and they employ trained welders for that purpose. There was no evidence to show that it was wrong or unsafe to repair metal equipment in the quarry by welding carried out by qualified welders employed by Ronez. **The Jurats conclude that the Plaintiff has not proved that it was wrong to weld the old, damaged, seat whilst waiting for a new seat to arrive.**

The Second Accident – Was the Defendant at Fault?

49. The Plaintiff's primary argument was based on the assumption that the Defendant failed to order a new seat when the Plaintiff first reported the cracked seat in September 2002. The Plaintiff said that new seat arrived within two months of the Second Accident. He assumed it was ordered after the Second Accident and so he argued that if it had been ordered six months earlier, it would have arrived in about November 2002, well before the date of the Second Accident. **However, that argument must fail in the in the light of the Jurats' finding that the Defendant looked into purchasing a new seat after the first crack was reported to Mr Paver.**

50. The duties pleaded by the Plaintiff that arise under The Health and Safety at Work (General) (Guernsey) Ordinance 1987 ("the 1987 Ordinance") are all qualified by the words "reasonably practicable". The Defendant submitted it had done all that could reasonably be expected of it. The crane was regularly inspected. The Plaintiff said he checked it carefully every day that he had to use the machine. Mr Roussel said that Ronez' own mechanics serviced the equipment every six months or so. A specialist company, Allianz Cornhill, inspected all cranes and lifting equipment every six months. Ronez also employed Health and Safety consultants, Normandie, who carried out general inspections from time to time.

51. **The Jurats are satisfied that the Defendant had done all that was reasonably practicable to ensure the Plaintiff's health, safety and welfare at work and to provide and maintain plant and a working environment that was safe and without risks to health. So, the Plaintiff's claims under the common law duty of care and for breach of statutory duty under the 1987 Ordinance all fail.**

52. The contractual duties pleaded in paragraph 3 of the Cause were not pursued. Advocate Strappini said they duplicate the common law duties and, in any event, we had no evidence of the terms of the Plaintiff's contract of employment. All claims for breach of an implied contractual duty are therefore dismissed.

53. We now consider the claims under The Safety of Employees (Miscellaneous Provisions) Ordinance, 1952 ("the 1952 Ordinance"), section 10(1) and The Quarries (Safety) Ordinance 1954 ("the 1954 Ordinance"), section 13(1). Neither Ordinance contains the phrase "reasonably practicable". The material parts of each section are the same. Section 13(1) of the 1954 Ordinance is:

> *"All parts and working gear whether fixed or movable, including the anchoring and fixing appliances, of every lifting machine at every quarry shall be of good construction, sound material, adequate strength and free from patent defect, and shall be properly maintained."*

54. Advocate Strappini relied upon all the requirements of the section but focused on the requirement that the seat must be of adequate strength and argued that it cannot have been

of adequate strength immediately before the Second Accident or it would not have broken.

55. **The Jurats are satisfied that the seat was of adequate strength when the crane was built as evidenced by the fact that it had lasted for very many years. When it needed repair it had been properly repaired by welding. It was regularly inspected. In the view of the Jurats it had, apparently, deteriorated and worn out. The Defendant had done all it could reasonably be expected to do to maintain the seat and to keep it in good repair. The Defendant could not have foreseen that the seat was going to crack and collapse when it did.**

56. However the Deputy-Bailiff directed the Jurats that the requirements of the 1952 and 1954 Ordinances were strict and absolute. He had regard to the highly persuasive decisions of the House of Lords in the cases of *Galashiels Gas Co Ltd v O'Donnell [1949] A.C.275* and *Hamilton v National Coal Board [1960] A.C.633* interpreting the provisions of similar legislation in force in Scotland. He directed that the Ordinances impose on the employer a duty to ensure that at all times all parts of the crane, including the seat, are of sound material and adequate strength. The obligation to keep the machine "properly maintained" imposes an absolute and continuing obligation to keep it in a proper and efficient state. Any proof of a failure of any part of the drop ball crane establishes a breach of the statutory duty. Evidence that the seat cracked and collapsed is proof that the Defendant was in breach of its obligation to ensure the crane is of sound material, adequate strength and properly maintained.

57. Advocate Dunster drew attention to the decision in *Reilly v Beardmore & Co 1[1947] S.C. 275.* This was another Scottish case, a decision of the First Division of the Court of Session (or so it would appear from the extract provided). It pre-dates the two cases mentioned in the previous paragraph and in my view it does not assist Mr Dunster. Lord Morton referred to *Reilly* at page 285 of *Galashiels*; he said that nothing in the Lord President's observations (in *Reilly*), properly construed, is inconsistent with his views as to the absolute duty imposed by section 22 (1) of the Factories Act, 1937.

58. **In light of the Deputy-Bailiff's direction to the Jurats that the requirements of the 1952 and 1954 Ordinances are strict and absolute, the Court has to conclude that the Defendant is liable to the Plaintiff for the Second Accident and the injuries he suffered as a result.**

Injuries

59. The Plaintiff's injuries are fully described in the reports of the two medical witnesses and summarised in their joint report (Tab 10, pages 98 to 101).

60. In summary, he had a vulnerable back because he had pre-existing degenerative changes at the lower two levels of his spine.

61. He suffered a soft tissue injury to the lower back with symptoms down his left leg in the First Accident. He was then off work for three weeks. The symptoms resolved over a period of six to nine months.

62. Following the Second Accident, he developed neck pain and pain down his left leg. On 11 March 2004, he had an epidural injection. On 23 November, Mr Pring carried out a left L4/5 and left L5/S1 decompression. After this procedure, the Plaintiff was off work, as we have already stated.

63. He continues to report back and left leg symptoms but there is no continuing nerve compression. There is no indication for any further investigation or for operative

management. He is capable of light manual work and there is no reason why he should not continue in his present job to normal retirement age.

64. That is the joint opinion of the two medical experts. Where they differ is in paragraph 20 of their joint report (page 100). In evidence, the Defendant's expert, Mr Weatherley said that although it was likely that the Plaintiff's back would have developed symptoms within ten years even if he had not been injured, he could not say within any certainty how serious the symptoms would have been.

65. **The Jurats found that both the medical experts were credible witnesses but if they had to prefer the evidence of one to the other, they would prefer the evidence of Mr Weatherley as he has the greater expertise in relation to spinal injuries. They would therefore have to accept his evidence that symptoms could have developed within ten years of the Second Accident but as he could not say how serious they would have been, the Jurats are satisfied on the balance of probabilities that the Plaintiff has proved that if he had not suffered the Second Accident, he would have remained fit enough to continue in employment with Ronez if he had not been made redundant.**

Events Leading to Compulsory Redundancy

66. The Plaintiff argued he would not have been made redundant in September 2005 if his back had not been injured and, in reply, the Defendant argued that the injury had no bearing on its decision. The issue is of great significance when quantifying his loss.

67. A number of events occurred that the Plaintiff said were all either a direct consequence of his injuries sustained in the two accidents or would not have happened but for the accidents. He says they led to his compulsory redundancy and establish that he would not have been made redundant if he had not been injured in the accidents.

68. The Plaintiff had operated the drop ball crane for a number of years initially during normal working hours but, for the last couple of years, outside those hours because of the inherent dangers of the operation. As a result he worked a considerable amount of overtime, sometimes almost doubling his basic pay. He said that initially he was the only person who wanted to do the job and that was evidence of his hard-working nature. He acknowledged that the amount of overtime gave rise to some animosity and jealousy amongst his colleagues.

69. We heard about his relationship with one employee, Mark Baudains, a witness for the Defendant. The Plaintiff said that before Mr Baudains joined Ronez, he knew him as a driver for Circuit Skips who used to collect stone from the quarry. He knew he wanted to join the company and, when a vacancy arose, he told him about it and he got the job. Mr Paver said he did not know that the Plaintiff had tipped Mr Baudains off about the vacancy. Mr Baudains had previously asked him for work and approached him directly. The post was first advertised within Ronez, but there were no internal applicants and after advertising externally, a short-list was drawn up. Mr Paver said he interviewed Mr Baudains. He did not know, or had forgotten, that Mr Roussel also interviewed him.

70. Shortly after the Second Accident, the Plaintiff was asked to train Mr Baudains on the drop ball crane. He agreed to do so, believing that he would be the relief operator to cover for him during holidays and times of sickness.

71. Mr Paver said it was normal practice to have at least two people trained on every piece of machinery in order to provide cover for holidays and sickness. Training a second operator for the drop ball crane gave them operational flexibility. This was especially important as he said that, due to his other commitments especially golf, the Plaintiff was

sometimes reluctant to work overtime when when asked to do so. Mr Roussel said that the Plaintiff never refused overtime but he would do it when it suited him.

72. The Plaintiff strongly denied that he was reluctant to work overtime and said he had only ever refused to do so on one or two occasions. He said he would agree the overtime in discussions with the shot-blaster, Raymond Ozanne and Mr Paver.

73. Mr Baudains, called by the Defendant to give evidence, said that the Plaintiff did not like him doing overtime on the drop ball; he regarded the overtime as his own and did not want Mr Baudains pinching it. He said that caused a lot of problems between them and he took a lot of abuse from the Plaintiff. The Plaintiff said he thought that having Mr Baudains as a relief operator would not affect his overtime as he would always be the first choice on the machine so he denied that he was reluctant to train Mr Baudains.

74. **The Jurats concluded that although the Plaintiff worked long hours of overtime, he sometimes did so at times that suited him and his other commitments which, on occasions, did not suit Ronez and its commercial needs as determined by the requirements of its customers.**

75. The Plaintiff said Mr Baudains was a slow learner and eventually told him he did not want to learn because he was his own man and would do things his own way. This was denied by Mr Baudains who said he is always willing to learn.

76. Early in January 2004, the quarry supervisor, Seamus Gillespie, asked the Plaintiff his opinion of Mr Baudains because others had been complaining that he was a slow worker. The Plaintiff said he was slow but he did not want to become involved because Mr Baudains had a violent reputation and the Plaintiff did not want him to know what he had said about him.

77. Shortly afterwards the Plaintiff was called to a meeting attended by Mr Roussel, Mr Gillespie and the Shop Steward, Mr Freegard. A note of the meeting is at Tab 19 but that note must be treated by the Jurats with caution as the author of the note has not given evidence and it is not an agreed note of what occurred. The note does not include Mr Baudains in the list of attendees. The Plaintiff said he was not present; Mr Roussel recalled him as being there. Mr Baudains said he did have a meeting with the Plaintiff regarding the animosity between them. **The Jurats accept the evidence of Mr Roussel and Mr Baudains that he was present.**

78. At the meeting, the Plaintiff was told that Mr Baudains had made allegations that he was harassing and victimising him. Mr Baudains' evidence was that this related to the overtime issue. The Plaintiff said he thought it arose from Mr Baudains' attitude towards him as a trainer. The conclusion of the meeting was that the Plaintiff was told he must make an effort to get on better with his colleagues.

79. The note records that it was agreed at the meeting that because of the Plaintiff's bad back he would come off the drop ball crane and he would be considered for any other vacancy that might arise. The Plaintiff said that, in fact, he had already stopped operating the crane because he had been training Mr Baudains and he had been acting as the baby-sitter. His pay slips show that he was paid overtime of £600.60 on 9 March 2004 (tab 15, page 26) and only £7.80 the following week. **The Court accepts that is when the overtime ceased on the drop ball crane**. Mr Gillespie told him he was no longer required for baby-sitting duties but he said he was given no reason for the decision. Several people then took over.

80. The Plaintiff had carried out a number of other spare, or relief, roles at Ronez, including as operator of the asphalt machine which also involved overtime, working early in the morning to prepare loads for the day. After the Second Accident he worked on the machine, and earned overtime, because there was a heavy programme of road works and he covered in times of staff sickness. That ceased in the summer of 2004 when Mr Roussel asked him to drive a dumper truck whilst someone else trained on the asphalt machine. The Plaintiff said that he accepted Mr Roussel's decision, without debate. Later, when discussing his redundancy with Mr Roussel, he asked why he was not trained on the new machine and Mr Roussel said it was because of his inflexibility with regard to weekend overtime needed to meet customer requirements (Tab 14, page 20). The Plaintiff said that reason was not true; his unavailability for overtime on that machine was because he was required on the drop ball.

81. After the summer of 2004, the Plaintiff, with the support of his trade union, contacted Advocate Strappini to commence these proceedings. Mr Strappini first contacted Ronez with a letter before action on 14 October 2004 and he commenced the proceedings with the issue of a summons on 16 February 2005.

82. The Plaintiff said that after the summons was issued, he was gradually stripped of his duties so that he sank to the bottom of the pool of employees and, in due course, was assessed to be the most eligible for redundancy. One example was that, in 2005, he was not put forward for the renewal of his fork-lift certificate even though that was needed on the asphalt plant. **The Jurats' finding is that he was not retrained on the asphalt machine because of his inflexible approach to working overtime on the machine. So they reject his argument that the lack of re-training resulted from his injury.**

83. The Defendant alleges that it was after the summer of 2004 that the drop ball crane ceased to be used. The Plaintiff said he thought it was in 2005 but he could not be sure because he was not there in the evenings to see what was going on. Martyn Dorey, who has been the shop steward for the past year, said that overtime continued to be worked in that position after November 2004. Mr Roussel said he thought drop balling stopped in November 2004 but he had not kept any record of it. Mr Baudains said there was no more drop balling after he returned from the August 2004 summer holiday break. **The Jurats find the evidence of Mr Baudains on this issue to be credible. He was the person most likely to remember when the overtime ended as it directly affected his earnings.**

84. On 23 November 2004, the Plaintiff underwent a lumbar spine decompression. He was signed off work for six weeks. On 1 February 2005, his General Practitioner wrote to Mr Roussel saying he was gradually recovering but he was able to drive a dump truck although he could not operate the drop ball crane (tab 12, page 3). Ronez required him to be examined by its medical advisors and they concluded he was not able to drive a dump truck but because he was keen and enthusiastic to return to work, they suggested he be considered for temporary redeployment and part-time work. He eventually returned part-time in April 2005, after a further examination by Ronez' doctors. He drove a water tanker but the rocking and shaking of the cab of the vehicle exacerbated his symptoms. After another examination, Ronez' doctors advised, by letter dated 16 May 2005, that he was fit for full time work in his original job, Stock Piling/Dump Truck, driving a dump truck loaded by the Volvo Loading Shovel, but not the excavator, with material up to approximately 10 inches. (Tab 12, page 11). He was restricted in that he had to exit the vehicle while it was being loaded, which he described in evidence as time-consuming.

85. He was disappointed that he was not redeployed as a Weighbridge Operator at either of the company's two weighbridges. He had worked as a relief operator so he knew the job and he knew he could have done the work with his bad back. Two vacancies came up

after the Second Accident. He applied for the first vacancy but did not have the opportunity to apply for the second because he was then in Australia on holiday. He would however have expected to be considered because his back problems were known about and his earlier application was still in the system. Having been injured at work, he felt that a suitable job should have been "ring-fenced" for him.

86. **The Jurats accepted the explanations given by Mr Roussel as to why the Plaintiff was not offered a permanent position at either of the weighbridges and that his failure to be offered those posts did not result from any injuries he had suffered in the Second Accident (or the First Accident).**

87. He was made redundant after Ronez introduced a more flexible system of allocation of work for its dumper trucks. It decided that three trucks could be reduced to two. Redundancy Arrangements Guidance Notes had been issued by the parent company, Aggregate Industries (Tab 14, pages 1 to11) and were followed by Mr Roussel. He invited applications for voluntary redundancy but none were forthcoming. So the three operatives whose primary role was dump-truck driving were assessed in accordance with the guidelines. Two employees scored 43 and the Plaintiff had the lowest score, 35.

88. The Plaintiff was questioned at some length on the redundancy assessment carried out on him and the other two dumper truck drivers. He said he had no complaint that Mr Gillespie had a higher score than himself but he thought he should have been higher than Scott Anderson.

89. There were a number of aspects of the point scoring where he had specific complaints. He was no longer employed in the "Coated Plant" area because of being taken off the asphalt plant where he had not been retrained when the company installed a new machine although Mr Anderson was trained on it even though he had no experience on the old plant that it replaced. That gave Mr Anderson 3 points more than him. He thought their respective scores for Willingness/Flexibility with Overtime should be the other way round; he always worked overtime and had only ever refused on one or two occasions whereas Mr Anderson only worked it when it suited him. As for Willingness/Flexibility in Tasks, he thought they should have the same score; instead, Mr Anderson scored one more point than him. The Plaintiff was very aware of Health and Safety issues and spoke out whenever he saw something was wrong; he thought he should have a "VG", not an "FA". He disagreed with his low assessment "R" for Acceptance of Change; he said he accepted without question any change that made the job better. An "R" for Co-operation with Management was too low, he called it laughable; he should have been on a par with the other two because his Merchant Navy background had taught him that you accept whatever the captain says. On Punctuality, he said he was always on time and preferred to be 10 minutes early, whereas Mr Anderson was renowned for taking full advantage of the three minutes' leeway permitted when signing on; he thought that he should have been assessed on a par with Mr Gillespie and one above Mr Anderson. His Absence/Attendance rating was affected by his injury he said, without which he would have had no time off, unlike Mr Anderson who regularly took 2 or 3 days' sick leave.

90. **The Jurats are satisfied that Mr Roussel conducted the whole of the redundancy assessment in a professional and fair manner. He was the best placed person to carry out the assessment, he consulted his colleagues and took account of their views as appropriate. The Plaintiff believes that he was downgraded so that he would be the most likely candidate for redundancy and that the assessment was biased against him. Those fears are not borne out by the evidence and the Jurats are satisfied that the Plaintiff has not proved that he would not have been made redundant and, in particular, that he would have had a higher score than Mr Anderson if he had not been injured.**

91. When conducting the assessment, two possibilities for redeployment were considered for the Plaintiff (Tab 14, page 13). They were Hydraulic Excavator Operator at Les Vardes Quarry and Recycling plant operator at Les Monmains. Mr Roussel noted in the assessment that *"It would be necessary to discuss with Mr Buckley whether he wished to be considered for either of these positions and for management to assess if he had or could learn the required skills or aptitude."* There was no mention of his injured back.

92. The Plaintiff was informed of his redundancy at 1145 hours on Friday 23rd September, just before the end of the week's work. He was called to a meeting with Mr Roussel in the presence of the Shop Steward. Mr Roussel told him he was to be made redundant and that he would phone him later with the figures. After saying good-bye to four friends, the Plaintiff went straight to Mr Strappini's office.

93. At 2 p.m., Mr Roussel phoned to tell him the redundancy package. The Plaintiff said he told Mr Roussel this was not voluntary, but compulsory, redundancy. Mr Roussel told him to come to the office the following Monday for talks. He did so and the meeting is referred to in Mr Roussel's letter of 30th September (Tab 14 pages 18 to 20).

Possible Redeployment

94. The letter of 30th September mentions, at the top of Tab 14, page 19, four jobs that were identified as potentially available. Mr Roussel wrote *"I stated that I did not believe you were suited to any of these position (sic), you agreed with this assessment."*

95. Advocate Strappini has invited the Court to look closely at the opportunities put forward for redeployment because he argues that the reason the Plaintiff was not redeployed within Ronez was because of his injured back.

96. **The Jurats believe that the letter accurately records that the Plaintiff agreed with Mr Roussel that he was not suitable for the posts that were offered. The Plaintiff and Mr Roussel did not discuss their reasons at the time and so neither of them realised that they had reached the same conclusion for different reasons. The Plaintiff believed he was unsuitable for the jobs because of his back injury and was unaware that Mr Roussel had rejected him on other grounds unrelated to his back injury.**

97. The first available posts were supervisor jobs. In respect of those two posts, the Plaintiff did not contend in Court that he would have had the aptitude for either of the positions. His arguments concentrated on the other two posts, the Quarry Excavator Operator ("QEO") and the Recycling Plant Operator ("RPO").

98. Mr Guilbert was the QEO at the time. He was older than the normal retirement age and, very unusually, he had been kept on because no suitable replacement could be found. Mr Guilbert gave evidence and described it as a difficult job that could not be done by everybody. Mr Roussel said that only one person applied for the post when it was advertised within Ronez, he tried the job for a week and then gave up.

99. Mr Guilbert said that if the Plaintiff had been in good health, he knew of no reason why he could not have driven the excavator after appropriate training. As it was, there was no possibility of him doing so with his bad back. The excavator drives over rough terrain at the bottom of the quarry and there would have been too much vibration for him. The Plaintiff said in his evidence that he was unable to accept the position because of his back but otherwise he would have been suitable.

100. **The Jurats accept Mr Roussel's evidence that he considered the Plaintiff was not suited to be the QEO because it was a difficult machine to operate and he would lack the aptitude for the post even if he was fully fit. They also accept that if the Plaintiff had expressed an interest in the job, Mr Roussel would have asked the occupational health doctor to assess him and, subject to that, would have allowed the Plaintiff to try the machine. The Plaintiff did not tell Mr Roussel that the reason he did not want the job was because of his bad back.**

101. As for the RPO, Mr Roussel knew the job because he had done it as a relief operator. He said he could not have done it with his bad back because it involved standing in a cabin that vibrated with the movement of a conveyor belt, lifting, handling metal objects, a lot of shovelling and cleaning, as well as bending down to access confined spaces. He said that if he did not have a bad back, he could have done the job.

102. **The Jurats accept the evidence of Mr Roussel that he did not consider that the Plaintiff would want the job as it was boring and repetitive but if he had expressed an interest in it, he would have referred him to the occupational health doctors for assessment.**

103. At their meeting, Mr Roussel asked the Plaintiff to think of any other jobs for which he would be suitable. He put forward three proposals and Mr Roussel then looked into each of them as he explained in the letter on page 19 of Tab 14. For the reasons he gave, none of the suggestions was viable.

104. **In conclusion, the Jurats accept that there were no opportunities for redeployment within the company and they also find that the reasons why he could not be redeployed were unconnected with his back injury. Also, Ronez did not dismiss the Plaintiff on the ground that he was suing them; they have kept on other members of staff who have sued the company.**

105. **The correspondence at pages 21 to 24 records what happened when the Plaintiff appealed the redundancy decision to the General Manager, Mr de Garis. Mr de Garis saw no reason to change the decision. The shop steward participated in the discussions. The Jurats believe that if the Union had been dissatisfied with the process it would have said so or if the Plaintiff had complained to the Union, it would have challenged the decision at the time.**

106. The Plaintiff was made redundant with effect from 27 September 2005 and he later received redundancy pay of £7,957.68 plus an extra £500.79. **In the computation of loss, the Plaintiff need not give credit for the redundancy pay received because he would have received it even if he had not been injured.**

Ceramic Tiling

107. From 1986 to 1994 the Plaintiff worked as a ceramic tiler for Herridges Ltd before he joined Ronez. He said he was a fast, efficient, clean and tidy worker with a good reputation who received nothing but praise for his work. After joining Ronez, he continued to do occasional, part-time tiling for Herridges and he earned £1,380.00 gross from that source in 2001. He said that he has not been able to work for them since suffering injuries in the two accidents. He cannot cope with carrying 25kg boxes of tiles upstairs nor can he cope with the repetitive bending and stretching that is involved. He has done some tiling at home but he said a job that should have taken two days took him three weeks.

108. Peter Dodsworth, the Contracts manager at Herridges confirmed that the quality of the Plaintiff's work was very competent, to a high standard and that he had received no customer complaints.

109. Chris Le Lacheur, the contracts manager and a director of Channel Island Ceramics Ltd said there was a good demand for tilers. His company employs three full-time tilers and employs another five tilers as permanent, full-time sub-contractors. Their best employees earn £14.50 per hour for a 40 hour week, equivalent to £30,160 p.a. The sub-contractors can earn £38,000 - £42,000 p.a. before expenses. He gave evidence that a self-employed tiler spends 15% of his income on materials and has to pay self-employed social insurance contributions of 10.5%. It was pointed out in cross-examination that they would also have to provide their own transport, insurance and book-keeping. They also have no sick pay or holiday pay entitlement. **The Jurats concluded that they did not have sufficient evidence to decide what are the net earnings of a self-employed tiler but that was irrelevant because they were not persuaded that the Plaintiff would have become a self-employed tiler.**

110. In reply to a question from the Bench, the Plaintiff said he gave up full-time tiling to join Ronez because he wanted a change.

111. **The Jurats are not persuaded that the Plaintiff would have resumed full time work as a tiler. He gave up the work because he wanted a change. He had acquired skills as an operator of heavy plant and machinery. They do not believe he would have reverted to his old trade and they believe he would not have wanted to become self-employed when he had always been an employee. They accept the medical evidence that he could however do part-time ceramic tiling if he wanted to do so.**

Leisure and Domestic Activities

112. The Plaintiff said he had always been good at sport. Prior to 1997 he played darts to a high standard and he once reached the last 64 in the World Championships. He has not played since before the two accidents.

113. He was a keen golfer, playing three, or sometimes four, times per week. His handicap was 6.7. Following the accidents, he has reduced the number of games he plays. He has only played five times this year and although he can walk 18 holes, he only plays 12 of them and he prefers the easier holes. His handicap has risen to just above 7 but he cannot play to that handicap which would have gone higher if he had played in more competitions. He was recalled at his request to give additional evidence during which he said that he has not played competitively since the Second Accident. Advocate Dunster cross-examined him about a newspaper report of a competition in May 2005 where he was reported to have played in a team of four who came 27th. He said he had no recollection of that competition and denied that there was anything else that he had forgotten.

114. He used to fish and scuba dive regularly but he can no longer. His back cannot cope with the motion of the sea and he can no longer bear the weight of the weight belt or the air tanks.

115. He rides a bike occasionally for exercise but he has to pedal slowly and push it up the hills.

116. He used to enjoy gardening and was proud of the state of his garden which is now overgrown and untidy because he can only potter in the garden.

117. He helps his wife around the house because she also works but many tasks are difficult. He cannot use the Hoover because of the repetitive movements forwards and backwards.

Present Employment

118. The Plaintiff was lucky to find a new job within two weeks of being made redundant. He works for Ferryspeed, formerly Channel Express. He is an Operations Administrator, which is, essentially, a clerical job. There are limited opportunities for overtime, mainly on a Saturday morning. If a ferry is late, they start later and do not earn overtime until they have worked a certain number of hours.

Loss of Earnings

119. The Plaintiff's claim for loss of earnings, both to the date of trial and in the future, was put on three alternative bases and quantified in the Schedules at Tab 19 of the Court bundle. The first hypothesis was that the Plaintiff, had he not been injured, would have continued in the employment of the Defendant until normal retirement at age 65 and throughout that time he would have earned substantial overtime on the drop ball crane. **That hypothesis fails because the Jurats decided that the reasons for his redundancy in 2005 were unrelated to his injury.**

120. The second hypothesis was that the Plaintiff would have been made compulsorily redundant in September 2005 even if he had not been injured and would then have become a self-employed ceramic tiler. **That hypothesis also fails because the Jurats were not persuaded that he would have become a self-employed ceramic tiler.** He had ceased to be a full-time employed tiler in 1994.

121. We went back into Court on 23rd December to announce the Jurats' conclusions and invited further submissions from counsel as to how to calculate the loss of earnings in the light of the decisions. Advocate Strappini submitted it was irrelevant that the Plaintiff would not have become a tiler; his case was submitted on the hypothesis that he had the earning potential of a ceramic tiler.

122. The Deputy-Bailiff has considered carefully whether it is appropriate to assess his lost earnings on the basis that he had the potential to be a self-employed ceramic tiler when, as a question of fact, the Court has decided he would not have chosen that line of work. He concluded that it is not sufficient for the Plaintiff to put forward a hypothesis that is not supported by the facts of the case. All heads of special damage must be proved by evidence on the balance of probabilities, in the normal way.

123. Earl Jowitt said in *British Transport Commission v Gourley [1956] 185, at page 197* that:

> *"The broad general principle which should govern the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries."*

124. The Deputy-Bailiff directed the Jurats that the first question they must ask when considering lost earnings as a head of special damages is:

> *"…, what did the [Plaintiff] lose as a result of the accident? What are the sums he would have received but which by reason of the accident he can no longer get?"*

That quotation is from McGregor on Damages, 17th edition at paragraph 35-058, quoting Lord Reid in *Parry v Cleaver [1970] A.C 1, at p.13.*

125. It is for the Plaintiff to prove what he would have received if he had not been injured. That means what he would in fact have received, not what he might have received if he had done a job that he had no intention of doing.

126. **The Jurats believe that** the **Plaintiff had acquired skills at Ronez in operating plant and machinery of a type that is used in the construction industry. He was good at his job which he appears to have enjoyed and the Jurats have concluded that if he had not been injured he would, on being made redundant, have looked for alternative employment within the construction industry operating similar machinery.**

127. Assessment of the Plaintiff's loss of earnings therefore requires a consideration of what he would have earned in such employment within the construction industry. **The Jurats have carefully reviewed all of the evidence in the case in order to identify what might assist them in determining what the Plaintiff could have earned. They are of the view that Ronez' rates of pay are likely to be similar to rates available generally within the construction industry. Their rates are negotiated with the trade union who are likely to ensure that there are no major disparities between Ronez and other major employers in the industry. The Jurats have therefore looked at the third basis on which the plaintiff claimed loss of earnings, set out in Schedule III (Rev. 1) at Tab 19 of the Court bundle.**

128. The third basis relies on the hypothesis that the Plaintiff, had he not been injured, would not have been made redundant but would have continued in the Defendant's employment until retirement at age 65 but without working large amounts of overtime on the drop ball crane. It includes weekly overtime of 4.75 hours, based on the average number of hours worked by the Plaintiff during the 33 weeks from 10th March (when he was taken off the drop ball crane) to 23 November 2004 (when he underwent decompression surgery). Advocate Strappini did not address the Schedule in any detail but we understand that the number of hours of overtime is an equivalent number at basic rates of pay. In other words, if it was all remunerated at time and a half, he worked an average of 3.17 hours each week.

129. **The Jurats believe that if the Plaintiff had worked elsewhere in the construction industry, there would have been some opportunity to work overtime and that 3.17 hours at time and a half is a reasonable estimate of what he would have done.**

Assessment of Damages

130. During the hearing, counsel did not explain the schedules of loss to the Court in any detail. We have tried to make sense of them but we may have misunderstood some aspects of the figures. We have endeavoured to set out clearly the basis on which we believe the Plaintiff's losses should be calculated. If counsel think that we have used the wrong figures in any way, they are to draw such errors to our attention or to seek clarification, as appropriate.

Loss of earnings prior to redundancy

131. The Plaintiff maintained his pre-injury level of earnings until the date he was taken off the drop ball crane that is until 9th March 2004 when he was relieved of his baby-sitting duties. **The Jurats believe he was replaced as a baby-sitter for operational reasons that were unconnected with his injury. However, they also believe that he would have continued as the principal operator of the drop ball crane if he had not been injured and that Mr Baudains would have been only the relief operator to cover for him in times of illness, holiday and other occasions when he was unavailable. So, he**

would have continued to earn overtime at the pre-injury rate from the 9th March until the drop ball crane ceased to be used which, the Jurats have determined, was when the quarry closed for the annual August holiday.

132. In paragraph A.2 of Schedule I (Rev. 2), at Tab 19, page 1, the Plaintiff claims £4,756.86 for loss of overtime in the period w/e 16 March to w/e 20 July 2004. **The Jurats allow such loss.**

133. The Court was not told the exact date when the August shut-down started. His pay slips (at Tab 15, page 37) show that he earned £183.25 overtime in the last week of July and £251.62 and £175.04 in each of the first two weeks of August. **The Jurats have assumed that the Plaintiff would have been able to work overtime on the drop ball crane during the weeks ending 27 July, 3rd and 10th August but not thereafter. He therefore lost three week's extra overtime at the increased rate of £333.42 mentioned in paragraph A.3 of Schedule I (Rev. 2). His loss was 3 weeks @ £333.42 = £1000.26 less what he actually earned (£183.25 + £251.62 + £175.04 = £609.91) which comes to £390.35.**

134. After the August 2004 vacation, the Jurats have decided that the drop ball crane operation ceased so the Plaintiff did not lose any overtime until he went for the decompression operation on 23rd November 2004. The Plaintiff was off sick until Dr Le Noury, on behalf of Ronez, declared him to be fit for full time work on his original job on 16 May 2005 (Tab 12, page 11). The Court heard no evidence as to what he was paid during that time but it is stated in Schedule III (Rev 1) at Tab 19, page 16 that he was on full sick pay during that period.

135. **The Jurats have decided that during the period 23 November 2004 to 16 May 2005, the Plaintiff suffered no loss of basic pay but he did lose overtime. The overtime is to be assessed at the average rate of 4.75 hours per week (being the rate used by the Plaintiff in schedule III (Rev 1) at Tab 19, page 16). His hourly rate of pay was £10.94 so his weekly loss was 4.75 x £10.94 = £51.96. The period was 25 weeks so his loss was £1299.00.**

136. The Plaintiff then returned to his original job so he had no continuing loss of earnings until he was made redundant when, as we have said, the Jurats have decided that his injuries prevented him from seeking similar employment elsewhere in the construction industry.

Loss of earnings from date of redundancy to date of trial

137. We have already explained the Jurats' finding that if the Plaintiff had not been injured he would have sought alternative employment in the construction industry at a rate of pay similar to his basic pay and 4.75 hours of overtime that he enjoyed at Ronez after he was taken off the drop ball crane and before he went for his operation.

138. The Jurats have based their calculation of his lost earnings during this period on the Second Appendix and Third Appendix to Schedule III (Rev. 1) at Tab 19, pages 20 and 21 of the bundle. Page 20 sets out the Plaintiff's calculation of what he would have earned, on his third hypothesis, if he had continued at Ronez.

139. **The Jurats have accepted the calculations on page 20 with two adjustments. First, they have assumed that the Plaintiff would have been without work for two weeks after his redundancy whilst he looked for a new job. So they have deducted two weeks at £494.04. Secondly, they have deducted the productivity bonus. The Jurats heard no evidence concerning the bonus and have assumed it was special to Ronez**

and would not have been paid by another employer in the industry. They have therefore deducted £5 per week for each of the remaining 164 and a half weeks of the period covered by the Appendix (£5 x 164.5 = £822.50). So, they have concluded his earnings during that period would have been £86,644.65 - £494.04 - £494.04 - £822.50 = £84,834.07. His actual earnings were (as per the Third Appendix on page 21) £73,890.25. So, his loss was £84,834.07- £73,890.25 =£10,943.82.

140. **In summary, the Plaintiff's total loss of earnings to the date of trial is £4,756.86 + £390.35 + £1,299.00 + £10,943.82= £17,390.03, before deductions.**

Loss of future earnings from principal employment

141. The Plaintiff's pay-slips at Tab 16, pages 36 to 38 show that his current basic salary is £2,045.88 per month or £24,550.56 per annum. Whereas the comparable salary based on Ronez' rates of pay is £496.49 per week (Tab 19, page 20) or £25,817.48 per annum. So his loss of basic salary is £1,266.92 per annum. In addition, as we have said, the Jurats have concluded that there would have been an opportunity in the construction industry for some regular overtime that they assess as 4.75 hours per week at £13.06 per hour or £62.04 per week which is £3,226.08 per annum. The Plaintiff's last three pay slips (for August, September and October 2008) show that he has earned overtime in each of those months, totalling 46 hours over three months which is worth, in total, £814.20.

142. In assessing the loss of overtime, the Jurats have to consider carefully whether there are opportunities to earn regular overtime in his current employment. Are the last three months exceptional or do they represent a change in work patterns that will be maintained permanently? Other than in those three months, the Plaintiff has not earned any overtime in his present employment. The Jurats have carefully considered the evidence. Unfortunately, the Plaintiff was not questioned specifically about these last three months. But there was no evidence given to show he could earn overtime every month throughout the year in his present job.

143. He was asked about opportunities for overtime in cross-examination. He said there is some limited overtime on Saturday mornings. There could also be overtime if the ferry is late. (He works for a haulage company, Ferryspeed. He is concerned with incoming trailers, mainly of chilled and frozen food, which have to be unloaded and checked for onward delivery to customers including Marks and Spencer and, in addition, he investigates any discrepancies in the load.) If it is known that the ferry is going to be late, they start later than their normal time of 4.30 a.m. so that the job is completed in normal hours, without overtime. He said he has to work up to 45 hours in a week before overtime is paid. In a letter dated 20 October 2005 from Channel Express, the predecessor of Ferryspeed, offering him the job (Tab 16, page 1), his normal working week is said to be 40 hours.

144. **In just over three years in the job he has only been paid overtime on three occasions. They happen to be each of the last three months for which he produced his pay slips but that is coincidental. There is no evidence of any change in work patterns that would suggest the three month period from August to October 2008 will be repeated in every future month with regular paid overtime. The Jurats have assessed that he will earn overtime of £814.20 per annum on the basis that he earned that amount in the last twelve months.**

145. **The future loss of earnings is the difference between his current basic salary at Ferryspeed and the current equivalent based on Ronez' rates of pay which we said above is £1,266.92 per annum, add to it a figure for loss of overtime being the**

difference between £3,226.08 (at Ronez' rates) and the overtime he could earn at Ferryspeed at £814.20 per annum: £1,266.92 + £3,226.08 - £814.20 = £3,678.80

146. By way of multiplier, the parties have agreed a figure of 8.016. That agreement was reached with some reluctance on the part of Advocate Strappini as it assumes a rate of return of 2.5% for Guernsey and his actuarial expert had opined that, in view of Guernsey's rate of inflation, the rate should be 0.5% lower than the UK. On the other hand, Advocate Dunster indicated he would wish to argue for a higher rate of return, perhaps 4%. In the end, the parties took a pragmatic view and agreed 2.5%. The Court may be required to decide on a future occasion, what should be the approach in Guernsey.

Deductions

147. All the amounts quoted above for loss of earnings are subject to deductions for Income Tax (20%) and Social Security contributions (6%).

148. Whilst employed by Ronez, the Plaintiff also paid a compulsory pension contribution of 5%. This was not addressed in evidence but the Court understands from the documents and, in particular, his wage slips that the pension contributions were deducted from his basic pay only and that overtime payments were received without such deduction. The Jurats have concluded that prior to redundancy he suffered no loss of basic pay as a result of the injury. Thereafter, the Jurats have assumed that any alternative employer would not have had a compulsory pension scheme. **So, the Jurats have concluded that no deduction need be made in respect of pension contributions.**

149. A deduction is required in respect of Social Security benefits received pursuant to section 114 of The Social Insurance (Guernsey) Law, 1978. The material wording of sub-section 114(1) is:

> *"In an action for damages for personal injuries…there shall in assessing those damages be taken into account, against any loss of earnings...which has accrued…to the injured person from the injuries, one half of the value of any rights which have accrued…to him therefrom in respect of…industrial injury benefit…for the five years beginning with the time when the cause of action accrued."*

150. A letter from the Social Security Department dated 5August 2008 (at Tab 13, page 21) advises that the Plaintiff received the following payments of Industrial Injury Benefit:

"19February 2002 to 9 March 2002	*£352.72*
9 March 2004 to 27 March 2004	*£280.50*
22 September 2004 to 25 September 2004	*£66.00*
23 November 2004 to 12 April 2005	*£2,064.44"*

151. The cause of action arising from the Second Accident accrued on the date of the Accident, 8 April 2003, so the first of those payments is to be ignored.

152. 9 March 2004 is the date on which the Plaintiff ceased to be involved with the operation of the drop ball crane. The court heard no evidence that he was off work later in the month and there is no claim for loss of earnings at that time (other than the general claim for loss of extra overtime resulting from him being taken away from the operation of the crane). Mr Pring's Report says in paragraph F.03 (at Tab 10, page 26) that he was not off work until he underwent spinal surgery (in November 2004). However he also states, in paragraph D.15 (page 20 of Tab10) that Dr Boyle, Consultant Anaesthetist, carried out a lumbar epidural on 11 March 2004. The wage slips for pay dates 9th, 16th and 23rd March

2004 (Tab15, pages 26 and 27) show that the Plaintiff was in receipt of sick pay. **The Jurats have therefore concluded that the sum of £280.50 was received in connection with the injury sustained in the Second Accident.**

153. As for the benefit received in respect of the period 22 September to 25 September 2004, the Court heard no evidence that the Plaintiff was off work at that time nor can we find anything in the documents to suggest he was off work (the relevant pay slips are missing from the file). **However, in the absence of any other explanation, the Jurats accept that the sum of £66.00 was also paid in connection with the injury sustained in the Second Accident.** Whether any deduction should be made in respect of that period depends on the construction of section 114 because the Jurats have not awarded any loss of earnings in respect of the relevant period. The proper construction of the section is addressed below.

154. The payment of benefit in respect of the period 23 November 2004 to 12 April 2005 relates to the time the Plaintiff was off work following the spinal surgery. **It therefore arises from the Second Accident.** The amount of benefit received for the period (£2,064.44) exceeds the amount that the Jurats have assessed as the loss of earnings in respect of that period (20 weeks at £51.96 per week which equals £1,039.20). The amount of deduction to be made again depends on the construction of section 114.

155. The question of construction of section 114 of the 1978 Law is, in essence, whether the deduction of one half of the benefits received in respect of a period of time is to be set against the loss of earnings assessed in respect of the same period of time. The Deputy-Bailiff received no submissions from counsel on this point and if either counsel disagrees with his interpretation, he will hear argument from counsel. The Deputy- Bailiff has considered the decision of Devlin J (as he then was) in *Flowers v George Wimpey & Co Ltd [1956] 1 Q B 73* interpreting The Law Reform (Personal Injuries) Act 1948, section 2 which is similar to section 114(1) and, in particular the paragraph that begins in the middle of page 86 and continues onto the next page.

156. The Deputy-Bailiff directed the Jurats that there is no reference in section 114 to periods of time other than the five year period after the accrual of the cause of action. Consequently, he directed that there must be deducted from the total loss of earnings one half of the value of accrued rights to industrial injury benefit and that the value of those rights is the amount actually received by the Plaintiff in respect of the injury suffered in the Second Accident. **The Jurats have therefore deducted one half of £280.50 + £66.00 + £2,064.44 = £2,410.94 and that equals £1,205.47**.

Loss of Earnings-Conclusion

157. **The Jurats have assessed the Plaintiff's loss of earnings to the date of trial, before deductions, as £17,390.03. That figure is to be reduced by 26% to allow for income tax and social security contributions the Plaintiff would have paid. 26% of £17,390.03 is £4,521.41 so his net loss is £12,868.62 before deduction of one half of the industrial injury benefit received namely £1,205.47 leaving a net loss of £11,663.15.**

158. **In respect of future loss of earnings, the calculation is £3,678.80 less 26% in respect of income tax and social security contributions which equals £2,722.31 multiplied by 8.016 and that equals £21,822.04**

Smith v Manchester award

159. The Plaintiff also claims the sum of £15,000 for disadvantage in the labour market. When the Court indicated its decision in outline on 23 December and invited counsel to consider how it should approach the question of future loss of earnings, the Deputy-Bailiff invited submissions as to whether, in the absence of specific evidence of the rates of pay in the construction industry, the Jurats should deal with it on a general basis by way of a *Smith v Manchester* award. Counsel for the Plaintiff argued against that proposal and submitted that the Court should make a special damages award based on the evidence that is before the Court. The Court has done so and it has assessed the Plaintiff's future loss of earnings in the manner we have already explained. In the course of that assessment we said that the Jurats were of the view that if the Plaintiff had not been injured he would have found alternative employment in the construction industry within two weeks of the redundancy which is how long it took him to find his present job.

160. The Jurats must now decide whether to make an additional award on a *Smith v Manchester* basis. The Deputy-Bailiff directed the Jurats that they must consider whether there is any real risk that the Plaintiff will lose his present job and, if so, whether he will then be disadvantaged in finding other employment by reason of his injuries.

161. **The Jurats' finding is that there is no evidence that he is at risk of losing his present job; it is a job he has now done for just over three years so his employer must be satisfied with him. He is involved with the importation of food providing an essential link in the food supply chain for the Island. There is no reason to believe that such employment is at risk even in these uncertain times. Even if he was to lose his job, he has now acquired clerical skills which he did not previously posses but which are likely to be sought after by other employers. The Jurats therefore are not persuaded that there should be any additional compensation for any disadvantage in the labour market.**

Loss of pension rights

162. The Plaintiff claims the sum of £76,000 for loss of pension benefits as he no longer contributes to the Ronez pension scheme. The figure of £76,000 was agreed by the Defendant although it disputed that such loss was recoverable. The Jurats have decided that the Plaintiff was made redundant for reasons unconnected with the injury. **The loss of pension rights arises from the redundancy and it is therefore not recoverable.**

Part-time ceramic tiling

163. The Plaintiff claimed that but for his injury he could have earned additional money from some part-time ceramic tiling. The medical experts agreed that although he was not fit for such work on a full-time basis, he could do some part-time. **Accordingly, this head of damage fails. The Jurats comment that the evidence suggests that the Plaintiff would be available for other part-time work. His working day at Ferryspeed starts and finishes early. He used to work very long hours at Ronez on the drop ball crane and there is no medical evidence to show that he could not do an additional part time job of a suitable nature in the late afternoons and evenings after he finishes at Ferryspeed.**

General damages

164. The Plaintiff claims the sum of £11,500 by way of general damages for pain, injury and loss of amenity. The Defendant has agreed that figure in respect of both the First Accident and the Second Accident. The Jurats having decided that the Defendant is not

liable for the First Accident must now decide how much of the agreed figure is to be attributed to the Second Accident. The Plaintiff's injuries are summarised in the first three numbered paragraphs of the joint report of the medical experts (Tab10 , page 99). They conclude that the symptoms resolved over a period of six to nine months. So, all the symptoms attributable to the Accidents from which the Plaintiff has suffered since the Second Accident,from which he is presently suffering and from which he will continue to suffer are attributable to the Second Accident. **The Jurats have decided to apportion £10,000 of the agreed figure for general damages to the Second Accident.**

Conclusion

165. **In summary, the decision of the Court is that:**

m. The Defendant is not liable to the Plaintiff for the First Accident, for which he was solely responsible.

n. The Defendant is liable for the Second Accident.

o. The injuries suffered by the Plaintiff are as agreed by the medical experts save that, on a balance of probabilities, the degenerative changes in his spine would not have developed symptoms to the extent that he would have had to retire from Ronez before normal retirement age.

p. The Plaintiff ceased to be the operator of the drop ball crane because of his bad back. As a result he suffered a loss of overtime from 9 March 2004 until the August 2004 vacation when the drop ball stopped being used.

q. The Plaintiff suffered a loss of earnings, as a result of his injuries, commencing in November 2004 when he underwent the decompression operation on his lumbar spine and continuing until April 2005 when he resumed part-time work and May 2005 when he resumed full-time work. He was on full sick pay so his loss was confined to overtime.

r. The Plaintiff would have been made redundant on 27 September 2005 even if he had not been injured.

s. The Plaintiff would not have resumed work as a full-time ceramic tiler.

t. The Plaintiff could however do part-time tiling if he wanted.

u. The Plaintiff is not otherwise disadvantaged in the labour market as a result of his injuries.

v. The loss of pension benefits claimed by the Plaintiff is not recoverable as it resulted from the redundancy and was not caused by his injuries.

w. The Plaintiff's loss is :

Loss of earnings to date of trial	**£11,663.15**
Loss of future earnings	**£21,822.04**
General damages for pain, injury and loss of amenity	**£10,000.00**

x. The Plaintiff is awarded damages in the sum of £43,485.19

166. The Plaintiff claims interest thereon. Counsel have not addressed the Court on the calculation of interest. We hope they can agree it but if not, they may apply to the Court. Similarly, the Deputy-Bailiff will hear any applications for costs. Such applications, and any other applications arising from the judgement are to be tabled forthwith and no later than the Interlocutory Court on 6 February 2009.

