Neutral Citation Number: [2020] EWHC 379 (QB)

Case No: E90MA057

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Liverpool Civil and Family Courts
35 Vernon Street, Liverpool, L2 2BX

Date: 21st February 2020

Before :

MRS JUSTICE FARBEY

- -

Between :

BRIAN JOHN MORROW	**Claimant**
- and -	
SHREWSBURY RUGBY UNION FOOTBALL CLUB LIMITED	**Defendant**

- -
- -

Marc Willems QC (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Geoffrey Brown (instructed by **Plexus Law**) for the **Defendant**

Hearing dates: 4-12 November 2019
Post-hearing written submissions: 18 February 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE FARBEY

Mrs Justice Farbey :

Introduction

1. This is a claim for personal injury damages and consequential loss arising from an accident on 28 February 2016. On that date, the claimant and his wife were watching their son play rugby on the defendant's field. The claimant was struck on the head by a rugby post, knocking him unconscious. Liability is not in dispute: negligence was admitted prior to the issue of proceedings.

2. I heard evidence from the claimant and 18 witnesses over the course of 6 days and submissions from counsel over 1 day. Further witnesses supplied agreed statements. I am grateful to Mr Marc Willems QC on behalf of the claimant and Mr Geoffrey Brown on behalf of the defendant for their assistance.

3. The claimant's position was that, owing to the effects of the accident and to general stress, he was suffering such anxiety that he needed an intermediary to assist him to understand the proceedings and give his best evidence. At an interim hearing HHJ Bird, sitting as a Judge of the High Court, granted permission for an intermediary to be appointed subject to a ground rules hearing. I conducted a ground rules hearing prior to trial and made a number of directions. During the course of the claimant's evidence, an intermediary sat beside him. I shall return to the ground rules hearing and to the role of the intermediary below.

4. The case bundles run to over 4,400 pages. If I were to set out all the strands of the evidence, this judgment would be even longer than it is. I limit myself to recording the significant parts of the evidence but I have considered all the relevant evidence.

The accident

5. The claimant (born on 21 December 1969) was aged 46 at the date of the accident, the circumstances of which are not in dispute. The claimant and his wife Bethan Hartey-Morrow had been watching their son play rugby at Shrewsbury Rugby Union Football Club. As it was a junior match, the game was being played across the field. Parents and other supporters were therefore watching from the try line close to the rugby posts. About half-way through the match, Mrs Hartey-Morrow went into the clubhouse to buy some coffee. The claimant continued to watch the game whereupon one of the upright rugby posts fell away from the crossbar, striking the claimant on the head and rendering him unconscious. Having been treated at the scene by paramedics, he was taken to the Accident & Emergency Department of the Royal Shrewsbury Hospital where he remained until his discharge on 2 March 2016.

6. Undisputed medical evidence shows that the claimant sustained facial and skull injuries, namely:

    i. A 3cm laceration to the right parietal region of the skull that required suturing. This resulted in permanent scarring.

    ii. A fracture of the right zygoma with minimal displacement that did not require surgical treatment.

iii. A fracture of the right orbital wall that did not need surgical treatment.

iv. Extensive fracturing of the anterior cranial fossa.

7. The claimant's facial fractures have fully healed without resultant deformity. The nature and extent of his physical injuries beyond facial fractures is in dispute. Prior to the accident, the claimant held a qualification in financial planning and worked as an independent financial adviser (IFA) for LEBC which is a national business giving financial advice to individual and corporate clients. The claimant worked in the Manchester branch. He claims that the accident caused a resurgence of previous epilepsy and a new somatoform disorder which in turn caused him to give up work as the result of the accident. The major part of his claim relates to loss of past and future earnings as a consequence of psychiatric damage.

8. On 30 March 2016, LEBC's Human Resources Manager, Surbhi Gosain, wrote to the claimant requesting that he complete the appropriate documentation to enable LEBC to notify its insurers - UNUM - of a potential claim under the LEBC Group PHI Scheme. By letter dated 8 August 2016, UNUM accepted the claim and its liability to make payments from the scheme.

9. The claimant returned to work in November 2016 and so UNUM ceased its payments under the policy. On 26 November 2016, the claimant again ceased work. UNUM was informed that his absence from work had been caused by a deterioration in his epilepsy following two seizures. By letter dated 12 January 2017, UNUM reinstated its payments which were backdated to 26 November 2016 at £2,980.96 per month. Those payments continue, representing 75% of the claimant's final basic salary

Summary of the parties' pleaded positions

10. On the pleadings, the claimant accepts that it is unlikely that he has suffered any significant brain damage but claims that he suffered (among other things) a brain injury (which is different to enduring brain damage), hearing problems, tinnitus and balance problems. He claims to have cognitive complaints that reflect his psychological state following the accident. He suffered a relapse of pre-existing epilepsy in the form of two seizures in November 2016, which were attributable to mood disturbance caused by the accident compounded by poor sleep. He claims damages for pain, suffering and loss of amenity in the region of £60,000.

11. The claimant's case is that he will never resume his work as - or at the level of - an IFA. He will in future only ever be capable of a minimum wage role (whether on a full-time minimum wage or on a higher wage for more productive work but part-time and complemented with therapeutic voluntary work). That situation will endure until the age at which he would have retired from his work as an IFA, namely 65. He claims loss of earnings of £114, 105.74 (with £739.46 loss of pension contributions) and future loss of earnings of £946,097.28 (with £129,167.95 future loss of pension contributions). He claims loss of congenial employment in the sum of £8,048.92. There are a number of claims for special damages set out in the claimant's detailed schedule of loss.

12. The defendant does not maintain that the claimant is dishonest but asks the court to conclude that his evidence is unreliable (by virtue of his mental state and/or make-up).

He has on multiple occasions with experts and other professionals (and in his witness statements) given a misleading picture about his pre-accident medical history, by failing to mention relevant psychological problems. He has described his post-accident history in extravagant terms, which may be explained by a somatoform disorder or at least from a tendency to catastrophisation.

13. The defendant's case is that the claimant's pre-accident presentation bears a striking correlation with his post-accident presentation. Over the five years leading to the accident, there were multiple complaints to the GP and other doctors about a range of problems (fatigue, insomnia, stress, anxiety, palpitations and migraine) which are the sort of factors which the claimant now says prevent him from working.

14. Whereas LEBC were positive about the claimant's performance at work, the claimant was struggling to cope, as evidenced by his medical and personnel records. Only nine days before the accident, the claimant's wife had sent an email to his GP practice describing him as suffering from a number of symptoms relevant to his capacity to continue work at LEBC (particularly fatigue) and seeking a referral to specialist medical advice on account of such problems.

15. The defendant does not accept that the claimant has a history of epilepsy and does not accept that he suffered epileptic seizures after the accident. The defendant does not accept that the claimant suffered any significant injury beyond the short-term effects of a head injury and post-concessional symptoms.

16. The defendant denies that the claimant is to any material extent less able to work than he would have been if the accident had not occurred. The claimant may have the perception or have persuaded himself that he cannot work but that does not mean that he in in fact unable to do so.

17. The defendant has raised as a factual issue whether (and for how long) it might have had an impact on the claimant that he may have mistakenly believed himself to be suffering from brain damage (as opposed to a head injury) and/or that he was endorsed by professionals in holding that belief. The defendant submits also that as a matter of law the consequences of the claimant’s mistaken belief should not be regarded as something for which the defendant is responsible even if the “but for” test of causation would otherwise be satisfied.

18. It can therefore be seen that the parties are poles apart, the defendant taking the position that the claimant has always been fit for work and the claimant taking the position that his future loss of earnings should extend all the way to retirement age. The trial brought little shifting of ground and the court was therefore presented with two extreme positions.

19. The parties were unable to agree a list of issues that the court needed to decide. Mr Willems provided me with a list to which Mr Brown made significant additions and amendments. Given the extent of disagreement between the parties, it has proved more convenient to frame my judgment around the schedule of damages and the counter-schedule which was in any event the method urged upon me by Mr Brown.

Vulnerability and special measures

Preliminary hearing before HHJ Bird

20. At an interim stage, the claimant applied to the court for the appointment of an intermediary on the grounds that he suffered from significant anxiety and depression which made him a vulnerable party. HHJ Bird considered the application at a hearing on 17 September 2019. In his ruling delivered on the same day, he allowed the application on fair trial grounds but ordered a ground rules hearing to take place.

21. In the context of criminal proceedings, Parliament has determined which witnesses (other than the accused) are to be treated as vulnerable and so eligible for special measures designed to help them give their best evidence to the court. The situation is different for vulnerable defendants but I do not need to deal with their position here.

22. In brief, section 16 of the Youth Justice and Criminal Evidence Act 1999 lays down eligibility for special measures for witnesses who are vulnerable on grounds of age or incapacity, including witnesses suffering from mental disorder within the meaning of the Mental Health Act 1983 and those who otherwise have a significant impairment of intelligence and social functioning. Section 17 deals with vulnerability on grounds of fear or distress which would diminish the quality of the witness's evidence.

23. It is now well-established that the court should consider "ground rules" before a vulnerable witness is to give evidence in order to determine what directions are necessary in relation to the nature and extent of that evidence, the questions to be asked by the advocates and any other necessary modifications of the court's procedures. One of the special measures available for the assistance of vulnerable witnesses is a requirement that the witness be examined through an intermediary (section 29 of the 1999 Act). The intermediary's role is to assist the witness to understand questions and communicate answers. It is not a general witness support role which is provided by others within the criminal justice system. An intermediary is independent of the parties and owes his or her duty to the court.

24. In the criminal law context, judges and advocates now have the benefit of the various toolkits in the well-respected Advocate's Gateway which may be found online and which aims to support the identification of vulnerability in witnesses and defendants and the making of reasonable adjustments. Toolkit 16 concerns intermediaries and states that the role of the intermediary is to "support effective communication to enable vulnerable defendants and vulnerable witnesses to participate effectively in the criminal justice system".

25. In November 2017, the Family Procedures Rules were amended to include specific provisions in relation to vulnerable witnesses: see Part 3A and Practice Direction 3AA. Under the Rules, the role of an intermediary is to communicate questions put to a witness or party; communicate the evidence given by the witness or party in reply to questions; and explain questions or answers so that witnesses, parties and the court understand the questions and the evidence. Toolkit 13 of the Advocate's Gateway provides guidance.

26. In the context of civil proceedings, there are no specific provisions dealing with vulnerable parties either in legislation or in the Civil Procedure Rules. In August 2019, the Civil Justice Council ("CJC") issued a consultation paper seeking views on change. The consultation paper states that vulnerable parties and witnesses in civil

proceedings are not a homogeneous group. The paper recognises that vulnerability may be caused by a person's mental condition which may "hamper" access to justice.

27. The CJC recommended that the Civil Procedure Rule Committee should consider amending the CPR to focus the attention of all civil judges, parties and advocates on the issue of vulnerability. The CPR should be amended to reflect the principle that the requirement to deal with a case justly includes the court and the parties ensuring that (i) all parties can effectively participate in proceedings; and (ii) all witnesses can give their best evidence. The court and parties should consider whether a party's participation in the proceedings, or the quality of evidence given by any party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make directions as a result.

28. The CJC had in mind the provisions relating to vulnerable witnesses in both the criminal and family courts, including the use of intermediaries to ensure that a vulnerable person is able to communicate with and understand the court, thereby giving his or her best evidence.

29. There is a toolkit in the Advocate's Gateway dedicated to civil proceedings which mirrors some of the learning gleaned from criminal proceedings but which refers to the court's wide discretion in jurisdictions where there is no definition of the concept of vulnerability.

30. Although the CPR do not deal expressly with the adjustment of procedures for vulnerable witnesses, it was not in dispute that this court has a general case management power to consider such adjustments and to make appropriate directions in order to ensure that the claimant was able to give his best evidence.

Ground rules hearing

31. I held a grounds rules hearing on 25 October 2019. The purpose of the hearing was to consider what adjustments were needed in order that the claimant should understand the questions put to him by the advocates and be able to communicate his answers to the court.

32. For the purpose of the hearing, I read reports by the intermediary (Ms Sara Draper) dated 19 August 2019 and 22 October 2019. She holds a BSc (Hons) in Speech and Language Therapy from the University of Manchester. She is a member of the Royal College of Speech and Language Therapists and a Communicourt accredited intermediary.

33. I asked the intermediary a number of questions relevant to her role. I asked these questions myself on the grounds that it is the court's duty to ensure the fairness of proceedings and on the grounds that her duty would be to assist the court in eliciting the claimant's best evidence. Neither party objected to such a course which was convenient in the circumstances.

34. The intermediary said that she would have a role in helping the claimant to communicate: she denied that she would be present in order to give him general support. She would ensure that his anxiety would not get in the way of him communicating or understanding the evidence.

35. I was left uncertain as to how the intermediary was qualified to do this. She was in my judgment unable to demonstrate any qualification, expertise or experience in determining when a person's anxiety becomes a bar to effective communication. In a case involving extensive expert opinion about the claimant's anxiety and other psychological problems, she could in my judgment have nothing to add.

36. Asked how she would assist the claimant to communicate with the court, she said that she would observe his behaviour as a witness. She would have gained insight into his behaviour through time spent getting to know him. Some people are slow to react and can "shut down" when asked questions. If a person is normally able to answer questions quickly, the intermediary would infer that any delay in responding to counsel's questions would be a sign of vulnerability. In my judgment her answers lacked cogency. I decline to infer that a person who pauses in answering a question in cross-examination thereby demonstrates an inability to communicate. That is not the court's experience.

37. I asked why the intermediary - rather than the court - should asses when the claimant was in need of a break from giving evidence. She said that she would be in the best position to see when he was struggling. I was left none the wiser as to why I would not be able to see this for myself.

38. I asked about the recommendation in the intermediary's report that counsel should keep questions short as the claimant "gets overloaded" if sentences have more than four key words. She said that a key word means an information-carrying word that is important for understanding the sentence: if the word were to be forgotten or its order in a sentence were to be changed, the meaning of the sentence would change. In my judgment, it is not realistic to expect counsel to prepare questions on this loose and vague basis.

39. I also had concerns that the intermediary may not have been aware of the precise nature of her duty. Her second report recognised that her duty is to the court but she suggested also that part of her role was to assist the claimant's communication during conferences with his legal team. For reasons that I need not spell out, the court is not concerned with a party's legal advice. The second report also suggested that she would intervene should she take the view that questioning from counsel did not adhere to the ground rules. However, the court makes the ground rules and it is a matter for the court to assess whether they are breached. The intermediary is not an umpire.

40. The intermediary suggested that she would assist the advocates with rephrasing problematic questions. In my view, it is not the role of an intermediary to take over the reins and make demands, or even requests, of counsel during the course of questioning. That would be a dangerous course. I was also concerned to prevent the intermediary from communicating with the claimant while giving his evidence on the grounds that there was in my view a more than negligible chance that she might unintentionally influence what the claimant was saying.

41. The written reports suggested that the intermediary would remain in court even when the claimant was not giving evidence in order to assist him in understanding the proceedings. However, a person whose duty is to assist the court ought not to become involved with a party in this untransparent manner which could give rise to the

intermediary performing her role in a way and to a degree that the court would be unable to scrutinise or even know about.

42. That said, the defendant did not ask me to discharge the intermediary or to go behind Judge Bird's order. I did not regard the defendant as prejudiced in any way by Judge Bird's order and so, at the end of the ground rules hearing, I made the following directions:

i. The intermediary would sit with the claimant to facilitate his communication while giving his evidence and guide him through the trial bundles. This rule reflected that the intermediary's role was not to provide general witness support but to aid communication and comprehension.

ii. The intermediary should not interrupt the claimant while he was giving evidence and should not speak to the claimant without the court's permission. If the intermediary felt that the claimant did not understand a question or that he needed a break, she should let the court know without interrupting the evidence. This rule was designed to ensure that the intermediary did not unintentionally influence the claimant's evidence to the court.

iii. The court would be mindful to allow additional breaks as and when required by the claimant. This rule was designed to ensure that the court retained control of the course of the evidence while allowing the claimant to have a break if stressed.

iv. The intermediary should be discharged once the claimant had completed his evidence. This rule was to ensure that the intermediary had no formal role after her duty to the court had been performed. If the claimant needed any assistance after that, it was the professional duty of his solicitors to provide it or to secure that it was provided.

v. The court dispensed with the need for advocates to be robed. This rule was designed to decrease the formality of the trial, with a view to putting the claimant at ease.

vi. The claimant was permitted to bring blank paper into the witness box when giving evidence. I was told that this rule would aid the claimant's concentration.

vii. Counsel for the claimant was permitted to carry out a brief examination of the claimant – beyond the adoption of his witness statement - in order to settle the claimant's nerves.

43. I refused to make any rules that would constrain the nature or content of counsel's questions. It goes without saying that both counsel were aware of best practice in questioning an anxious witness, including the need to avoid structurally complex or compound questions. It would lie within my case management powers to interrupt if I considered that any question was unfair. Mr Brown in any event very properly indicated that he had no objection to laying down signposts so that the claimant would

be aware that Mr Brown was moving from one topic to another and would know the general direction of the questions in cross-examination.

44. I made it plain that the ground rules were not set in stone but I would keep them under review as a matter of fairness. In the event, it was not necessary to revisit any of the rules.

45. I should also record the exemplary assistance of court staff before and during the trial. They arranged an appropriate courtroom with an adjacent private room for the claimant to use when he wished to be on his own. Court staff arranged for the claimant to visit and familiarise himself with the courtroom prior to the commencement of the trial. They modified the witness box to allow more space so that the claimant was not cramped or hemmed in. These practical measures meant that reasonable adjustments were made for the claimant's stated needs.

46. The intermediary's contribution to the proceedings was negligible. On a couple of occasions, she asked whether the court could take a break during the evidence but I was unsure why she chose those moments to make such a request as opposed to other moments. She gave some minimal assistance to the claimant when he was looking for documents in the bundles but he was capable of finding the documents for himself.

47. The claimant gave no indication that he could not follow questions or that he could not give the answers that he wanted to give. The intermediary did not raise any comprehension or communication difficulties with the court.

48. Mr Brown conducted his cross-examination with conspicuous fairness. He took matters slowly and carefully so that the claimant could follow the questions. As I have mentioned, I permitted the claimant to take blank paper into the witness box as an aid to concentration. He did not appear to use the paper. He gave evidence forcefully and fluently.

49. I have strong reservations about whether any of the ground rules were necessary. The intermediary served no useful role. Nothing that the intermediary did could not have been done by counsel and solicitors performing their well-defined roles founded on training, experience and professional ethics; or by the court in the exercise of its wide discretion to control proceedings and having the benefit of extensive expert evidence.

Claimant’s medical history

Medical records

50. The claimant suffered health problems prior to the accident. In 1995, he suffered a seizure diagnosed by Dr David Smith – an eminent specialist - as epilepsy. He had a second seizure in 1997. He was started on sodium valproate (Epilim) in 1999 but entered a complete long-term remission, suffering no further epileptic seizures prior to the accident.

51. Commendably, the claimant donated a kidney to his brother in 2005. In 2006, sadly, he suffered from chronic kidney disease.

52. The claimant has a long history of intermittent bowel disturbance and abdominal pains. A diagnosis of probable irritable bowel syndrome and pain of a psychological origin was made by Wrexham hospital. On 4 March 2016, the claimant's GP wrote a referral letter to a consultant gastroenterologist which stated that the claimant and his wife were "quite anxious characters" who had been told on numerous occasions that there would appear to be no pathology and that the claimant's pain was of non-organic origin. They were nevertheless "still looking for an answer".

53. On 3 February 2012, the claimant stated to his GP that he was suffering from anxiety and was feeling stressed. He was at the time undertaking professional examinations. On 5 April 2012, he said to his GP that he was suffering from light headedness (which struck the GP as being postural hypotension) and was concerned that this could lead to seizures. On 9 May 2013, he admitted to stress.

54. On 24 March 2014, he was recorded as being "generally worried about himself; stressed". On 21 July 2014, he complained of fatigue. He said that he was (among other things) gaining weight and not sleeping.

55. On 11 September 2014, he seems to have been diagnosed with pleurisy. At this time too, he admitted to stress but also said that he felt well. On 29 December 2014, he denied stress but said that he was suffering from insomnia. He said that he felt fine.

56. On 1 May 2015, his GP noted that he admitted to stress, which was described as chronic and secondary to his job. I pause there to note that he had, by the beginning of May 2015, reported stress to his GP three times in little over a year. I have moreover summarised the most salient aspects of his GP records: from 2012 to 2015, he contacted his GP numerous times.

57. On 16 March 2016, which was after the accident, he reported to his GP that he had chatted to his wife about several issues and was still feeling "spaced out". On 17 March 2016, he reported that he was slowly improving but still suffered from rotational vertigo on sharp head movements.

58. On 4 April 2016, he reported that he was slowly improving though he had suffered three episodes of dizziness that were short-lived, mainly when bending down. He was suffering from headaches and facial pains. He reported anxiousness, mainly when going out of the house. On 19 April 2016, he reported multiple issues including dizziness, tinnitus and two episodes of near faint or collapse.

59. On 20 May 2016, he was diagnosed with diabetes (type 2). This led to a phased change in his epilepsy medication from Epilim to Lamotrigine as the former is contraindicated for people with diabetes. On 27 June 2016, his diabetes was reviewed. He told his GP that he was struggling after his head injury and recent diabetes diagnosis. He was feeling tired, lacked concentration and his mood was low.

60. On 19 September 2016, he seems to have been diagnosed with anxiety with depression. He reported feeling increased anxiety since his head injury. He said that he was feeling flat, not sleeping well, had poor appetite, and was suffering from headaches. He denied stress. On 3 October 2016, he underwent a "depression interim review" and was prescribed diazepam.

Wife's email to GP surgery: 19 February 2016

61. On 19 February 2016, which was just 9 days before the accident, the claimant's wife, Mrs Bethan Hartey-Morrow, sent an email to his GP surgery entitled "Second Opinion Request". In the email, she expressed concerns for her husband's health. She said that she had had two recommendations in relation to a private consultant. She set out in brief terms her husband's career history. She described him as suffering from a number of symptoms including "IBS like symptoms", fatigue and palpitations. She then set out details of the claimant's medical history between 2005 and 2012. She stated (ungrammatically but clearly): "Needing closure why he is feeling so fatigued and have excess weight other than lifestyle." She asked who the best GP would be to make a referral to a Shropshire consultant. The defendant laid great store on this email, submitting that it demonstrated that at the time of the accident the claimant was already suffering many of the symptoms that he attributed to the accident.

Driving records

62. As an IFA, the claimant needed a car to travel to clients around the country. On 22 July 2016, he was informed that his driving licence would be withdrawn on medical grounds (his diagnosis of diabetes) as from 19 August 2016 and replaced with a new short-period driving licence valid for three years. By letter dated 19 December 2016, his entitlement to drive was revoked on grounds of the November 2016 seizures.

63. By letter dated 15 January 2019, the claimant applied to renew his licence. He told the DVLA that he was suffering from anxiety and stress, as well as poor sleep. His self-analysis was supported by his GP who completed a pro forma medical report saying that he suffered from anxiety and depression. On the basis of the information provided by the claimant and by his GP, the claimant's licence was restored for five years on 1 April 2019.

The Claimant's evidence

64. The claimant adopted his witness statements (11 September 2017; 3 May 2018; 5 March 2019; 13 June 2019) which I have fully considered.

Pre-accident situation

65. The claimant holds an honours degree and HND in Mechanical Engineering, Manufacturing and Materials Science. His first job was in Kent as a Graduate Metallurgist/Production Engineer. After two years, in around mid-1994, he decided to look for alternative work. Having moved to Shropshire, his brother-in-law gave him a job in a firm of financial advisers. Within 18 months, he had passed the exams to begin the process of obtaining a licence in financial services. He became an authorised IFA in early 1997. This aspect of the evidence is not controversial and I accept it.

66. The claimant stopped working in his brother-in-law's business in 2000, eventually becoming a Senior Adviser in the Manchester office of LEBC in 2004. In September 2015, he was made the Branch Head of the Manchester office. His role was divided into two parts: as Branch Head and as a Senior Financial Consultant. Each part took

around 50% of his time. He would travel to other LEBC branches, helping to set up a mortgage department 2014. This evidence seems probable and I accept it.

67. The claimant had clients all over the country, including Cardiff, Suffolk and Leicester. He had five consultants working for him. Living rurally, he would tend to leave the house at 5am to start work just after 6am. He would get home around 6pm to 7pm or later. The defendant does not dispute that the claimant worked very long hours and I accept that he did so.

68. By 2015/16, the financial year in which the accident occurred, he was 36% ahead of his financial target and had a very strong pipeline of new business on the horizon. I accept that the claimant was producing good results for LEBC in 2015/16 but it does not follow that this was part of an upwards trajectory or that the pattern would repeat itself.

Post-accident situation

69. Following the accident, the claimant was absent from work for several months and then returned to work on a phased basis. Although I regard him as painting an exaggerated picture, I accept that when he returned to work, he felt shattered and distracted.

70. He claims that, on 26 November 2016, he suffered two seizures in his bathroom at home. I have read a nursing assessment made on that date at the Royal Shrewsbury Accident and Emergency Department. The assessment records that the claimant had a tonic-clonic seizure at around 1.30pm for around 90 seconds with no loss of consciousness. He sustained minor injuries and a wound above his eyebrow was glued.

71. The claimant said in cross-examination that the seizures felt similar to his 1995 and 1997 episodes. He was asked why the nursing assessment referred to one rather than the two seizures that he claimed to have suffered. He said that he had suffered two seizures but had only attended hospital in relation to the second. He reported two seizures to an Interdisciplinary Team Meeting on 28 November 2016. Having heard the claimant and his wife give evidence, I am firmly of the view that they are telling the truth by referring to two seizures and I reject the defendant's contention that there was one seizure at the most. I also accept that the seizures and their effects were frightening and deeply upsetting for the claimant and his wife.

72. Following the seizures, the claimant took several weeks off work. He returned to work in January 2017 for 15 hours per week. In April 2017, it was agreed that he would take a six-month break but he did not return to work.

73. After leaving his job, the claimant began voluntary work for the National Trust in the gardens of Chirk Castle. He is not currently involved in paid work because he remains technically employed by LEBC in order to receive insurance payments from UNUM. He said that he would be a demanding employee because he quickly gets physically and psychologically tired, and it takes him a lot longer to do basic things than before the accident.

74. He fears that if he were to return to a stressful situation, his epilepsy would recur. He is scared of suffering sleep seizures. His sleep is very poor as he does not stop worrying about things. He believes that his epilepsy is active but that he controls it.

75. Socially, he feels like he is on the outside of conversations with his circle of friends: it takes longer to process what they are saying and he struggles with noise such that he has to sit in the corner. He does not like crowds.

76. The various aspect of his evidence which I have set out above are broadly reliable and I accept them on the balance of probabilities. However, the claimant's evidence was unreliable in a number of significant respects to which I now turn.

Partial seizures

77. The claimant told Dr Bruce Scheepers for the purposes of a report in September 2017 that he had experienced 74 partial seizures since February 2017 (according to his seizure diary). He said that partial seizures involved auras. He appeared to me to use "partial seizure", "micro-seizure" and "aura" in a similar way, meaning a sense of fear. For example, he would feel that a person was looking over his shoulder and he would be too fearful to turn around and look. Partial seizures could also involve physical conditions or sensations, such as a strange or metallic taste in his mouth, a sensation in his left arm, nausea, moments of absence, a prickly feeling and hot face, and high-pitched buzzing in his right ear. Symptoms could come two or three at a time and lasted about 5-10 minutes.

78. The claimant said in evidence that he had been free of partial seizures since January 2018. He applied for a driving licence in January 2019 as he had by then been seizure-free for a year. He also said that partial seizures had continued to mid-2018 but with one-off symptoms rather than clusters. I found it hard to follow the claimant's evidence. It is difficult to understand how he had been seizure-free for a year at the time he applied for a driving licence if his seizures continued until mid-2018.

79. Given the confusion, Mr Brown asked him to confirm that he had stopped having partial seizures in about early 2018, which seems to be what he told Dr Scheepers in April 2019. When asked to give this confirmation, he denied that that was the case, saying that (as I understood his evidence) Dr Scheepers' report was referring to the sort of seizures he suffered in November 2016 and that he had experienced partial seizures in 2019.

80. I do not accept the claimant's evidence. It does not make sense for Dr Scheepers to record that he had suffered no full epileptic seizures since January 2018 as this would be a random date. It is also inconsistent with the letter of Dr Colin Pinder, the consultant in neurological rehabilitation who reviewed the claimant in March 2019. Dr Pinder records that the last seizure was a partial seizure in January 2018.

81. It is difficult to understand why the claimant told Dr Priestley in April 2019 that he continued to have symptoms which he believed might be seizure-related when the impression was given by him elsewhere in the evidence that those symptoms had ceased by January 2018. Generally, the claimant's evidence is inconsistent with

information provided to DVLA in January 2019 that he had not suffered an altered level of consciousness since November 2016.

82. In my judgment, the claimant's evidence about his partial seizures was muddled and inconsistent. He has not proved that he suffered partial seizures after January 2018. In my judgment, the claimant does not prove that after January 2018 he was prejudiced in working in his previous job as an IFA on account of any form of micro-seizure.

83. I also take the view that, on balance, the claimant has downplayed any pre-accident partial seizures. On 25 September 2008, LEBC contacted the claimant's GP with concerns about his "aura like" symptoms which the claimant believed could have been triggered by stress. His GP wrote a letter in reply on 30 October 2008. The claimant however denied that he had auras in 2008 because he would have stopped driving if that were the case.

84. On 17 January 2012, the claimant's GP recorded: "Last fit 16-April-2010" but the claimant denied that he could have suffered a partial seizure around that time, seemingly indicating that the GP record was wrong. I do not accept that the GP record is wrong. The claimant's evidence about it was muddled. His evidence about partial seizures is not reliable. I have formed the view that the claimant minimised his pre-accident partial seizures in order to dramatise the post-accident partial seizures.

History of stress, anxiety and fatigue

85. The claimant says in his witness statement that his health prior to the accident was "genuinely good". Nevertheless, he suffered an epileptic seizure in 1995 and then again in 1997. He started to take Epilim in about 1997. He says that, on account of the epileptic seizures, he maintained a strict regime to ensure that he did not get overtired. He remained active and tried to ensure that his stress levels were under control.

86. I do not accept that the claimant has given a full or accurate picture of his stress levels prior to the accident. The claimant minimised his history of stress, anxiety and fatigue both to the experts and to others he encountered before trial and in his witness statements and in evidence to the court.

87. In a detailed letter dated 28 September 2016 from his treating psychologist Dr Newby to Ms Andrea Wilderspin (a registered nurse and brain injury case manager at N-Able Services Ltd), there is no mention of the claimant's pre-accident history of insomnia, anxiety, stress or fatigue. The claimant said in oral evidence that he could not now remember whether he had told Dr Newby that he suffered from these symptoms prior to the accident. He gave similar answers about why he had not described to neurologist Dr Cooper pre-existing problems relating to micro-seizures, migraines, insomnia, fatigue and stress: he could not recall but would have answered honestly any questions from Dr Cooper.

88. He gave similar answers in relation to why he had not told neuropsychologist Dr Priestley about pre-accident fatigue, headaches and migraines, insomnia, stress and anxiety: he would have mentioned what he was asked about.

89. He gave similar answers in relation to why a letter from Dr Pinder in April 2017 made no reference to pre-accident problems with fatigue, headache, insomnia, stress or anxiety: he did not know why those matters had been omitted and could not remember whether he had raised them.

90. The claimant in his witness statement described post-accident constant exhaustion but in oral evidence he denied being exhausted before the accident, pointing out that he had just been promoted to Branch Head and saying that he loved the job. In oral evidence, the claimant denied that pre-accident visits to his GP suggested that his health was affected by stress. He claimed that he was not suffering from stress at a clinical level because he was not prescribed medication. The purpose of repeatedly seeing his GP about stress was to gain repeated reassurance and to make sure that nothing was going to happen to him. By contrast, he suffered real anxiety after the accident.

91. The claimant's failure to mention pre-existing symptoms similar to those he encountered before trial (and his failure to mention pre-accident problems in his witness statements) is indicative of minimising his pre-accident health problems. In my judgment, the claimant sought to minimise his pre-accident stress in order to maximise the effect of post-accident stress. It is probable that he took this path in his evidence to the court because pre-accident stress and fatigue was related to his job – and the largest element of his claim to this court concerns loss of earnings. I have reached this conclusion for the following reasons.

    i. Following a hospital attendance for gastro review on 21 June 2011, the claimant was diagnosed with disordered breathing possibly precipitated by stress. The consultant physician who examined him recorded that he seemed stressed, owing to (among other factors) difficulty in his job at LEBC as a financial adviser. In cross-examination, the claimant accepted that he thought that his workload was affecting health at that time, as it was a stressful job.

    ii. The claimant said that at some time before 2014 he had plotted via an Excel spreadsheet how he could decrease his workload over time. The solution for him was to look after more clients but fewer customers (i.e. individual employees within corporate clients) and to delegate. Given his firm evidence that he liked hard work and that it was in his "make-up" to try to carry on, I have concluded that he took these steps because of the high stress that he suffered in his job.

    iii. On 10 May 2016, Ms Wilderspin performed an Immediate Needs Assessment with a colleague at the claimant's house. The claimant told her that he had no pre-existing psychological difficulties. Asked by Mr Brown why he had not told Ms Wilderspin that he had consulted his GP for stress, he said that he did not regard his pre-accident stress as a psychological problem. He attributed it to the stress of his job.

    iv. He said in cross-examination that the multiple references to fatigue in his wife's February 2016 email referred to 2012 and that in run-up to the accident he was not suffering from fatigue. He was then forced to accept that the words "he is feeling fatigued" (near the end of the email) cannot refer to 2012.

He said that he was probably feeling fatigued at the time of the email because he was tired from work.

v. He distanced himself from the word "fatigue" saying that this was his wife's word in the email: he regarded himself simply as tired. He said that his wife raised the issue of fatigue in the email because he had just started his new role as Branch Head. It follows that his wife was concerned about work-related fatigue after his promotion. I find it hard to accept that his wife would have sent an email about the claimant's health that would not have reflected his own concerns. The February 2016 email is evidence that the claimant was worried about fatigue because of his job. It was of sufficient severity for his wife to raise it with his GP surgery. Both the claimant and his wife perceived it to be serious.

vi. He said that he had not told Dr Scheepers about pre-accident fatigue, stress and anxiety as they were not relevant to Dr Scheepers' assessment: they were part of doing his job at LEBC.

vii. He told the defendant's consultant psychiatrist Dr El-Assra that he did not suffer from stress prior to the accident but that "you get tired during the job".

viii. He said in evidence that headaches and other psychological symptoms were part of his job.

ix. Even if his symptoms were not clinical, the claimant's visits to his GP show at the least that he perceived himself as suffering from tiredness, stress and anxiety prior to the accident. He perceived these symptoms as being a natural consequence of his job.

x. The claimant denied any pre-accident health concerns to the defendant's clinical psychologist Dr Plowman, save for IBS. He said in oral evidence that IBS had been his only concern. It is plain from the extensive pre-accident medical records that he worried about his health well beyond IBS. I reject his oral evidence and take the view that he minimised his previous worries – even if sub-clinical – because he wishes to dramatise the effects of the accident.

92. For these reasons, I did not regard what the claimant told the court or told others about his pre-accident stress, anxiety and fatigue as reliable.

Back problems

93. The claimant said that he did not know whether he had suffered back pain before the accident and could not remember. Even when reminded that he had told his GP about back pain following a road traffic accident in November 2006, he said that he did not recall. I did not find his evidence persuasive.

94. On 7 October 2009 he visited his GP about longstanding right-sided low back pain when sitting for long periods at work. The claimant said that the GP had put this on his medical record but he did not recall having a substantial period of back pain. I regard his evidence as lacking clarity.

95. On 19 May 2014, he reported low back pain but the GP stated that there was nothing obvious that would precipitate pain. When asked about this, the claimant said that he did not recall anything about it. He gave me the impression that he was distancing himself from the GP record.

96. The claimant appears not to have told the orthopaedic expert Mr TR Redfern about back pain when examined for these proceedings in November 2018. His explanation in his oral evidence was that he would have told Mr Redfern about the pain if it had been an active condition. I do not accept that the claimant has given a reliable explanation and do not accept his evidence.

97. In my view, the claimant was seeking to minimise his pre-accident back problems so as to maximise his post-accident problems. I did not regard his evidence about back pain as reliable.

Balance; hearing; smell and taste

98. The claimant accepted that loss of balance had not been a major disability. He continues to suffer from vertigo but he is starting to manage it and to adapt.

99. The claimant said that he suffered from severe tinnitus after the accident. He said that his tinnitus is now mild. It comes and goes.

100. He claims loss of smell and taste. In particular, food and drink do not have taste after initial tasting.

101. The claimant has not dramatised this part of his evidence and has in my judgment been straightforward with those experts and others who have asked him about them for the purposes of these proceedings. I accept his evidence.

Pain preventing use of a laptop

102. The claimant said that his arm pain was getting worse not better but seemed unable to answer the question whether arm pain affected him using a laptop. I regard this as an attempt by the claimant to minimise his ability to find work.

The Claimant's wife: Bethan Hartey-Morrow

103. Mrs Bethan Hartey-Morrow adopted her witness statements (19 June 2017; 22 February 2018; 26 February 2019). She works as a part-time hairdresser. After the accident, the claimant's balance was "terrible" and he could not walk unaided. She would have to take his arm to guide him. He fell in the shower on a few occasions. She had to assist him with dressing, for example by lifting his legs to help him put on clothing. She herself had to take two weeks off work as she felt overwhelmed. She drove her husband to nearly all of his hospital appointments.

104. She said that after the accident her husband suffered persistent anxiety which he had not suffered before the accident. The anxiety appeared to be related to stress at work. She said that he felt constantly tired and that he did not sleep properly. He suffered from bad nightmares. She described a deterioration in his concentration and memory, going so far as to say that he would recognise people but would not know who they were or remember why he knew them. She claimed that he could not remember their

wedding day – which I do not accept. Nor do I accept her evidence that the claimant suffered such memory loss that he did not recall why he knew certain people. In my view, she has exaggerated the effects of the accident, perhaps in her own mind or perhaps out of her concern about her husband's situation.

105. She claimed that he had reduced tolerance for noise and crowds. He lost his sense of taste and smell. He had reduced appetite for food. He became unable to drive long distances as it made him very tired. The burden of driving therefore fell on her.

106. After the birth of their son in 2005, she suffered from postnatal depression. Following a number of bereavements shortly afterwards, she was prescribed anti-depressants and has become a long-term user. She was referred to her GP for counselling and her medication was increased after her husband's accident. She found herself constantly worrying about her husband, focusing on his needs and health in the months of the accident and even after that.

107. She said that her husband continues to suffer severe anxiety and low mood. He can be sharp and argumentative towards her and their son. She could feel overwhelmed by having to support the family and continue work. Her husband cannot cope with ordinary events such as going to the theatre in Manchester or spending a few nights away from home.

108. In answer to questions from Mr Brown, Ms Hartey-Morrow said that she was unsure whether her husband had complained to her about partial seizures before the accident. She purported not to understand a question about whether the claimant had complained about issues affecting his level of consciousness between 1997 and the accident. When asked whether the claimant feared that he would suffer an epileptic fit during that period, she said that there is always a fear.

109. Asked about the February 2016 email, she said that she had heard that the claimant's GP was going to retire. The claimant did not have a good rapport with one of the other GPs at the medical centre. She was concerned that he might be allocated to that GP and so she thought that it would be a good idea to ask for a completely different GP to be assigned to the claimant. For these reasons, she sent the email.

110. She wanted to make sure that the concerns expressed in the email would be properly addressed and to ensure that her husband's symptoms mentioned in the email were under control. She believed that if her husband was going to be working long hours following his promotion, it would be useful for him to have a "health check", which she described as being like a "MOT". She wanted the GP surgery to refer her husband to a consultant. She had concerns about some of her husband symptoms but said that she was not concerned that he was heading for problems with his health.

111. She was asked about where she had obtained the medical information set out in the email. Her answers were evasive but she seemed to say that she had taken the information from a running document kept by her husband.

112. Asked about the two references to fatigue and the reference to palpitations in the email, she accepted that her husband suffered from these problems when she wrote the email and that she was concerned about his health at that time. She said that, by

fatigue, she meant fatigue at having a "big belly" from irritable bowel syndrome. This does not make sense.

113. I did not believe the claimant's wife when she said that she was not concerned about his health in February 2016. The email was a request for advice on seeking the opinion of a medical consultant. It would not make sense for the wife to seek medical advice if she was not concerned about the claimant's health. The email says in plain terms that the claimant felt fatigued. It mentions three specific doctors in private practice. On her own account, Mrs Hartey-Morrow had already carried out online research about two of them and, in doing so, had read about the third. She set out in the email a detailed account of the claimant's past symptoms – presumably to highlight their relevance to her request. This was not a casual email containing a simple query about who was to take over as the claimant's GP. The claimant's wife sent this email because she was worried.

114. Her responses to other questions relating to why she had not mentioned her husband's pre-accident fatigue, palpitations and other health problems in her witness statements lacked clarity and were evasive. Mr Brown repeated questions where necessary so that this witness had sufficient opportunity to understand and answer. I infer that she decided to stick to what she wanted to say as opposed to what she was asked to say.

115. She said that the case was about her husband being hit with a post and that other matters were not relevant and so not covered in her witness statement. She accepted that her husband had suffered anxiety before the accident but said that it was a good thing, enabling him to get on in life. She said that palpitations could be good, for the same reason. Fatigue was normal for a person who had balanced corporate and personal clients, who was a team leader and branch head at work, who was a husband and a father.

116. Mrs Hartey-Morrow presented as an abrasive witness. She made repeated derogatory remarks about Mr Brown's questions. She mentioned she was taking medication that makes her emotional and said that she was annoyed about having to give oral evidence. I do not accept that her emotional state explains the weaknesses in her evidence. Her answers were unclear.

117. Despite other significant weaknesses in her evidence, she gave a vivid and compelling description of the claimant suffering two seizures on 26 November 2016. She accepted that her husband could work very long hours (on her account, from about 5:30am to midnight). She accepted too that his job made him tired and anxious even before the accident. In these respects, I accept what she said.

The claimant's friend: Grant Cathcart

118. Grant Cathcart is a longstanding friend of the claimant and his wife. He adopted his witness statements (7 November 2018; 25 February 2019). Prior to the claimant's accident, he saw the claimant about once every six months but they started to go to the gym together in around July 2018 and became much closer friends.

119. He accompanied the claimant by train to London to see the defendant's neurologist Dr Clarke. The claimant was nervous and anxious on the train going to London. When they continued their journey after the train, the claimant started to sweat profusely.

He was extremely tired after the appointment and sweated heavily when they returned to the station. He looked pale and faint. He was unwell and needed to sit down. On the train back home, he had breathing difficulties and remained agitated for the remainder of the journey.

120. Mr Cathcart said that prior to the accident the claimant was very sociable, holding parties at his house. He is now a frustrated figure. He does not know how to approach problems. He is not comfortable in noisy environments. He is easily distracted in conversation. He had been unable to fit a locking system in a shed in his garden. He finds it hard to start tasks. He suffers from anxiety and mood swings. He sometimes sounds low on the telephone. He complains frequently of pain, particularly headaches. He often says that he has been suffering with headaches for days. At one stage, when the two men were in London for another of the claimant's appointments, Mr Cathcart was afraid that he would have a seizure because of a vacant look in his eyes.

121. I do not accept that the claimant was too unwell to see Dr Clarke or any of the experts in the case. Each of the experts had more than sufficient experience to carry out a fair examination. Nor did any part of Mr Willem's cross-examination get anywhere near suggesting otherwise. Other than that, I regard Mr Cathcart as giving a broadly reliable account of the claimant's behaviour after the accident.

The claimant's treating psychologist: Dr Gavin Newby

122. Dr Gavin Newby has been the claimant's treating neuropsychologist since September 2016 and was called to give factual rather than opinion evidence. From March 2005 to August 2016, he was a Consultant Clinical Psychologist and Clinical Lead at the Acquired Brain Injury Service, Cheshire & Wirral Partnership NHS Foundation Trust. He is now in private practise. He adopted his witness statement made on 26 February 2019 save that the final six paragraphs were struck from the statement because they strayed into the realm of opinion.

123. Dr Newby first assessed the claimant on 19 September 2016 following an instruction from Ms Wilderspin. Initial assessments undertaken by doctors who have not given evidence in this case referred to a traumatic brain injury. The information with which he was provided led Dr Newby to focus on treating the claimant on the basis that he had a brain injury.

124. Dr Newby's own view was that the claimant had presented as someone with a brain injury and that he described difficulties with planning, mood and anxiety which are consistent with brain injury. In a letter to Ms Wilderspin dated 28 September 2016, Dr Newby suggested that the claimant was suffering the consequences of a "significant acquired brain injury".

125. Dr Newby performed the European Brain Injury Questionnaire on the claimant and his wife. Also in the early days, Dr Newby introduced psychoeducation on the effects of brain injury. He described this as a conceptual hook to explain symptoms of brain injury to the claimant and to offer the claimant a rationalisation as to why he was suffering particular symptoms, using a well-respected workbook on brain injury. Nevertheless, he said (and I accept) that this aspect of his work was a small part of his contact with the claimant.

126. Dr Newby's treatment consisted of three phases. The first phase ran from September 2016 until November 2017. Dr Newby noted that the claimant seemed overwhelmed by his symptoms, particularly orthopaedic and headache pain, fatigue, anxieties and worries about his finances.

127. The first year of treatment was dominated by the claimant's concerns about work and his wish to stay in work. He told Dr Newby that he was not coping, and they discussed pacing and addressing his workload. After the claimant stopped work, he became very worried about the financial security of his family and so the focus of sessions with Dr Newby shifted.

128. In November 2017, Dr Newby became aware of the views of some of the medicolegal experts that it was likely that the claimant had not suffered a brain injury but was suffering the psychological consequences of injury. He then reformulated the therapy that he was providing to the claimant. He began to adopt a cognitive behavioural therapy ("CBT") approach which continued for one year. The therapy was complicated by "difficulties in his overwhelming symptoms". The claimant's stress levels slowly increased. He indicated high levels of preoccupation with his difficulties which completely dominated his thinking, making it very difficult for him to feel that he was making progress.

129. Dr Newby said that the medicolegal appointments that the claimant attended were extremely difficult for him. He would be very anxious beforehand and suffered with extreme fatigue after the appointments. His problems were exacerbated by travel to London for appointments, which necessitated a very early start.

130. In the latter stages of this second phase of treatment, Dr Newby encouraged the claimant to be active, persuading him to consider taking up the Chirk Castle placement. The claimant nevertheless continued to complain of headaches, sleeplessness, orthopaedic pain and financial worries, which continued to overwhelm him.

131. Dr Newby began the third phase of treatment when he came to believe that the claimant should have a "reunification of the team" approach. It seems that the purpose of this new approach was for a multi-discipline team to develop co-ordinated and interconnected treatment goals. The various professionals could provide structure to the claimant's days and supply information to Dr Newby to assist in the therapeutic sessions. It seems that, in practice, this approach involved liaison between Dr Newby, an occupational therapist (called Carolyn West) and a support worker. The claimant's back and neck pain continued to overwhelm him cognitively at times, despite the care of a neuro-physiotherapist.

132. By the time of his witness statement, Dr Newby had moved to less regular sessions, approximately one session every 6 to 8 weeks. Dr Newby was concerned that the claimant should not become dependent on their sessions and so not develop appropriate strategies for himself.

133. Dr Newby hypothesised that, if he had not regarded the claimant as having a brain injury, the claimant's treatment would in many respects have been the same or very similar. The first couple of sessions would have been different, and he may have adopted a different approach to issues of health and illness, looking at the claimant's

health anxiety. He would nevertheless still have focused on the claimant's distress and strategies for dealing with it. There would potentially have been fewer sessions.

134. Dr Newby said that he and Ms Suzanne Guest (the occupational psychologist) discussed strategies as to how the claimant could cope at work as they assessed that he could only work at 25% of his capacity. He and Ms Guest encouraged the claimant to work part-time. He discussed with the claimant whether working would be sustainable in the long term – because he would discuss this question with anyone suffering from brain damage. Recovery from brain injury can take up to five years. He would not therefore have advised that the claimant could never work again but would have advised that some modification was required. He formed the view that the emotional cost of trying to work was enormous for the claimant.

135. Dr Newby accepted that his advice to the claimant about continuing to work was influenced by the fact that he thought that the claimant had a brain injury (by which I understood him to mean ongoing damage to the brain).

136. I should note at this stage that none of the medicolegal experts held the view that – at least in hindsight- Dr Newby had adopted the appropriate therapeutic strategy by treating the claimant as a person with ongoing brain injury or damage. I shall bear this in mind when considering the question of causation below.

Tinnitus; balance; hearing loss; sense of smell and taste: Zeitoun and Nandi

137. Mr Hisham Zeitoun (consultant ENT surgeon) and Dr Raj Nandi (consultant audiovestibular physician) gave evidence instructed respectively by the claimant and defendant. Their Joint Statement dated 9 July 2019 shows that, on the material questions that I must decide, there was a large degree of agreement between them.

138. In respect of tinnitus, they agreed that if the court were to accept the claimant's evidence (which in this regard I do), then the tinnitus was a result of the accident. I therefore find proved that the accident caused tinnitus.

139. Dr Nandi assessed the tinnitus as grade 2 (mild) under the Guidelines for the Grading of Tinnitus (McCombe A et al (2001) Clin Otolaryngol 26, 388-393) whereas Mr Zeitoun regarded it as grade 3 (moderate). They reached these differing grades on the basis of their differing views of the frequency as reported to each of them by the claimant. However, Dr Nandi accepted in cross-examination that a person's perception of tinnitus and its severity can fluctuate over time, and that this would have been reflected in what the claimant reported to the experts.

140. I see no reason to reject what the claimant told Dr Nandi in January 2019: that the tinnitus was intrusive and interfered with daily activities. The claimant told the court (and I accept) that his tinnitus is now mild. It comes and goes. But I have formed the view that for around three years he suffered from deeply unpleasant tinnitus. I will treat his tinnitus overall as being "moderate" within the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases (14th ed), chapter 5(B)(d)(ii).

141. Both experts agreed that the claimant had suffered balance disturbance due to benign paroxysmal positional vertigo (BPPV) caused by the accident. On testing by Dr

Nandi in January 2019, the problem remained but I accept that it was successfully treated (at least for the foreseeable future) by way of an Epley manoeuvre. I accept therefore that the accident caused BPPV for around three years.

142. Mr Zeitoun also diagnosed persistent postural-perceptual dizziness (PPPD) which has a psychological component. He concluded that this had been caused by the accident. Dr Nandi accepted that the claimant suffers from PPPD but said that it was not a consequence of the accident.

143. It is not necessary for me to resolve this difference of opinion about the cause of PPPD The claimant accepted that loss of balance had not been a major disability but that sometimes he would fall over or misjudge catching a ball or stepping down. I see no reason to reject his evidence.

144. The claimant said that the Epley manoeuvre was useful but that he continues to suffer from vertigo and balance problems (such as when gardening). Even if he has exaggerated, he also said that he is starting to manage it and to adapt, from which I infer that PPPD is not now a debilitating condition.

145. The award for general damages must therefore reflect limited balance problems over a period of around three years. I accept Dr Nandi's evidence that problems relating to balance should not have an adverse effect on the claimant's ability to work and it follows that neither BPPV nor PPPD is a material factor in the assessment of loss of future earnings.

146. The claimant said that he feels that his hearing loss has been significant since the accident. As a former mechanical engineer he was exposed to noise at work but he was provided with ear defenders. He said that was in any event not in proximity to loud noise on a consistent or regular basis.

147. Both experts agreed that the claimant has mild to moderate hearing loss in the left ear and mild hearing loss in the right ear. There is evidence of notching at 4kHz in both ears, but it is considerably deeper in the left ear. Although the claimant's employment in the engineering sector may have exposed him to noise, notching can occur in the absence of noise induced hearing loss (NIHL).

148. Dr Nandi pointed out that the trauma from the accident was to the right side whereas the greater hearing loss is to the left ear, which in his view indicates pre-existing NIHL. His view is that the high frequency pattern of hearing loss and the presence of an "audiometric bulge" demonstrate NIHL according to the appropriate methodology. Mr Zeitoun said that it would not be unusual for a blow on one side to cause hearing loss on the other side: it would depend on how the force of the blow was distributed around the head. He said that NIHL may be different in each ear but that the difference in the claimant's ears would indicate that one ear was extremely sensitive to noise and the other hardly sensitive at all, which would be unusual.

149. I take into consideration that the left ear is worse whereas the right ear may have been exposed to greater trauma but I find the claim for hearing loss to be proved. Even allowing for some dramatization in his account, I accept the claimant’s evidence that his hearing became worse after the accident. I do not accept that the claimant was exposed to hazardous noise levels at work. I believe the claimant's evidence that he

was supplied with ear defenders as there is no reason to consider that his employer would not have complied with health and safety measures of this sort. I also accept Mr Zeitoun's evidence that a person suffering from NIHL would (other things being equal) be unlikely to suffer such a great differential between each ear. The defendant does not prove NIHL.

150. Even if the claimant had suffered NIHL in the past, both experts agreed that the accident may have contributed to the hearing loss which he noticed after the accident. For these reasons, the claim that the accident caused hearing loss is proved. Moderate tinnitus and hearing loss keep him within chapter 5(B)(d)(ii) of the Judicial College Guidelines.

151. Although Mr Zeitoun's report says that the claimant will have difficulty taking employment in which he has to communicate against background noise, the claimant has not proved that any hearing loss has caused or will cause loss of earnings.

152. Both experts agreed that the claimant's claimed loss of smell and taste is accident-related but that further testing would be required to quantify the loss. In the absence of further evidence, it is difficult for the court to identify the degree of disability.

Orthopaedic evidence: Mohammad and Redfern

153. Both consultant orthopaedic surgeons (Mr Saeed Mohammad for the claimant and Mr TR Redfern for the defendant) agreed that the blow from the rugby post caused a soft tissue injury at the neck without a structural bony injury. There was dorsal but not lumbar spine tenderness recorded. Problems reported by the claimant after the accident relating to pain from his left foot, gout in a toe, Freiburg's disease, hamstring tendinitis and forearm tendinitis were not related to the trauma sustained in the accident.

154. Mr Redfern does not accept that the claimant has any ongoing disability as a consequence of the accident and does not accept that post-accident musculoskeletal complaints were related to the accident. Mr Mohammad believes that even symptoms that post-date the accident may be related to it and that, in any event, the claimant has developed a pain syndrome. He takes the view that the claimant is disabled by ongoing problems in the neck and lower back which can be wholly attributed to the accident. His disability means that he is disadvantaged in the labour market.

155. Mr Mohammad provided me with a file of documents to support his opinions. While I appreciate his own efforts, I doubt the forensic utility of this approach: it is a matter for counsel to draw the court's attention to the relevant evidence. I have not derived assistance from the medley of documents (which were not sorted or put into context by anyone). The issue of pain syndrome loomed larger in Mr Mohammad's evidence than in the pleadings. I am not persuaded that Mr Mohammad has the expertise to give his opinion on matters outside the field of orthopaedic surgery. At the end of his evidence I was left in some doubt as to whether he attributed post-accident pain to organic or psychological causes, or a mixture.

156. The Joint Report suggests that the different views of the experts may stem from their different perspectives. Mr Mohammad is a specialist spinal surgeon in a tertiary referral centre. Mr Redfern has worked in a "normal district hospital setting". Mr

Redfern accepted that he did not have the benefit of working in a teaching hospital with the large teams of professionals that would have assisted Mr Mohammad. I am not however persuaded, or prepared to infer, that the sophistication of a teaching hospital would enable an orthopaedic surgeon to gain expertise in psychology or psychiatry to the extent needed for medicolegal purposes or at least for the purposes of the complex issues in this case.

157. Where the two experts hold different views, I prefer the evidence of Mr Redfern. The claimant does not prove pain syndrome or ongoing orthopaedic problems caused by the rugby post.

Neurological evidence: Cooper and Clarke

Dr Cooper

158. Dr Paul Cooper was called as an expert by the claimant. He is a consultant neurologist at the Greater Manchester Centre for Clinical Neuroscience; Honorary Senior Lecturer in Medicine at the University of Manchester; and Medical Director at the David Lewis Centre for Epilepsy which is the United Kingdom's largest provider of specialist epilepsy services. His experience at the David Lewis Centre frequently includes the complex interactions between epilepsy, psychiatric illness and abnormal behaviour. Among other posts, he chairs the Association of British Neurologists Expert Advisory Group on Traumatic Brain Injury; is a member of the UK Epilepsy Research Group; and is a member of the Scientific Panel on Head Injury of the European Academy of Neurology.

159. Dr Cooper examined the claimant on 15 November 2016, producing his first report on 5 February 2017. He provided an update by letter on 27 September 2017; a further report on 5 June 2018; responses to Part 35 questions on 10 August 2018; and a further letter dated 23 January 2019.

160. Dr Cooper's opinion is that, as a consequence of the accident, the claimant suffered a mild (probable) traumatic brain injury on the Mayo Classification as defined by loss of consciousness of less than 30 minutes and post-traumatic anterograde amnesia of less than 24 hours.

161. The two November 2016 seizures were not attributable to any brain injury caused by the accident itself. However, sleep disturbance and psychological upset attributable to the accident had altered the claimant's threshold for seizures, resulting in the recandescence of the pre-existing epilepsy. Exacerbation of pre-existing sleep or mood disturbance would be sufficient to trigger the recandescence.

162. Dr Cooper's first report noted that the claimant was being supported to return to and continue his previous job, which was appropriate.

Dr Clarke

163. Dr Charles Clarke was called as an expert by the defendant. He has been a consultant neurologist since 1979, both in NHS practice and latterly at the Queen Square Private Consulting Rooms in London. He has research experience in epilepsy from the 1980s and has some published to some degree on the subject of epilepsy. He examined the

claimant on 5 September 2018 and produced a report on 8 November 2018. He produced a brief supplementary report on 12 March 2019 and a letter on his experience dated 17 July 2019.

164. Dr Clarke does not accept that the claimant suffered a brain injury on the Mayo classification as opposed to a head injury. On balance, he takes the view that the two November 2016 attacks were not seizures and were not due to epilepsy.

Joint Neurology Report

165. In the Joint Neurology Report of 28 July 2019, both experts agreed that the claimant had sustained a head injury, with a short period of loss of consciousness, initial confusion and agitation, and subsequent amnesia. It was agreed that there had been no evidence of resultant damage to the brain with any enduring cognitive, behavioural or other physical consequences. The claimant's cognitive complaints reflected his psychological state. The extent to which his psychological condition was attributable to the accident was a matter for psychiatric and neuropsychological expertise.

166. Both experts agreed that, from a neurological perspective, there was no reason why the claimant should not be employed in some capacity at that time. There was no reason from a neurological perspective why the claimant should not return to his former employment. Neither Dr Cooper nor Dr Clarke were of the view that the claimant suffers from active epilepsy.

Conclusions on neurology

167. The defendant did not accept that the claimant has ever suffered epilepsy and Mr Brown sought to undermine the longstanding diagnosis when cross-examining Dr Cooper. However, as Dr Cooper observed, the claimant was diagnosed with epilepsy after clinical assessment by Dr David Smith, an experienced and pre-eminent neurologist. He was thereafter treated for epilepsy. I do not accept that the diagnosis or treatment would have been anything other than professional and appropriate. I accept Dr Cooper's evidence that the sleep episodes mentioned by the claimant's wife in her February 2016 email would strengthen the case for a diagnosis of epilepsy as convulsions arising out of sleep suggest epilepsy. I find proved that the claimant suffered from epilepsy prior to the accident but that it had been inactive since the 1997 seizure.

168. I have reached the conclusion that the November 2016 seizures for which the claimant was hospitalised were epileptic. I had the benefit of hearing evidence from two eminent neurologists. Both gave detailed and well-considered opinions rooted in the documents before the court. To the extent that their opinions differed as to whether the 2016 attacks were epileptic seizures, I prefer the evidence of Dr Cooper. He was a measured witness. He has very significant expertise in epilepsy. I accept his evidence that it would be unusual for a man of the claimant's age to develop a completely different condition in the nature of seizures when he had a longstanding diagnosis of epilepsy. I am satisfied that the claimant has met his burden of proof.

169. What was the cause of the re-emergence of pre-existing epilepsy? Dr Smith noted (when he saw the claimant in clinic on 16 March 2017) that the reason for the relapse was unclear but that it had occurred in the context of the stressful aftermath of the

head injury. There is no evidence that the claimant was injured by the rugby post in such a manner as to cause the resurgence. However, the claimant's case is not that the blow to his head caused post-traumatic epilepsy but rather that, after the accident, his psychological state was such that he developed sleep and mood disturbance. Dr Cooper (whose evidence I accept) says that it is well recognised that both matters can impact on an individual's epilepsy. On the basis of his particular expertise and the clarity of his oral evidence, I accept Dr Cooper's opinion that the November 2016 seizures were a manifestation of pre-existing epilepsy brought up by sleep and mood disturbance attributable to the psychological effects of the accident.

170. It is readily understandable that the claimant would need time off work both after the accident and after his epileptic seizures in November 2016. Did anything in his post-accident neurological condition prevent him from returning to work on a permanent basis? I will turn to psychology below. However, in purely neurological terms, I have reached the conclusion that nothing in the claimant's neurological condition prevented him from returning to his former employment permanently.

171. The two experts differed as to whether the claimant suffered a brain injury (Dr Cooper) or a head injury (Dr Clarke). The key point, though, is that there is no evidence of lasting brain damage and no evidence of neurological impairment that would have stopped the claimant from returning to his previous job (aside from the short recovery periods which he took off work after the accident and then after the November seizures). Putting aside psychology (the claimant's attitudes and beliefs), the two epileptic seizures suffered in November 2016 did not render him physically unfit to work and did not render him physically unable to return to his work at LEBC.

Neuropsychological evidence: Priestley and Plowman

Dr Nicolas Priestley

172. Dr Nicolas Priestley is a consultant clinical neuropsychologist who was called to give evidence by the claimant. He relied on his reports and other written evidence (18 March 2017; 29 September 2017; 18 March 2018; 11 August 2018; 9 April 2019).

173. Dr Priestley carried out a range of relevant of tests on the claimant. He concluded that the accident had not caused a significant deterioration in the claimant’s IQ. A mild slowing of information-processing was likely to be the result of low mood. Memory inefficiencies were likely to be result of psychological and emotional factors, not brain damage. They were not in any event statistically significant. He agreed that the claimant's presentation on objective measures of cognitive functioning was unremarkable. The claimant was both clinically anxious and clinically depressed. The accident and its consequences had had marked psychological consequences and some behavioural consequences. Clinical psychology was now more important than neuropsychology.

174. At the date he first examined the claimant (6 March 2017), Dr Priestley did not believe that the claimant was capable of sustaining full-time employment. If he were to lose his current job, he would be at a disadvantage on the open labour market owing to significantly reduced self-confidence and self-esteem. His sense of security had reduced on account of the effects of epilepsy. At that stage, Dr Priestley fully supported Dr Newby’s approach to neuropsychological treatment.

175. At the second examination on 3 April 2019, Dr Priestley noted that the claimant's pre-morbid diligence had now become obsessional. On the balance of probabilities, Dr Priestley did not believe that the claimant would ever be able to return to working at the same kind of level as prior to the accident. The extent of his psychological disturbance was such that Dr Priestley did not believe that the claimant would ever function particularly well under pressure. He would certainly not be able to manage the complex, multifactorial decisions inherent in his pre-accident employment.

176. The claimant told Dr Priestley that he no longer wished to work for anybody else. He wanted to try to establish himself on an independent basis working in a different field. He claimed to Dr Priestley to be exploring possible options, though none was presented to the court.

Dr Christopher Plowman

177. Dr Christopher Plowman (a chartered clinical psychologist) was called to give evidence by the defendant. He relied on his report dated 5 February 2019 and his letter dated 16 September 2019. Dr Plowman tested intellectual functioning, memory, attention and concentration, planning and reasoning. He concluded that the accident had caused no deterioration.

178. Dr Plowman also administered tests designed to shed light on the claimant's own views of his everyday functioning. The claimant obtained clinically elevated scores in six respects: inhibition, cognitive shifting, working memory, planning/organising and task monitoring. Dr Plowman concluded that these high scores were reflective of distressed emotional state rather than grossly impaired executive functioning.

179. Dr Plowman tested the claimant's mood state. He reported the experience of psychological distress in excess of that found within the inpatient psychiatric population. Dr Plowman formed the view that the claimant was "dramatising" his situation, in the sense that he was over-reporting to emphasise his distress. In relation to aetiology, treatment and prognosis, Dr Plowman would defer to a mental health expert.

180. The claimant reported to Dr Plowman that his memory, concentration, mood and anxiety had worsened over time. Dr Plowman emphasised that such deterioration would not be the anticipated pattern of recovery from an organically mediated brain injury. It indicated over-sensitivity to everyday cognitive lapses and over-reaction to perceived emotional difficulties. The emotional response to the accident lay within the province of neuropsychiatry.

181. Dr Plowman concluded that from a purely neurological perspective, the claimant would not be disadvantaged on the open job market. From a purely neuropsychological and cognitive perspective, it is likely that the claimant would have been able successfully to return to his employment within days of the accident. Dr Plowman did not believe that the claimant had any neurospsychological treatment or care needs.

182. In light of the claimant's ongoing concerns and erroneous belief that he had sustained a severe brain injury, Dr Plowman believed it was essential for the claimant to meet a further consultant neuropsychologist for a maximum of two sessions to reassure him.

Any further sessions would be counterproductive because they would inadvertently encourage the belief that a significant brain injury had been sustained period. The claimant would then benefit from treatment of his mood disorder by attending sessions with a clinical psychologist at the conclusion of this litigation when the stress of court proceedings would have been removed.

Joint Neuropsychology Statement

183. The Joint Neuropsychology Statement signed by Dr Priestley and Dr Plowman says that, from a neuropsychological viewpoint, there was no significant evidence of organic impairment and no significant intellectual deterioration. The persisting mild cognitive problems such as concentration deficits, memory inefficiency and slowed information processing, were likely to be the result of psychological causes and/or medication, sleep difficulties, pain, diabetes and seizures. Prior to the accident, the claimant appears to have been a highly diligent individual. Since the accident, this trait has been amplified into obsession, including health anxiety. The accident precipitated a sequence of cognitive, behavioural and emotional change which the claimant had been unable to manage.

184. Both experts agreed that the claimant had suffered increasingly high levels of anxiety and depression, which had had implications for his social behaviour, employment and relationships. They agreed that the claimant would be unable to resume his pre-accident high level employment, but they attributed this to the secondary effects of the head injury. Both agreed that vocational employment options were important and would promote the claimant's psychological well-being. They acknowledged the complicating factor of the claimant's income protection scheme, which may have provided a disincentive to return to employment. They considered the claimant's further rehabilitation to be a matter for mental health expertise.

Conclusions on neuropsychology

185. There is significant agreement between the two experts. They agree that the accident caused no significant intellectual deterioration. They describe the persisting cognitive problems as being mild. They are not the result of any brain impairment but the result of the claimant's psychological condition.

186. They have reached different conclusions about the claimant's ability to return to work. Where they differ, I prefer the conclusions of Dr Plowman which strike me as the more rigorously analysed. I accept Dr Plowman's view that, from a purely neuropsychological perspective, the claimant could have returned to work soon after the accident. The claimant does not prove that he could not have returned to and remained at work on account of any form of neuropsychological deficit relating to memory, concentration, problem-solving or anything else. He has in my judgment failed to lay an adequate evidential basis for such a conclusion.

187. As regards future work prospects, both experts now hold the view that the claimant would now be unable to return to his previous high-level employment. However, they also defer to the psychiatrists as to how the claimant's mood, stress and anxiety may be addressed.

Psychiatric evidence: Scheepers and El-Assra

188. Day 5 of the hearing was dedicated to the psychiatrists. The claimant called Dr Bruce Scheepers, a consultant neuropsychiatrist. The defendant called Dr Ahmed El-Assra, a consultant psychiatrist. There is a sharp divergence in the opinions of the two experts. I did not find the assistance that I was expecting from their oral evidence. I have reached the view that the failure of Day 5 to provide me with a clear steer about significant issues flows from the complexity of the issues, and not from the lack of expertise of either psychiatrist. Mr Willems suggested at one point in cross-examination that Dr El-Assra was becoming an advocate for the defendant. Dr El-Assra did become rather excited during parts of his cross-examination but the suggestion that he was not independent goes too far. In thorough cross-examination, both he and Dr Scheepers grappled with the multiple complicating factors in the case.

189. In reaching my conclusions about the psychiatric evidence, I have adopted the following approach. First, I have had resort to the burden and standard of proof to a greater degree in relation to the psychiatric evidence than other parts of the case, where the path to my conclusions was clearer. Secondly, I have considered what I regard as the internal logic of the reports. Thirdly, I have stood back and considered what each psychiatrist has said in the context of the evidence as a whole including the lengthy medical records going back many years. Fourthly, any precise psychiatric diagnosis is important only in so far as it would make a difference to one or more issues in the case. Fifthly, I have considered whether the opinion of each psychiatric is consistent with, or chimes with, the claimant's conduct of the litigation.

190. In analysing the psychiatric evidence, it convenient to start with what is agreed. In their Joint Statement dated 19 August 2019, both defer to the neurologists as to the nature of the November 2016 seizures. I have already found that those seizures were epileptic and I propose to say no more about this issue. Both also agree that, as a result of the accident, the claimant developed a range of physical and cognitive symptoms. They agree that the claimant requires psychological treatment for a functional or somatoform disorder rather than brain injury rehabilitation although they disagree as to whether the accident was the cause of somatoform disorder. They agree that the claimant is unlikely to make progress with psychological therapy until the litigation has ended. They agree that the claimant does not require a carer or case manager.

Dr Scheepers

191. In his first report, Dr Scheepers considered that the claimant had suffered a mild traumatic brain injury (in the same manner as Dr Cooper). In addition, Dr Scheepers concluded that the claimant had developed post-concussional syndrome ("PCS") on the grounds that he presented with a constellation of post-concussional symptoms (headache, dizziness, tinnitus, fatigue, neck and back pain, left-sided weakness, co-ordination problems, insomnia and anxiety).

192. Dr Scheepers' first report sets out how the vast majority of those who suffer from PCS recover within three to six months. A subgroup of 7% to 15% suffer from a chronic condition. The claimant's PCS had become chronic: the majority of his symptoms remained. Perceived injustice can lead to a chronic condition. Litigation may be a major stressor as the person is repeatedly reminded of the loss caused by an accident.

193. The persistence of the claimant's symptoms was on the balance of probabilities premised on an Abnormal Illness Belief ("AIB") on the part of the claimant that he was suffering from severe brain damage.

194. The claimant had also developed an Adjustment Disorder with mixed anxiety and depressed mood. Dr Scheepers reached this conclusion on the basis of the claimant's own description of a personality change complicated by reduced self-esteem and self-confidence, fluctuating mood, irritability, agitation and anxiety and some obsessional features.

195. The claimant had some health anxiety before the accident but he did not have a pre-existing neuropsychiatric disorder, mental illness or personality disorder. Nevertheless, Dr Scheepers expressed the view that post-accident personality and behaviour characteristics are an exacerbation of pre-morbid personality traits and a reflection of the difficulties in adjusting to altered life circumstances. The claimant's pre-morbid anankastic personality has made him prone to catastrophic thinking.

196. In addition, the relapse of his epilepsy has had a profound effect on the claimant's well-being. His fear of having another seizure is possibly the most disabling of his current symptoms.

197. But for the accident, the claimant would not have presented with this constellation of symptoms and would have continued to lead a full and active life.

198. Given the contribution of the unresolved litigation to the claimant's stress, Dr Scheepers concluded in his first report that the claimant would be likely to make a full recovery from his PCS within a year of the settlement of his claim, with appropriate treatment and with successful treatment of his epilepsy.

199. In his April 2019 report, Dr Scheepers recognises that a diagnosis of PCS is contentious and no longer recognised by DSM-5. He reformulates his opinion, saying that:

> "1.6 In my opinion regardless of what clinicians wish to call this constellation of symptoms or indeed whether symptoms may be neurologically or psychologically determined, this cluster of symptoms is very well recognised as a frequent consequence of injuries to the head…
>
> 1.7 My own opinion is that this cluster of symptoms, at least in its chronic form, represents a functional disorder or somatic symptom disorder previously referred to as Somatoform Disorder…".

Therefore, Dr Scheepers accepts that the claimant now suffers from a Somatoform Disorder. The DSM-5 replacement of Somatoform Disorder with Somatic Symptom Disorder makes no difference to my task and so, for ease of reference, I shall refer to Somatoform Disorder.

200. Dr Scheepers also analyses in detail the claimant's past history of responding to adversity by developing somatic or mental health symptoms so that:

> "many of his current complaints have been reported at various times in the past and can reasonably be regarded as illness behaviour and an adverse emotional response to a feeling of loss of control and helplessness".

In Dr Scheepers' view, given the claimant's pre-morbid history and personality, his post-accident symptoms, his fear of seizures and his fear of failure should come as no surprise. They had caused a profound and disproportionate reaction to the accident.

201. In oral evidence, Dr Scheepers accepted that the claimant had suffered from health anxiety prior to the accident and that he now exhibits illness behaviour based on AIB, which he attributed to the claimant's belief (reinforced by Dr Newby's treatment) that something has happened to his brain that accounts for his multiple problems.

202. Dr Scheepers disagreed with Dr El-Assra's diagnosis of pre-accident Somatoform Disorder on the grounds that the claimant's pre-accident somatised symptoms were all sub-clinical and that he would not have been able to function at the high level required to be an IFA if he had had a clinical somatoform condition.

203. Dr Scheepers' overall analysis and conclusions are complex – which may reflect the complexity of the claimant's presentation and condition. He emphasised the sub-clinical nature of pre-accident health problems but accepted that the claimant suffered from pre-morbid anankastic traits. Having analysed all his written evidence (not just the parts I have cited) and having heard his oral evidence, I have concluded that, by the time of his April 2019 report, Dr Scheepers also essentially accepted that the claimant suffers from longstanding AIB which pre-dated the accident. If that is not his conclusion, then he has not rejected the existence of pre-accident AIB in a sufficiently analytical manner.

204. As at the date of the April 2019 report, Dr Scheepers believed that the claimant's symptoms were now so entrenched that he would be unable to return ever to working in a demanding job in the financial sector. That report reiterates that full recovery might not be possible until the case has settled, saying that this is now even more of an issue since the claimant has started claiming income protection. These payments are a further significant complicating factor since the claimant is unlikely ever to return to working in the financial services sector owing to the demanding nature of the work. The income protection payments have become the "elephant in the room" that is preventing the claimant from progressing. The payments have enabled the claimant to be cautious about taking on new employment which has in turn perpetuated his illness belief and maintained his functional symptoms.

205. The report says:

> "2.27 In my opinion the Claimant does not require a brain injury case manager, neuropsychologist, support worker, or occupational therapist and in my opinion, he does not require a reflective diary and repeated opportunities to rehearse a brain injury paradigm and with his catastrophisation and all or nothing attitude reflect on the losses he has suffered.
>
> 2.28 Because of his premorbid personality, in my opinion this approach has allowed too much 'naval-gazing' and because of his fear of failure and shame he

> experiences about not working he has also indulged in demand avoidance behaviour".

206. By April 2019, therefore, Dr Scheepers disagrees with Dr Newby's approach, expressing the view that the claimant requires a different treating psychologist and the dismantling of his "brain injury" rehabilitation team.

207. In Dr Scheepers' view, there is no neuropsychiatric reason why the claimant should not be capable of returning to full-time employment in some capacity. Importantly, Dr Scheepers concludes that the claimant does not need to recover from his adjustment disorder or to "get better" before he can consider returning to employment. He would alter the timeframe for full recovery from one year (his view in the first report) to two years. He confirmed in cross-examination that, by saying that the claimant can return to full-time employment in some capacity, he was simply taking account of events and reflecting the reality of the situation: for example, the claimant had told him that he could not return to financial services as he feared that the stress of the job might trigger a seizure.

Dr El-Assra

208. In his comprehensive report dated 5 June 2019, Dr El-Assra observed that a review of the claimant's medical records showed a persistent pattern of multiple presentation to doctors with physical symptoms. The majority of those symptoms were without pathology. The medical records reflected psychiatric symptoms of anxiety, stress, poor sleep, fatigue and depression, and contained reference to psychosocial conflicts. This clinical picture is in Dr El-Assra's view consistent with a diagnosis of a Somatoform Disorder which has been ongoing for many years and which preceded the accident. The course of such a disorder is known to be chronic with fluctuating symptoms. It is embedded within a person's personality. The claimant's perfectionist and rigid thinking amounts to an Anankastic Personality Disorder. He did not accept Dr Scheepers' diagnosis of an Adjustment Disorder.

209. The accident caused PCS for a period of a few months with a cut-off point around the time that the claimant returned to work. Thereafter, other factors have been operating, including ongoing work issues, poor work/life balance and the continuation of his pre-existing similar physical symptoms caused by Somatoform Disorder and not the accident.

210. Dr El-Assra took into consideration a number of inconsistencies between what the claimant told him and available records. He noted that the claimant's therapy records show his concerns about the level of the defendant's settlement offer in these proceedings (of which I of course have no details). Litigation and the receipt of income insurance payments have complicated the picture by reducing the motive to work and by the expectations of financial security, which he described as a "conscious mechanism". He concluded:

> "In my opinion there has been a process of misattribution probably based on both conscious and unconscious (monetary issues) mechanisms. The accident was therefore used as a scapegoat for his pre-existing and ongoing condition".

211. Any treatment (CBT) should be carried out at the end of the litigation for the unrelated Somatoform Disorder. The CBT provided so far has been based on a brain injury. As a result, the claimant did not show any improvement. Any care arrangements would be counter-therapeutic by reinforcing the illness behaviour.

212. Nevertheless, in cross-examination, Dr El-Assra said that, but for the accident, the claimant may have continued to work as an IFA until 50 or 55 years old. He reached these parameters from a psychiatric point of view and from his clinical experience of treating people with somatic disorder generally. He qualified his answer by saying that the claimant's physical health problems (diabetes, heart condition, hypertension) might affect when he would have stopped work as an IFA and emphasised that the February 2016 email did not present a picture of a man who would be able to cope in the long term with a stressful job.

Conclusions on psychiatry

213. I appreciate that the pre-existing medical records do not diagnose a somatoform condition. I have taken into consideration - as the claimant repeatedly emphasised in his evidence – that interventions in relation to his mental health were limited before the accident. But I have had the advantage of multiple days of oral evidence and of rigorous analysis by counsel of the written medical documents which are extensive and which span many years. In my judgment, the claimant suffered on balance of probabilities from a pre-accident Somatoform Disorder. The claimant does not prove on the balance of probabilities that he began to suffer from a new psychiatric condition which has been the cause of stopping work as an IFA when he would otherwise have worked until retirement. It is in my judgment more likely that the accident brought pre-existing psychiatric traits to saliency. Dr Scheepers, who accepts post-accident somatoform disorder, does not explain adequately why that disorder was new or why the accident brought about a new disorder.

Causation

Legal framework

214. Mr Brown submitted that, as a matter of law, the defendant should not be held responsible for the loss which ensued from the accident because it would not be fair for the defendant to pay damages for the effects of the claimant's belief that he suffered a brain injury or brain damage when he had suffered a head injury. The claimant was initially regarded by Ms Andrea Wilderspin (the brain injury case manager) as having a brain injury. She recommended treatment by Dr Newby, a neuropsychologist who treated him as a person with a significant acquired brain injury. It is a significant part of the defendant's case that Dr Newby's treatment, erroneously founded on ongoing brain damage which did not exist, was counter-therapeutic and caused the claimant's psychiatric health to deteriorate rather than to improve. Overwhelmed by anxiety about loss of brain function as endorsed by Dr Newby's approach (such as psychoeducation), the deterioration in the claimant's health caused him to stop work permanently and he now claims loss of future earnings to cover the remainder of his working life. The defendant maintains that, as a matter of legal policy, common sense and fairness, it should not be held responsible for this state of affairs.

215. In support of this argument, Mr Brown relied on the judgment of Laws LJ in *Rahman v Arearose Ltd* [2001] Q.B. 351, para 32, in which he observed that every tortfeasor should compensate an injured claimant in respect of that loss and damage for which he should justly be held responsible. Causation will be relevant but will fall to be viewed and understood in light of the kind of harm from which it was the defendant's duty to guard the claimant (para 33). Mr Brown submitted that it was not the defendant's duty to guard the spectator of a rugby match from the harm of misperceiving his injury and having this misperception reinforced by harmful and wrongly-targeted therapy.

216. Mr Brown also drew my attention to the speech of Lord Nicholls in *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, paras 69 to 72, which he submitted define the concept of legal causation in terms of loss for which a defendant ought to be held liable. Lord Nicholls in these paragraphs observed that the extent of the loss for which a defendant ought to be held liable involves a value judgment, concerning the extent of the loss for which the defendant ought fairly or reasonably or justly to be held responsible. Mr Brown asked me to make a value judgment that the defendant should not be held responsible for paying the claimant's future earnings for a head injury which had no lasting physical effect and which in itself was not more than a short-term impediment to his employment as an IFA.

217. Mr Willems relied on the well-established principles set out in the speech of Lord Browne-Wilkinson in *Page v Smith* [1996] 1 AC 155 at 181D-F whereby psychiatric damage or the recrudescence of psychiatric illness may give rise to an entitlement to damages. I should not enter into the territory of value judgments but apply the ordinary "but for" test. In any event, Ms Wilderspin was jointly instructed by the clamant under the Rehabilitation Code to provide an Initial Needs Assessment report which the defendant was obliged to fund under the Code. The defendant was not obliged to follow or pay for Ms Wilderspin's recommendations. Dr Newby's treatment did not amount to an intervening event breaking the chain of causation – nor was it pleaded as such. The claimant could not properly be regarded as failing to mitigate his loss by following Ms Wilderspin's recommendations.

218. I agree with Mr Willems. I see no reason to depart from the "but for" test or to substitute my own value judgment (even if that were to lead to a different outcome, which I doubt). In this case, there is no special or peculiar difficulty in identifying the extent of the loss which the defendant is responsible or ought to be liable for. With hindsight, the evidence shows that Dr Newby's treatment was not the right one. The defendant does not however prove that it obliterated the defendant's wrongdoing or that, as an intervening act, it broke the chain of causation.

219. In terms of whether the claimant failed in his duty to mitigate his loss, he cannot in my judgment be blamed for following the recommendation of the jointly instructed case manager. The defendant does not prove that he acted unreasonably in attending Dr Newby's sessions or that, by doing so, he was doing something other than trying to mitigate his loss.

The parties' positions on the evidence

220. When would the claimant have stopped work as an IFA but for the accident? The parties took extreme positions. The claimant did not countenance any case other than

that he would have remained at – indeed been promoted within – LEBC until retirement at 65. The defendant presented its case as if the February 2016 email marked such a crisis that the claimant was doomed to stop work at around the time of the accident. I have concluded that both parties have overegged their case.

221. I shall deal with the principal factors which add complexity to consideration of the question of the cause of the claimant giving up and remaining out of work.

Claimant's unreliability

222. As I have set out above, the claimant has in my judgment endeavoured to minimise his pre-accident psychological or psychiatric difficulties; he has dramatised his post-accident difficulties. The claimant has also refused to countenance any improvement in his symptoms. Asked in cross-examination how much difference it made that he was no longer having micro-seizures when he saw Dr Priestley, he admitted that he felt better and less anxious. When asked why he did not tell Dr Priestley about feeling better, he backtracked and said that anxiety about partial seizures never goes away even though he did not have "signals".

223. When examined by Dr Scheepers in April 2019, his driving licence was in the process of being restored. Dr Scheepers commented that the restoration of his licence would in itself be likely to restore enormously his feeling of regaining of control especially considering the isolated position of his home. Nothing in his witness statements reflects anything other than deterioration in his psychological or psychiatric state, nor did he mention any improvement in oral evidence.

224. I have accepted part of the claimant's evidence but his unreliability in certain material respects has inhibited my ability to assess his capacity to return to work and the level at which he may now obtain work.

Insurance payments

225. Both psychiatrists refer to the insurance payments (from UNUM) as a complicating factor (the "elephant in the room", to use Dr Scheepers' language). I do not accept that the claimant's decision to rely on UNUM rather than to re-enter the job market can be explained as part of his current psychiatric state caused by the accident. I regard his decision to remain on UNUM payments as conscious – to reflect Dr El-Assra's language. There is no evidence that he is or has ever been incapacitated (in whole or in part) from making decisions about what is in his best financial interests. It has all along been his choice.

226. It is possible that his own decision to accept UNUM payments has contributed to "demand avoidance behaviour" or to greater fear of return to the job market. However, I do not accept that the accident caused any mental health problem that has caused or contributed to the claimant's receipt of UNUM payments. I accept Mr Brown's submission that loss resulting from the claimant having the benefit of the UNUM cover is not within the realm of what the defendant can be held responsible for.

Claimant's situation immediately prior to the accident

227. The defendant submitted that the February 2016 email demonstrated that there were serious concerns immediately prior to the accident about the claimant's ability to carry on working at high pressure. Mr Alec Wightman (the claimant's line manager whose evidence I turn to below) accepted in cross-examination that, had he been aware of the content of the February 2016 email he would have been very concerned as it pointed out a lot more concerns in relation to the claimant than he knew about. The defendant's case was that the claimant had before April 2017 planned to leave work as a result of the stress of his job, long working hours, lack of support from LEBC, the unrelated diagnosis of diabetes and other unrelated stressors such as the death of his grandfather, his father's serious ill health and a boundary dispute.

228. However, I accept that the decision to give up work was (as he told Dr El-Assra) the most difficult decision that the claimant had ever had to take. I accept that he was previously able to hold down a stressful job even in the face of stressful life events (such as the tragic death of a niece and a close friend within six months of each other and the death of a second friend five months later). None of these previous stressful events had triggered any resurgence in epilepsy: the claimant had at the date of the accident been seizure-free for 19 years.

229. I reject the defendant's suggestion that the claimant was looking for an easy way out of working for LEBC or that the accident fortuitously presented itself as an easy way out. I accept the claimant's evidence that it made sense to leave the job in April 2017, at the end of the tax year, in order to maximise the chance that he would reach his annual target so as to maximise income for his family. I do not accept that the February 2016 email marked such a crisis that the claimant would at that time have stopped working for LEBC but for the accident.

Claimant's perception of his injury

230. The claimant said that, so far as he was concerned, he had suffered a head injury as a result of the accident. He did not know whether or not he had been diagnosed with a brain injury. Language used by others (such as doctors, report-writers or his solicitors) which described his injury as a brain injury was not his responsibility. All he knew was that the accident had a devastating effect on his ability to work. He believed that he had suffered a brain injury as his head was hurting and he had constant headaches. I am prepared to accept what the claimant says about his perception of the nature of his injury, which was a matter for others to diagnose and treat.

231. For reasons set out above, I do not accept that the defendant avoids responsibility because Dr Newby (or indeed others such as Ms Wilderspin) treated the claimant as a person with ongoing brain damage and provided therapeutic services on that basis.

Other ongoing stressors

232. Dr Scheepers' first report states that the relapse of the claimant's epilepsy has had a profound effect on his well-being and that his fear of having another seizure is possibly the most disabling of his current symptoms.

233. Both Dr Scheepers and Dr Al-Assra were of the view that the claimant's functioning and recovery are being substantially affected by the ongoing litigation. Mr Brown

properly accepted in his closing submissions that litigation anxiety is within the realm of what the defendant can be held responsible for.

Eggshell personality

234. Mr Willems submitted that the claimant's pre-accident illness anxiety made him vulnerable to greater or different psychiatric injury than otherwise. Mr Brown was forced to accept the vulnerability in so far as the defendant's own expert, Dr El-Assra, diagnosed a somatoform disorder.

235. The principle of eggshell skull is that the defendant has to take the victim of his or her tort as he or she finds that victim so that the defendant is liable for the whole damage even though its severity or extent has been increased because of the victim's pre-existing weakness or susceptibility to harm. Provided that some personal injury was foreseeable, it is no answer that another, less vulnerable person would not have suffered to the same extent: *Charlesworth and Percy on Negligence*, 14th ed, chapter 5-139-146.

236. In *Page v Smith*, the House of Lords held that it was no answer to the claim that the claimant was predisposed to psychiatric illness, nor that the illness took a rare form or was of unusual severity. There is no difference in principle between an eggshell skull and an eggshell personality. I accept that the claimant had an eggshell personality which caused a somatic reaction to the accident.

Return to work: psychiatric evidence

237. On Dr Scheepers' approach, the claimant should be medically recovered and fit to return to some form of work (not as an IFA) within two years – i.e. at the age of 52. But for the accident, the claimant might have "trundled on for years" (see Dr Scheepers' written evidence dated 13 August 2018). On Dr El-Assra's approach, the claimant would not likely have worked as an IFA beyond age 50-55.

Claimant's physical health

238. Dr Al-Assra said that physical illness may have intervened and stopped the claimant from working even before his posited range of 50-55 years old. Dr Newby commented that the claimant was very aware of his ongoing issues with diabetes and was extremely worried about further seizures.

239. However, there is in my judgment insufficient evidence to support the proposition that the new diagnosis of diabetes would make a difference to the claimant's capacity for work. Other pre-existing aspects of the claimant's physical health did not prevent the claimant from holding down his job at LEBC.

Conclusions on causation

240. Having considered and weighed in the balance these various relevant factors, which pull in different directions, I have reached the conclusion that the accident caused a severe somatic and psychiatric reaction which, but for the accident, would not have happened and which the claimant has been unable to manage.

241. I conclude that, on the balance of probabilities, the claimant's somatic and psychiatric reaction to the accident caused sleep disturbance and psychological upset which altered the claimant's threshold for seizures, resulting in the recandescence of the pre-existing epilepsy. In my judgment, but for the accident, the November 2016 seizures would not have occurred.

242. The combination of fear of further seizures and the more general somatic disorder caused the claimant to be overwhelmed by his work as an IFA which caused him to stop work. But for the accident, he would not have stopped work when he did.

243. As to how long the claimant would have continued to work if the accident had not happened, there is no exact science to a decision of this sort. It is a question of applying judgment to the written and oral evidence. Given the claimant's anankastic stubbornness, I accept on the balance of probabilities that he would fall at the upper end of Dr El-Assra's posited range (55 years old). He was 46 when the accident happened. Subtracting post-accident earnings and the insurance payments, he will therefore receive loss of earnings to trial and future loss of earnings at LEBC until his 55th birthday.

244. After that, I have formed the view that he would have left or been ushered out of LEBC. I am left with no picture of how he might earn a living other than at LEBC. His pleaded case is that he would earn the minimum wage. He does not prove that in his mid-50s he would earn anything other than the minimum wage which he deducts as residual mitigating earnings in the schedule of loss. It follows that he does not prove any loss of future earnings beyond his 55th birthday. I shall approach the quantification of his claim on this basis.

Loss of earnings: Wightman, Jones, Towers, Cockin

245. The claimant called a number of witnesses from LEBC in order to assist the court with the quantification of the claimant's loss of past and future earnings.

Alec Wightman

246. Mr Alec Wightman is a chartered financial planner. As a result of illness, he is now one of five regional managers at LEBC, having previously served as one of two regional sales directors. He adopted his witness statements (2 November 2016; 30 January 2019). He relied in part on information that he had provided to the claimant's solicitors in an email chain in October 2017 and then again in June 2018. At that stage, it had been anticipated that the claimant would instruct a forensic accountant to calculate loss of earnings. The claimant's solicitors asked Mr Wightman to provide information with a view to assisting the accountant. Although District Judge Moss refused the claimant permission to rely on accountancy evidence, I was asked to consider some of the preparatory documentation including Mr Wightman's information.

247. Mr Wightman could not recall being supplied with the detailed medical history set out in the February 2016 email. He said that he was aware of the claimant's epilepsy, kidney donation and his colitis but was not aware of the full extent of the claimant's medical problems mentioned in the email. He was satisfied in 2012 (to which the 2016 email refers) that "everything seemed OK" in relation to the claimant's health

but then changed tack to say that he was aware that the claimant was struggling with tiredness and with his weight. He said that he could not recollect any other concerns about the claimant's health and well-being between 2012 and the date of the accident.

248. I do not find Mr Wightman's evidence to be reliable because it is plain from the documents that the claimant's health was an ongoing concern to Mr Wightman: he was concerned that the claimant's performance was adversely affected by health and lifestyle concerns. This concern surfaced in the performance reviews which Mr Wightman carried out as the claimant's line manager and which were documented in the case bundles.

249. By the time of his Appraisal and Development Review ("ADR") on 24 July 2012. The claimant was at that time a Senior Consultant. The notes of the ADR show that his Overall Performance Assessment for the year 2012-2013 was "Successful" which is mid-way in the five possible review outcomes. In oral evidence, Mr Wightman denied that more than a few employees would be assessed as better than Successful. The ADR notes say: "his effort has been outstanding given his health and home circumstances". It was further noted that the claimant had raised "the health and personal struggles" that he had faced but that he had "come through well" and was now able to "take his career forward".

250. Mr Wightman conducted the claimant's next ADR on 5 June 2013. Performance was again marked in the middle category. The ADR notes say: "Maintaining his health and work life balance is imperative" and that Mr Wightman had offered support via the employee assistance programme ("EAP") but that the claimant preferred self-help. Mr Wightman struck me as down-playing any concern about the claimant's welfare at that time, saying that the suggestion of the EAP arose from the fact that the claimant was simply struggling with tiredness and weight gain. A healthy lifestyle was appropriate for someone who had suffered from epilepsy. He did agree however that it was reasonable to conclude that an employer would refer an employee to an EAP out of concern for the employee's health but said that the passing of time had affected his memory of the claimant's state of health.

251. Following the June ADR meeting, Mr Wightman claimed to have met the claimant almost weekly in order to monitor his health but was unable to show the court any record of any such meeting; and he then said that he did not expressly discuss the claimant's health in any event. His evidence about whether he would have made a record of any meeting was not clear. He was not able to say how useful the weekly meetings were.

252. Mr Wightman conducted an interim ADR on 6 January 2014. By that time, the claimant was working on his largest client called Brookfield. Mr Wightman's notes of the ADR describe the claimant as a great asset to the branch. Mr Wightman noted: "At last Brian realises that he cannot fit everything into his life". He noted that the claimant had ongoing health issues but that he was feeling a lot better and working hard to "keep his demons at bay". Mr Wightman said in oral evidence that, by referring to the claimant's demons, he was not referring to health issues: he had meant that the claimant needed to stop underselling himself and stop feeling that he could not do work that he was capable of doing. On balance, I accept that Mr Wightman did mean what he said he meant; but the reference to "demons" must denote something which Mr Wightman regarded as affecting the claimant's performance and

ability to make money for LEBC. After this ADR, the weekly meetings continued, or at least a monthly catch-up. However, there are no records of meetings.

253. Mr Wightman conducted the next ADR on 21 May 2014. The notes show that the claimant expressed to Mr Wightman a lack of confidence in his ability as an IFA. Mr Wightman "endeavoured" to restore his confidence by praising his work. Mr Wightman's view was that the claimant's "health and home life" could be a factor in his well-being. He needed to "work smarter" and "look after himself". He was again assessed in the middle grade.

254. The next ADR took place on 7 May 2015. There is no evidence of any Overall Performance Assessment. The claimant commented that his improved performance year-on-year was due to "working harder NOT smarter". Mr Wightman noted that the claimant offered a "good" service but that time constraints could cause difficulties in getting everything done. While offering a "first class service", the clamant needed to "thin out" the number of clients he had. Mr Wightman urged the claimant to have belief in himself as a "really good" consultant. The urgent need for self-belief was noted.

255. Despite Mr Wightman's clear misgivings, the claimant was promoted to Branch Head in September. There is no contemporaneous documentation to shine a light on his performance in his new role. Mr Wightman said in his witness statement that the claimant came into the role "all guns blazing". I regard this as implausible because it is not consistent with the picture painted by the ADR in May 2016 (only four months before the promotion). Mr Wightman said in his witness statement that the claimant was "fully able to perform" in his new role "to a very high standard". That evidence is in my view also inconsistent with the picture painted by the successive ADRs.

256. In light of the ADR review notes, it is surprising that Mr Wightman's witness statements make no mention of the claimant's health problems or other difficulties at work. In his first witness statement, Mr Wightman accepts that he had worked closely with the claimant since the claimant joined the business in 2004. Mr Wightman had been the head of the Manchester office from 2010 until his promotion to regional sales director in 2015. He was the claimant's direct line manager both before and after the claimant became the Manchester Branch Head. He had supervised the claimant for six years. Given their admitted close relationship, I would have expected Mr Wightman to refer to the claimant's problems in his witness statements. His failure to do so in my judgment casts doubt on his reliability.

257. Mr Wightman said that. after the accident, the claimant made a gradual return to work. LEBC encouraged him to work remotely from home where he could log onto the work system. LEBC provided the claimant with the services of driver and paid for him to stay in a hotel on one night per week in order to reduce his travel to and from work.

258. Mr Wightman said that, after the accident, the claimant had difficulty concentrating. His short-term memory was poor. He would become very tired, particularly at the end of the day. He would find it difficult to prioritise tasks. He was unable to work at the same speed as before the accident. He would struggle to manage client visits on his own. He could work at only about 60% of his previous capacity.

259. He described how the claimant would come into work early and push himself hard. He believed that this hard work was to compensate for the fact that he could not perform his work as quickly as before the accident. He was less effective at running monthly branch meetings, seeming to lose the thread of the discussion. He had struggled to undertake an online examination as part of the firm's CPD.

260. Mr Wightman said in his later statement that, in the early months of 2017, he and Surbhi Gosain (Human Resources Manager) had met the claimant to discuss his performance. They told him that he could not continue in his present role, as his health would deteriorate even further and because the company was suffering from his poor performance. The claimant said that he did not want to leave work but finally accepted that he should take a six-month break. However the claimant had since then not returned to work.

261. Mr Wightman expressed the view that the claimant would now be unable to hold down a "reputable" job at LEBC. The role of a financial adviser involves interviewing skills and technical assessment of the client's situation. Mr Wightman did not think that the claimant would be able to hold client meetings, which would require him to bring together multiple pieces of information and present them in a clear and concise manner. Furthermore, LEBC was undergoing change and would soon become unrecognisable to the claimant.

262. In terms of loss of earnings, Mr Wightman said that LEBC deals with both individuals and companies. The claimant was in charge of the larger schemes run by one of the big companies for which LEBC acts. Before the accident, he was building a very good client portfolio. Mr Wightman would have expected him to continue to build this business and would have expected his fee income to increase year on year

263. In 2018 LEBC had been restructured and the role of Branch Head had been deleted so that, if the claimant had still been working, his earning capacity would have increased because he would have had more time to spend with clients. He would have had the opportunity to become a bigger fee earner with the potential for a larger bonus and commission share. Acting as Branch Head would in Mr Wightman's view have taken up about 25% of the claimant's time. If he were no longer undertaking that role, he would have that further time to increase his revenue. I note that the claimant's witness statement said that he spent 50% of his time as Branch Head. I am left unclear as to the reason for this difference but it does nothing to enhance my impression of Mr Wightman.

264. Mr Wightman said that, in the last few years, salary structure has changed such that basic salaries have only risen with indexation. The bonus potential has however increased significantly. He said that in the past he had known consultants who had 70% or 80% of total salary being paid as basic salary topped up by a bonus. Consultants now have bigger bonus percentages. For example, one consultant earns half his total salary in basic pay and the other half comes from bonuses.

265. He said that, given the claimant's performance before his accident, he believed that he had the potential to improve bonus payments had he remained with the business. He could have been promoted to the role of regional manager. When the five regional manager positions were created in 2018, three of the five roles were filled by serving branch managers. In his opinion, the claimant would have stood a reasonable chance

of securing one of these posts. Two branch heads had retained their salaries: the move to regional manager was a sideways steps and, as a gesture of goodwill, they had retained their salaries.

266. Mr Wightman confirmed that the claimant's pre-accident income contained four elements:

i. Basic salary

ii. Branch Head bonus

iii. Standard bonus

iv. Excess mileage.

267. He confirmed that employer pension contributions were 7.5% of basic salary. I pause to say that the claimant's previous salary sacrifice added to pension contributions does not fall for separate consideration by the court. However, those parts of the schedule of loss that concern the claimant's past and future income must be reduced pro rata (for reasons unconnected to the merits of the claim).

268. Mr Wightman dealt with each of the four elements of income.

Basic salary

269. It is not in dispute that, by letter dated 15 September 2015, the claimant was promoted to Branch Head, Manchester at an annual salary of £55,000. By letter dated 8 December 2016, his salary increased to £55,500 per annum from 1 January 2017. Mr Wightman's evidence was that basic salary would have increased to £56,300 per annum in January 2018 if the claimant had not suffered the accident. He reached this figure on the basis that it reflected the company percentage rise. I see nothing remarkable in his evidence and I see no reason to reject it. I accept, therefore, that the claimant would have been awarded a pay rise to £56,300 in January 2018.

270. As for the claimant's likely pay rise in January 2019, Mr Wightman expressed the view that, on a reasonable assumption, he would have received a basic salary of £62,500 "based on his commitment, business production plus additional cost of living increases". I am not persuaded that basic salary would have risen to such a degree. The rise which Mr Wightman projects does not follow the more modest rises of previous years. Mr Wightman gave no proper or adequate explanation of why 2019 would have brought a greater rise.

271. Mr Wightman expressed the view that, but for the accident, the claimant would have secured further promotion at LEBC. A natural progression could have been a promotion to regional director. He himself plans to retire in about 2021 and he would have expected the claimant to apply for his position at a starting salary of around £70,000 in today's terms.

272. In my judgment, Mr Wightman's speculation about the claimant's promotion prospects are not consistent with other parts of the evidence. The Joint Neuropsychological Statement refers to the claimant working at a high level to maximum capacity before the accident with little capacity for flexibility or change. Dr Plowman’s view was that

many of the multiple health concerns referenced in the claimant's wife's email appear to be associated with stress and poor coping.

273. Much of Mr Brown's cross-examination of Mr Wightman was directed to the point that LEBC, despite its concerns about the claimant's health, appears to have been more motivated to increase the claimant's profit than to address his welfare in any meaningful way. I do not go so far as to comment on LEBC's general strengths or weaknesses as an employer. I do accept however (from the evidence of the LEBC witnesses) that the job of an IFA involved long hours and pressure to introduce and keep profitable clients. I do not accept that the claimant would have persuaded his employers to promote him in these circumstances. It is possible that he may have received some kind of promotion but it is not probable that he would have become a regional director at a salary of £70,000.

Branch head bonus

274. In the year ended 30 September 2016, the claimant received a bonus as Manchester Branch Head in the sum of £3,000. The bonus was discretionary and depended on a number of factors. It could go up or down. In his written evidence, Mr Wightman said that, if the claimant had worked throughout that year, his branch head bonus would have been very hard to predict but could have been £4,000.

275. Mr Wightman estimated £8,000 in the year ending September 2017 and £10,000 in the year ending 2018 as LEBC had two very good years of growth. He believed that some branch heads had a very substantial bonus in those good years as the bonus would depend on individual and branch success. However, he could not recall whether the Manchester branch had improved when the claimant was its Head and described his figures as estimates.

276. Mr Wightman has not provided a clear description as to how the branch head bonus was fixed. He has not provided a clear analysis of why the claimant's bonus would have increased so greatly between 2016 and 2018. His evidence lacks supporting detail and does not strike me as reliable.

Standard bonus

277. The claimant's standard bonus was based on annual turnover (meaning fee income generated for LEBC). The LEBC Pay & Reward Committee adopted a formula: Bonus = (income generated – salary x X)) / y. For material purposes, X was 3.2 and y was 3. In the year ended 30 September 2015, the fees generated by the claimant were £220,592 and his standard bonus was based on this figure. In the six months to 31 March 2016, the claimant generated fees of £135,093. Positing a £6,000 increase in fees to reflect that the accident affected the claimant's productivity, Mr Wightman believed that the claimant would have generated £141,000 in the six months to 31 March if the accident had not happened. He doubled that figure to project £282,000 as a reasonable figure for 12 months ending 30 September 2016.

278. Taking an upwards trajectory, Mr Wightman would have expected the claimant to have generated around £300,000 in the year ended 30 September 2017. By the year ending 30 September 2019, he would have been likely to generate £325,000. He

accepted however that there could be spikes in the fee income generated. For example, the Brookfield client may have explained a large rise in 2014.

279. Mr Wightman told the court that the claimant had never informed LEBC that he was suffering from serious health problems and that his health had not prevented him from carrying out his new role. However, a letter from Suzanne Guest (the occupational psychologist) dated 2 December 2016 indicates that the claimant was "most comfortable" with Branch Head work and that he planned on "working up to customer work" on his return from sick leave. Mr Wightman noted on 30 November 2016 that the claimant found his Branch Head duties "the easiest to do". I infer that the managerial branch head duties were not as stressful for the claimant as customer-facing duties. I see no reason why that would not have been the case both before and after the accident. In my judgment, the deletion of the Branch Head role and the return to greater customer-facing duties would have been stressful for the claimant. Mr Wightman's upward trajectory would be improbable.

Excess mileage

280. Mr Wightman said that excess mileage was paid for business travel at a rate of 45p per mile.

Glynn Jones

281. Glynn Jones opened the Manchester branch of LEBC in 2001, rising to become a divisional director and then, in November 2017, being appointed Group Development Director following the company's restructuring. He adopted his witness statements dated 18 October 2016 and 5 February 2019. In those statements, he gives a general account of how the claimant's accident affected his ability to continue working for LEBC. After the accident, the claimant represented a risk for LEBC as a business, finding it difficult to solve problems for its clients. Absent improvement in his health, it would be very difficult for the company to take him back. In his view, the claimant would have continued to flourish if the accident had not happened. Mr Jones speculated that he would have been earning around £100,000 per annum including a bonus if he had remained.

282. Mr Jones attached two documents to his second witness statement. One of those documents helpfully sets out the income which the claimant generated for LEBC from the 2004/05 financial year onwards.

283. The figures are:

2004/05	65,074
2005/06	115,491
2006/07	137,009
2007/08	140,994
2008/09	103,709
2009	45,004 (four months only, marking LEBC's change to its financial

	year)
2009/10	161,001
2010/11	186,433
2011/12	169,096
2012/13	192,924
2013/14	249,522
2014/15	220,591
2015/16	209,145

284. Mr Jones asked the court to note that 2014/15 was the claimant's last full year in work. He had taken that figure and compared it with the claimant's first full year (2005/06) to reach the conclusion that the income generated for LEBC by the claimant had essentially grown by 10% per year. He imagined that this same rise would have continued if the accident had not happened.

285. Mr Jones nevertheless accepted that changes in the market and in legislation do happen, which may affect growth. He accepted that there was a degree of speculation in forecasting (as he put it: "you cannot see what you cannot see "). However, nothing had happened since 2016 to cause him to alter his view that a 10% year-on-year increase was about right for at least the past years in which the claimant had not worked.

286. It was put to Mr Jones that his forecast of continued growth in fee income did not reflect fluctuations such that, in some years, the claimant's fee income fell and in other years it may have been inflated for specific, non-replicated reasons (for example when he gained the Brookfield client). Mr Jones accepted that the claimant's fee income had fallen between 2013/14 and 2014/15 even though he had a large client like Brookfield.

287. I appreciate that Mr Jones has done his best. His method is nevertheless rudimentary. The claimant did not increase his fee income each year. It is possible that the fees that any particular IFA may raise will increase with experience; but Mr Jones accepted that there does come a limit to what an IFA can bring to LEBC in fees. There are in my judgment too many variables not in the data before me (such as the effect of market forces) to prove any clear or indefinite upward trajectory. Not least, I have reached the view that the claimant's health before the accident – including stress and fatigue – casts doubt on his ability to increase his fee income by an average of 10% every year.

288. The second of Mr Jones' documents is entitled "Brian Morrow. Where might he be now?". This contains a projection of what the claimant may have earned, had he continued to work for the company. Like Mr Wightman, Mr Jones' speculates that the claimant would have been a prime candidate for the newly created Regional Manager role for the Northern Region which would have led to an increased basic salary of

£75,000 pa. I reject this evidence for reasons which I have already set out above in relation to Mr Wightman.

289. Mr Jones also posits what would have happened if the claimant had instead returned to being a full-time adviser. He says that his salary would most likely have remained the same but, owing to his quality and capacity as an adviser, he would have generated at least £300,000 pa for the business which would give him earnings of £93,750 as a minimum.

290. By way of comparison, Mr Jones cites two other advisers. One of those has worked for LEBC in London since 2007. He generated £562,695 for the business in 2017/18, earning around £175,000. However, the largest sum which the claimant generated was £249,522 (in 2013/14). I do not accept that he would have generated over twice that sum in 2017/18 or at all. The other adviser was in any event based in London and I am not prepared to infer that his situation would map onto Manchester.

291. Mr Jones also pointed to Gareth Cockin who has worked in Manchester since 2012. He generated £357,715 in 2017/18, earning around £111,000. The claimant has never generated this sort of money. I see no reason to infer that he would have done so, had he remained with LEBC.

Alistair Towers

292. Mr Towers is an IFA working for LEBC. He joined the company in June 2016, after the claimant's accident. He adopted his witness statements made on 31 January 2018 and 12 February 2019. He has around 300 clients. He confirmed the long hours involved in the job, saying that he sometimes gets home at 10:00pm. He can work over 60 hours per week on occasion. There is a great deal of travel since all clients must be seen face to face at least once a year. Corporate clients need to be seen more frequently. He describes seeing 68 clients in the course of three days' travel. This sort of work level means that he can attend more than 20 client meetings in any one day. Follow-up work must be undertaken on top of meetings. Workloads for IFAs are greater than ever as new reporting obligations (such as MiFID II) have brought changes of practice. Mr Towers said that it is likely that pay structure will also change in the coming year.

293. Since the claimant's absence from work, Mr Towers has taken over a large number of his clients. The clients are based all over the country. The biggest client is a national utility company which employs 1,200 staff. Mr Towers services the company by regular meetings.

294. In the six-month period 17 January 2017 to 26 July 2017, in relation to one of the claimant's client companies, Mr Towers attended 183 meetings, which were with individual employees of the company as well as with the employer itself. Before his absence from work, in the period 16 March 2015 to 15 February 2016, the claimant had attended 164 meetings for this client. During the period August 2016 and August 2017, this client generated 753 emails to which the claimant and then (when he was absent) Mr Towers responded.

295. In my judgment, Mr Towers gave his evidence in a straightforward and helpful manner; but his evidence of the pressurised nature of working for LEBC casts doubt on whether the claimant would have continued to do well there.

Gareth Cockin

296. Gareth Cockin has worked for LEBC since 2012. He is a Senior Consultant. He adopted his witness statements made on 31 January 2018, 13 June 2018 and 12 February 2019. He too described the pressures of the job and the great amount of time spent travelling. On average, he spends about 2 ½ days in the office and the other 2 ½ days travelling round the country. He regards this as typical of the role.

297. Before the accident, Mr Cockin worked closely with the claimant, often on a daily basis, in the Manchester office. It was the claimant who promoted him to Senior Consultant. After the claimant ceased work, Mr Cockin inherited some of his more lucrative clients. He describes how the claimant was responsible for enabling LEBC to pitch successfully to a very large corporate client which became a big fee earner for the Manchester branch and for the claimant personally.

298. In the 2017/18 financial year, Mr Cockin's fee income increased by 30% - rising from £285,000 to £365,000. He attributed approximately 15% to 20% of this increased fee income to the work he inherited from the claimant: he said that the claimant laid the groundwork for at least £40,000 of the increase in his fee income. This portion of his fee income was attributable to the claimant because he had used his Brookfield connections to help LEBC to pitch for another strong client.

299. He explained the challenges for LEBC from MiFID II, which caused IFAs at LEBC to make adjustments, particularly those who have larger client bases. He said that MiFID II requires a detailed review for each client, which should be done face to face, thereby involving a great deal of additional work and travelling. He said that there is uncertainty in the financial sector at present, particularly due to Brexit. This means that clients are more anxious and need more reassurance about their investments. In the last ten years, LEBC has seen some good investment returns but this is changing. It becomes more difficult to handle clients when their investments go down.

300. Like Mr Towers, Mr Cockin gave his evidence in a straightforward and helpful manner; but his evidence of the pressurised nature of working for LEBC casts doubt on whether the claimant would have continued to do well there.

Rehabilitation costs: Louise Denzell

301. Louise Denzell gave evidence (instructed by the claimant) in relation to costings of his past, present and future rehabilitation needs. She qualified as an occupational therapist in 1998 and now works as a brain injury case manager. Since 2006 she has also worked as an independent expert witness for Jacqueline Webb & Co. Ms Denzell provided a written report dated 19 March 2018, which she adopted. There is no need for me to extract here the content of her report.

302. Ms Denzell struck me as a thoughtful witness with much common sense. She was able to withstand very thorough cross-examination. She accepted that the costs of care could not be determined in a scientific way but she said that she had reached

approximations based on sensible assumptions. I accept that her methodology was reasonable. The defendant challenged her assessment of the need for past care on the grounds that it was excessive. The defendants' quibbles on this aspect of her report failed to recognise the shocking and frightening nature of the blow to the head. It was reasonable for the claimant to seek support and reassurance after the accident. The defendant's disagreement as to the proper extent of that care struck me as unduly severe.

Pain, suffering and loss of amenity

303. The claimant's schedule of loss seeks £60,000 for pain, suffering and loss of amenity. The defendant did not directly challenge that figure and did not assist the court on this specific issue. The Judicial College Guidelines contain a Note dealing with how multiple injuries, and the extent to which there is an overlap between injuries, should be reflected in the general damages award. The Note cites the judgment of Pitchford LJ in *Sadler v Filipiak* [2011]EWCA 1728, para 34, about the need for judges to stand back from the compilation of the various relevant parts of the Guidelines to ensure a just outcome. I have taken that approach.

304. I accept Mr Willems' submissions that the following parts of the Guidelines and their brackets apply (before standing back under *Filipiak*):

i. Less severe brain damage (chapter 3 A(d)): £13,430-£37,760

ii. Psychiatric and psychological damage, moderately severe (chapter 4A(b): £16,720-£48,080

iii. Moderate tinnitus and hearing loss (chapter 5 B(d)(ii): £13,080-£26,040

iv. Pain disorders (chapter 8(b)(ii)): £18,480-£33,750

v. Multiple fractures of facial bones (chapter 9A(b)): £13,080-£21,000.

305. Mr Willems accepted that the elements of brain damage and psychiatric damage overlapped but submitted that the other elements all represented separate injury. I agree and shall put aside the element of less severe brain damage because it seems to me that, even if brain damage were properly diagnosed, psychiatric damage was prevalent and led to loss of function. I shall also remove the element of pain disorder in light of my rejection of Mr Mohammad's evidence.

306. Mr Willems suggested that I take the mid-point of each bracket of the relevant Guidelines prior to standing back. I agree with this approach; nor did Mr Brown oppose it.

307. In standing back, I take into consideration the sudden and shocking nature of the accident; the initial severity of the injury; the severe headaches; the claimant’s redevelopment of epilepsy and his fear thereafter of the redevelopment of epilepsy; loss of function caused by anxiety and unpleasant somatised symptoms; and those aspects of his injuries that do not fall within the above categories such as loss of balance. In these circumstances, I do not think that the removal of the element

representing pain disorder should lead to a deduction of more than £2,000 from the general damages claimed.

308. I shall therefore award general damages in the sum of **£58,000**.

Conclusions on loss of earnings

Basic salary

309. According to Mr Wightman, when the role of Branch Head was deleted from the LEBC workforce, four Branch Heads became consultants and one left the business. On this basis, it is probable that the claimant would have reverted to being a consultant. The defendant did not suggest that the claimant would have taken a salary cut. I shall therefore assume that his basic salary would have remained the same if he had returned to the pure consultant role. However, the claimant on his part has not proved that, had he carried on working at LEBC as a consultant, he would have received basic salary rises in excess of the LEBC standard rise at 2%. His loss of basic salary to trial will be calculated on this basis. Loss of future earnings will be calculated on the same basis.

Branch head bonus

310. The defendant's case is that any chance that the Branch Head bonus would have risen to £4,000 (as maintained by Mr Wightman) is speculative. I agree. I have not been provided with a clear picture. I am not prepared to give Mr Wightman the benefit of the doubt as he presented as an unreliable witness. Loss of branch head bonus and future loss will both be calculated at £3,000 per annum until the date that the role was deleted.

Standard bonus

311. I have already concluded that Mr Jones' method of average increase since 2004 is too rudimentary a tool for assessing loss of standard bonus. I accept that the quantification of this aspect of the claim is not easy. The pattern is not all one way: for example, the claimant's turnover decreased from £186,433 to £169,096 between 2011/12 and 2012/13. The claimant's highest turnover was £249,522 in 2013/14. That is explained by the Brookfield client.

312. In general terms, the claimant has not proved that his turnover for LEBC would (for the remainder of his time as Branch Head and/or thereafter) have increased from its pre-accident level. Bonus for the year ending 31 March 2015 (unaffected by the accident) was £27,997.94. For the year ending 31 March 2016, it was £20,675.95 (plausibly slightly lower than it would otherwise have been but for the accident). This gives an average of £24,336.95 in the two years before the claimant's standard bonus fell considerably in 2017 as a result of the accident. In my judgment, it would be unfair to take the 2016 figure on its own as it may well have been slightly lower as a result of the accident taking place in February 2016; but a two-year average broadly irons out any reduction due to the accident. Any further extrapolation from past years lacks proper rationale.

313. For these reasons, I shall award loss of bonus and loss of future bonus on the basis that (i) the claimant would have received an annual standard bonus; and (ii) the multiplicand should be £24,336.95.

Excess mileage

314. Payments representing excess mileage averaged £2,149 per annum over the three years 2014-2016. Mr Willems submitted that the payments were a benefit to individuals over and above the actual expenses incurred when driving on company business. It was deemed to be part of the overall salary package.

315. However, I regard the payment of excess mileage as the reimbursement of an expense incurred by an individual while at work which the employer reimburses so as not to leave the individual out of pocket. It is possible that the true cost of mileage – either in the past or in the future – would have been less than the 45p mentioned by Mr Wightman, so that LEBC employees would in effect receive added income from driving for business purposes. There was no evidence about the true cost before me. I was not taken to any part of the claimant's employment contract which suggested that excess mileage was anything more than an expense. In terms of future payments, I see no reason for the defendant to pay for an expense that will not have been incurred. I make no award.

Pension contributions

316. Loss of pension contributions and loss of future pension contributions will be awarded and calculated on the basis that the claimant would not have received basic salary rises in excess of the LEBC standard rise at 2%.

Loss of congenial employment

317. The claimant seeks a separate award of £8,048.92 for loss of congenial employment (see for example *Willbye v Gibbons* [2003] EWCA Civ 372, [2004] P.I.Q.R. P15). Mr Willems submitted that the claimant clearly loved his work and profoundly misses his employment and the status it gave him. In my judgment, the claimant has not provided enough evidence to indicate that he enjoyed his work as an IFA or that he found it satisfying – as opposed to appreciating the salary and the financial status that he enjoyed (which does not make the job itself congenial). The evidence shows that he found the work of an IFA tiring and stressful. In short terms, he struggled. This part of the claim is not proved.

Personal care support

318. In closing submissions, for the purposes of proportionality, the claimant reduced his claim for past assistance with personal care and travel from £9,452.68 to £6,000. This includes both a reduction of 25% for the gratuitous nature of the care provided by the claimant's wife and a reduction of £1,236.08 arising from a calculation error conceded by Ms Denzell in oral evidence. The defendant submitted both that the number of hours and the hourly rate remained excessive. The greatest degree of disagreement related to ongoing care from 23 February 2018 to trial which was claimed at 3.5 hours per week, giving a total of £3,047.30. The defendant submitted that this did not take account of the fact that the claimant regained his driving licence during this period

which would reduce the figure to £750. Taking Mr Willems' proportionate approach but making a further reduction for the driving licence, I propose to reduce the £6,000 claim by £1,700, so that I shall award **£4,300**.

Paid case management

319. The claimant and his family incurred case management fees as a result of the accident in the sum of £10,918.79 (£11,040.08 less £121.29 which it is agreed that the defendant has already repaid). Ms Denzel's report suggests that the defendant has already repaid the vast majority of the remaining fees but the picture is not clear. Mr Brown submitted that the extent of case management was based on the premise that the claimant was suffering the effects of a brain injury. He submitted that it would be difficult to attribute the high level of case management to anything other than brain damage.

320. However, Ms Denzel stated that, while the case manager had brain injury expertise, she also had transferable skills to deal with the symptoms which are common to psychological illness as well. I accept that some benefit accrued to the claimant from the provision of this case management. I accept that the claimant acted reasonably by engaging with case management based upon guidance by experts. The defendant does not establish that the claimant has failed to mitigate his losses by incurring these costs.

321. I shall therefore award **£10,918.79** (less any amount which the defendant has already paid, for whatever reason).

Equipment

322. The claimant says that he purchased a gym ball, wobble cushion, exercise mat, resistance bands, turbo trainer and GHB training straps to aid his rehabilitation following the accident. He was however active at his gym before the accident and he does not prove that he needs to purchase these fitness items.

323. As for other equipment, the defendant has already paid for a recliner armchair, an epilepsy sensory watch and a subscription for the watch, so that these must be deducted from the claim. The claimant says that he has purchased posture support and an eye mask to aid his rehabilitation. Putting aside the proportionality of asking the High Court to decide claims worth £18.99 (the posture support) and £8.65 (the eye mask), I take the view that he has not proved that he needed them. This part of his claim fails.

Travel expenses

324. The claimant accepts that the costs of travel to experts' appointments do not amount to damage and are claimed as costs. Other than that, I shall allow the mileage and parking costs as claimed: **£1440.32**. I do not allow the taxi costs which are unexplained and seem excessive. I do not allow the car leasing costs. The claimant says that he did not use his car for six months but was locked into leasing payments. However, I accept Mr Brown's submission that the claimant does not prove why the claim for leasing payments is appropriate and why he should be recompensed in relation to the ongoing possession of his own - albeit leased - car. I do not allow the

airport trip or flights to Greece as the claimant does not prove that he was unable to travel: he told his GP on 20 May 2016 that he was off to Greece on 6 June. In any event, I do not accept that he was too ill – physically or mentally – to travel.

Therapies

325. The claimant seeks £25,748.51 for psychological and occupational therapy, together with massage. I do not allow the claim for massage (£1,040 for 26 sessions). The claimant does not prove that he required massage as a treatment or that he needed 26 sessions. For reasons which I have already adumbrated, the claimant was reasonable to undertake the psychological therapy (including Dr Newby's treatment) that he did undertake. I also regard the occupational therapy as reasonable. This part of the claim is therefore proved in the sum of **£24,708.51**.

Increased costs

326. The claim for additional fuel costs at home is allowed. The claimant would in broad terms have been likely to spend more on fuel at home when he was unable to go to work as a result of the injury. I deduct £49.51 which the claimant accepts would reflect the time that the claimant's son would have been at home during the school holidays, such that fuel costs would have in any event have been incurred. On this basis I award **£208**.

327. The claim for additional food costs in the sum of £440 is not proved. I have been provided with no basis for the claimant to spend more on food as a consequence of his injury.

328. The claim for gym membership (from June 2017 to trial at £1,077) is not proved. The claimant said in oral evidence that, prior to the accident, he went to the gym every Saturday and Sunday and then again twice between Monday and Friday. He does not prove that the accident has caused additional gym fees.

329. The claimant has employed a gardener from June 2019 to trial at a rate of £25.00 per fortnight for 11 fortnights (totalling £275). The claim for past gardening costs is not proved. The claimant said that he struggles with gardening. However, he accepted that he could garden for a long time as if he starts something, he feels that he has to finish it. His Reflective Diary entry for 27 April 2019 shows that he worked for three hours in the garden on that day.

330. In cross-examination, he said that he can only manage garden jobs that are done while kneeling, owing to bad balance. He said that it was painful to get up again and it took time. He also said that he used a spade in the vegetable garden at Chirk Castle. Even assuming that it is possible to use a spade while kneeling, the claimant said that tendonitis in his hand and forearms gives him a problem. and that he struggles with anything that involved using his arms. If that were the case, I do not understand how he could use a spade. In my judgment, the claimant has over-dramatised his problems and this aspect of his claim must fail.

Miscellaneous expenses

331. The claim for wasted concert tickets, broken glasses and damaged clothing is proved and reasonable: **[Counsel please calculate].**

332. The claim for an OTTY mattress is not proved as no need for such a mattress has been demonstrated. Ms Denzel's report says that details of a therapeutic mattress (in her section on equipment to improve comfort) should not be read as a recommendation and the claimant has not drawn my attention to other relevant evidence.

333. For reasons already explained, I am not persuaded that the claimant was unable to use a pre-booked holiday villa in Greece. This claim is not proved.

Future personal care support

334. The claim for future care set out in the claimant's schedule was not pursued (Dr Scheepers and Dr El-Assra agreeing that the claimant does not require a carer or case manager).

Future services

335. There is a claim for future gardening assistance for life in the sum of £15,370. For similar reasons as set out above in relation to past gardening costs, the claim for future costs is not proved. This aspect of his claim – which suggests that he will never recover from the accident even to the extent of being able to attend to his garden - lacks realism. Ms Denzel's report suggests that he will need someone on an occasional basis to assist with more complex or strenuous activities for four sessions per year. She clarified that this sum represented jobs such as cutting trees and fencing. Ms Denzel's costing is £160 per annum whereas the schedule claims £500 per annum. Neither amount is proved.

336. There is a claim for future DIY and maintenance assistance for life amounting to £14,116.34 to the age of 70 and £3,448.76 thereafter. The claimant told me that he cannot change a light bulb and needs a DIY claim. I do not accept his evidence. In his third witness statement, the claimant said that he fixes and maintains doors, fences, sheds and boundaries at Chirk Castle. He managed to paint the poles of a canopy. He also told Dr Scheepers in April 2019 that he spent time repairing and renovating things at the Castle. Both his witness statement and his instructions to Dr Scheepers are hard to reconcile with being unable to change a lightbulb: I have formed the view that the claimant over-stated his disability and dramatised his evidence to me. His claim for future DIY costs is not proved.

Future increased costs

337. For similar reasons as past gym membership, the claim for gym membership after trial to the claimant's recovery (£31 per month for twelve months) is not proved.

Future vocational psychology

338. There is a claim for future vocational psychology in the sum of £4,950 which (it is submitted) would assist the claimant to go back to work. The claimant will be compensated for 6 years' loss of earnings such that assisting him back into the workplace within the next 6 years would amount to over-recovery. His employment

prospects after 6 years cannot be attributed to the defendant and so this part of the claim is not proved.

Future treatment

339. The claim for tinnitus retraining and neuro-physiotherapy was essentially accepted. It amounts to **£2,150** which I shall award. As to hearing aids, I prefer the evidence of Dr Nandi to Mr Zeitoun because it is clearer on this point. Dr Nandi says that without the notch or bulge in the audiogram, the claimant would have required hearing aids by about 55 years old (the claimant in any event conceding that he would require aids by the age of 60).

340. The claimant's case is that he will need to pay for one set of hearing aids every five years. Dr Nandi's view (which makes sense on the evidence) is that he should consider using an aid in the left ear only. No one has told me the cost of a single aid but the defendant did not ask me to make any deduction for the use of a single aid. I will therefore award the cost of one set of hearing aids claimed in the schedule of damages which should last until the claimant is 55: **£2,000**.

Conclusion

341. Following the circulation of a draft of his judgment, the parties were unable to agree the calculations relating to loss of earnings and pensions. I shall therefore hear counsel on these issues. The calculation of other heads of damage is agreed and summarised in the Appendix which I attach to this judgment.

APPENDIX

General damages including interest	£60,320.00
Personal care support	£ 4,300.00
Paid case management	£10,918.79
Travel expenses	£ 1,440.32
Therapies	£24,708.51
Increased costs	£ 208.00
Miscellaneous expenses	£ 363.98
Future treatment	£ 4,150.00