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Case No: QB-2018-005820

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 October 2021

Before :

MRS JUSTICE YIP

- -

Between :

JEREMY DAVID STANSFIELD	**Claimant**
- and -	
BRITISH BROADCASTING CORPORATION	**Defendant**

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- -

Marcus Grant (instructed by **Anthony Gold Solicitors LLP**) for the **Claimant**
Jonathan Watt-Pringle QC (instructed by **DAC Beachcroft**) for the **Defendant**

Hearing dates: 17, 18, 19, 24, 25, 26, 27, 28 May, 29 June, 2 July, 29 September 2021

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Approved Judgment

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MRS JUSTICE YIP

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30a.m. on 1 October 2021.

Mrs Justice Yip :

1. The claimant, Jem Stansfield, was a presenter on the BBC's popular science show "Bang Goes the Theory". An engineer by background, his career developed via making scientific exhibits for museums into working in television and then presenting shows with an engineering or scientific slant. He continued to have a hands-on role, devising ideas, and building and inventing things for the shows he presented. This claim arises out of the making of an episode of Bang Goes the Theory in which the claimant assumed the role of a human 'crash test dummy' for a feature about the relative safety of forward and rearward facing child car seats. During filming on 8th February 2013, the claimant conducted a series of crash tests. He was strapped into a rig like a go-cart which was propelled along a track into a post. In the introduction to the piece, the claimant explains that he had calculated the experiment to give a similar crash profile to hitting a lamppost in a real car in an urban environment. The crashes were performed forwards and backwards twice each. It is not in dispute, and perhaps not surprising, that the claimant suffered some injury. What is contentious is the extent of that injury and the consequences for the claimant. It is his case that the crash tests have left him with a constellation of symptoms producing a significant decline in his health, which impairs all aspects of his life, particularly his ability to work. He seeks substantial damages for the losses he says have resulted. The defendant, the BBC, contends that little more than a moderate whiplash injury with depressive symptoms can properly be attributed to the crash tests, such as would give rise to only modest damages.

2. I must say that I find it astonishing that anyone thought that this exercise was a sensible idea. On his own account to camera, the claimant was simulating a road traffic collision of the sort that commonly causes injury. It might be thought that someone of his intelligence and scientific background might have appreciated the risk. Indeed, in the finished piece, he rather prosaically observes, "I wouldn't recommend this". Equally, there was evidence that the BBC had actively sought advice, been warned of the danger, yet allowed the experiment to proceed. I have not been required to determine liability for the injuries sustained by Mr Stansfield. That aspect of the case was resolved by agreement between the parties. They have agreed to share responsibility for the injuries and resultant losses flowing from the crash tests to the extent that the BBC will meet two-thirds of the claim. My task therefore is to make findings as to the nature and extent of the claimant's injuries and to assess the resultant damages.

The claimant's case in outline

3. The claimant's case, as set out in his Particulars of Claim, is that the crash tests have caused him "a cluster of physical, cognitive, vestibular, behavioural and psychological symptoms that compromised his ability to function effectively in his work, home and recreational lives." He identifies a long list of symptoms including chronic pain in the spine, head and face; visual disturbance; tinnitus; headaches; dizziness; nausea; vertigo, disturbed sense of smell; fatigue and reduced mental stamina; sleep disturbance; intolerance / sensitivity to noise and light; cognitive difficulties and personality change. It is right to say that different symptoms have taken on differing levels of prominence at different times.

4. The claimant's case as to the nature of the injuries giving rise to his symptoms has developed as the expert evidence has been gathered. It has been apparent that there is a complex interplay between different medical disciplines. The views of some experts

had clearly evolved during the course of the litigation. The claimant's case as presented at trial was that this was to be viewed as a "complex head injury claim" but one where the cause of several of the symptoms was multi-factorial. In his final Schedule of Loss, the claimant's case on causation was put as follows:

> "By reason of his unremarkable pre-accident history, and the absence of any inter-current trigger breaking the chain of causation, the precise diagnosis/formulation now, past the eighth anniversary of the crash tests becomes increasingly academic, given the prognosis for any further significant recovery is poor."

5. By far the largest element of the claim is the claim for loss of earnings. The claimant's case is that he was determined to continue with his career and tried hard to do so. He says that he was "carried" by friends and colleagues for the first 12 months but was struggling to manage his work due to his symptoms. He worked significantly fewer days than he had done previously and by February 2014 was forced to stop work halfway through filming the eighth series of Bang Goes the Theory. Since then, he has worked sporadically on a consultancy basis but has not returned to TV presenting or to working at anything like the level he did previously. It is the claimant's position, in essence, that his career was on an upward trajectory at the time of the crash tests. In November 2012, he had retained a new agent, Mrs Hilary Murray, whose evidence was that he was "entering the golden years of his career". The claim is put on the basis that his earnings would have risen considerably over the next few years had he not been injured, whereas his residual earning capacity is much more limited. The basis upon which his uninjured earnings have been calculated is a very contentious issue.

6. The other heads of loss claimed are:

   i) general damages for pain, suffering and loss of amenity and for loss of congenial employment;

   ii) past and future care, domestic assistance, childcare and services;

   iii) past and future costs of medical treatment and therapies;

   iv) travel and miscellaneous expenditure.

The defendant's position and relevant legal principles

7. The defendant accepts that the claimant suffered some injury in the crash tests but requires him to prove the nature and extent of the injuries sustained. The defendant invites me to find that the orthopaedic injuries were relatively minor and that there was no serious neurological or audio-vestibular injury. As far as any psychological injury is concerned, the defendant says this should be limited to diagnosed depression, which has improved and will continue to improve upon completion of the litigation.

8. The defendant correctly, and uncontroversially, asserts that the burden of proving causation rests with the claimant. The defendant's counter-schedule referred to *Pickford v Imperial Chemicals Industries* [1998] 1 WLR 1189; *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] WLR 948 and *Newman v Laver* [2006] EWCA Civ 1135. At trial, Mr Watt-Pringle QC placed particular reliance on *Pickford.* That case

acts as a useful reminder that courts should take care not to reverse the onus of proof. The defendant does not have to prove fabrication or any alternative explanation for the claimed symptoms. Rather, the claimant must prove (on a balance of probabilities) that the symptoms upon which he relies to underpin his claim were caused by the crash tests. Lord Hope, giving the leading judgment in *Pickford* said [at p1200 B]:

> "… in most cases the question of the onus ceases to be of any importance once all the evidence is out and before the court."

However, he explained that exceptional cases would arise from time to time where the question of the burden of proof would be a determining factor and said:

> "They include cases which depend on the assessment of complex and disputed medical evidence, where the court finds itself in difficulty in reaching a decision as to which side of the argument is the more acceptable."

9. Mrs Pickford sought damages for repetitive strain injury arising out of her work as a typist. Lord Hope explained that it was necessary for her to prove that the cramp in her hands had an organic cause since [see p. 1199 H]:

> "This was the basis of her case that her condition was foreseeable and that, in failing to take precautions against it, the appellants had been negligent. Unless an organic cause for it was established, her claim for damages was without any foundation in the evidence."

10. Mr Stansfield's case is more nuanced. It does not depend upon him establishing that all his symptoms had an organic cause. I agree with the approach advanced in the Counter-Schedule, namely that the claimant must prove that "he suffered disabling organic brain, vestibular or whiplash injuries and/or disabling psychological injuries in the crash tests on 8th February 2013." I highlight the use of "and/or" in that statement. Insofar as the claimant establishes a causal link between the crash test and symptoms, he is entitled to recover damages flowing from those symptoms. This does not necessarily require him to prove the precise cause of the various symptoms where there may be overlapping and alternative medical explanations. But his claim will be assessed only on the basis of the symptoms which he is able to prove have been caused by the effects of the crash tests.

11. As I review all the evidence in this case, including the expert evidence, I shall remind myself where the onus of proof lies. Insofar as there is any difficulty in clearly identifying the medical cause of symptoms that is something I will have to take into account in deciding whether the claimant has in fact discharged the burden of proof. I keep in mind at all times that it is not for the defendant to establish an alternative explanation for the symptoms which are alleged.

12. It is right to note at the outset that the defendant does not allege that Mr Stansfield is guilty of deliberate fabrication, although his credibility in challenged in relation to parts of his evidence. Further, it is expressly not part of the defendant's case that the claimant

had any pre-existing condition or vulnerability which meant that he was likely to develop symptoms in any event. The defendant does point to an event on 12 March 2013, referred to at trial as "the fall in the snow". The defendant contends that this was a significant event, wholly separate from the effects of the crash test, which reversed an improvement in symptoms up to that date and also generated new symptoms.

13. The defendant also contends that the claimant has failed to mitigate his loss by failing to follow advice from his medico-legal psychiatric expert, Dr Sumners, that he should be prescribed anti-depressants. The claimant is reported to have described that suggestion as "offensive and derogatory" and to have refused to countenance such treatment. The defendant invites the court to find that this was unreasonable and should result in a reduction in any damages assessed to be consequent to the crash tests. On this issue, the defendant bears the burden of proof.

14. To the extent that the claimant proves that the effects of the crash tests have restricted his capacity for work, the defendant challenges the basis upon which the loss of earnings claim is calculated. The defendant does not accept that the claimant was on the verge of a very significant increase in his earnings. The defendant invites calculation of any loss of earnings on the basis of taxable earnings before and after the crash tests, albeit allowing for some growth.

15. Given the factual conclusions the defendant invites, its position is that the other heads of loss have only a modest value.

The key issues to be determined

16. Given the parties respective positions, the following key issues emerge:

    i) What injuries did Mr Stansfield sustain as a result of the crash tests?

    ii) What has been the effect of those injuries to date and what ongoing consequences are there?

    iii) Has the claimant failed to mitigate his loss by refusing treatment with anti-depressants? If so, what is the effect of that?

    iv) To the extent that the effects of the crash tests have impacted upon the claimant's earning capacity, how is his claim for loss of earnings to be assessed?

    v) What other damages are recoverable?

17. The determination of these central issues depends upon my findings of fact and careful analysis of the expert evidence. The factual evidence and the expert evidence cannot be viewed separately. Some of the findings of fact I make inform my analysis of the expert evidence. Equally, there are areas in which I must draw upon my assessment of the expert evidence to assist in making findings of fact.

18. When considering the factual evidence, the following areas seem to call for particular focus:

    i) The claimant's presentation immediately after the crash tests and later on 8 February 2013;

ii) His condition in the weeks and months following the crash tests;

iii) The timing of onset of relevant symptoms;

iv) The nature and effect of the fall in the snow on 12 March 2013;

v) The claimant's career trajectory and opportunities to increase his earnings.

The evidence

19. I heard evidence over 9 days and submissions occupying a further full day. In addition, a substantial amount of documentary and video evidence was placed before me. The case is perhaps unusual in two respects. First (although by no means unique to this case), the claimant has been seen by numerous treating doctors, consultants, therapists and practitioners in alternative therapies. It is clear that he has devoted much time and energy to seeking to understand his symptoms and to his claim. That has resulted in a vast amount of documentation being generated. The claimant's own statements ran to nearly 200 pages with 295 pages of exhibits. In all, there were over 7,000 pages of documents produced at trial. Second, there is a significant amount of video evidence showing the claimant at the time of and shortly after the relevant events and on subsequent dates.

20. There is therefore a substantial amount of contemporaneous evidence available. For the reasons given by Leggatt J in *Gestmin SGPS v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) [15 – 22], such evidence is likely to be more reliable than evidence based upon recollections of events which occurred several years ago. I did not have the impression that the claimant or any of his lay witnesses were being untruthful or seeking deliberately to mislead the court. However, as Leggatt J observed, human memory is fallible and the process of litigation will further interfere with memory.

21. An interesting observation was made by Mr Friedland, the claimant's neuropsychology expert, after listening to the evidence at trial:

> "I was struck by someone who has tried to approach his injuries in a way that he approaches Bang Goes the Theory and science, where he is trying to find a logical explanation. He tries to apply a scientific way of thinking to much more of a medical problem, which I think there is a mismatch and I think his way of thinking has not helped him manage his symptoms."

The claimant's wife made a similar observation in her statement, namely that the claimants' scientist's brain had caused him to become completely embroiled in the cause of his injuries and how to fix them.

22. I do have reservations about the claimant's reliability as a witness. He was tangential and difficult to keep to answering the questions asked. His presentation was frankly odd. He was self-critical but also quick to criticise those on the BBC 'side'. At times, he appeared evasive. The impression I had was that he was mistrustful and worried he might be 'trapped' by questioning, even though Mr Watt-Pringle was unfailingly courteous and straightforward at all times. This presentation must though be viewed in

the context of all the evidence I have about the claimant, to which I shall return in the course of this judgment. My firm conclusion was that the claimant was doing his best to give honest and accurate evidence but that the process was difficult for him.

23. The claimant's wife, Mrs Joanne Stansfield, admitted that her recollection of events shortly after the crash tests was not good. She was unwell that weekend and at the time she did not realise the significance of what had happened. This recognises the fallibility of the human memory and the difficulty in looking back and recollecting events.

24. For these reasons, I place greater reliance on the wealth of contemporaneous evidence than upon the retrospective accounts of the claimant and others. Ultimately though I have put all the available evidence into the balance, giving such weight to it as appears appropriate having tested it against other evidence.

25. I received expert medical evidence in seven different disciplines. Each side also produced evidence said to be from experts in "biomechanical engineering", although perhaps more accurately described as accident reconstruction experts, and from forensic accountants and care experts.

26. Many of the experts and several treating clinicians described this as a very complex case. Mr Friedland, a very experienced expert, said he had never seen a medico-legal or clinical case like this one. As I have already observed, there is a complex interplay between the different disciplines. This means that the expert evidence cannot be considered in a siloed manner. Although I will necessarily set out my analysis of the expert evidence under different headings, I have at all times had the interaction between the different disciplines and the factual evidence firmly in mind when reaching my conclusions. My findings take account of all the evidence I have read, seen and heard.

27. I will not summarise all the evidence which I have considered since to do so would make this judgment unwieldy. Further, while I have given careful consideration to all the submissions made to me, both orally and in the detailed written submissions produced on each side, I intend to deal with the disputed points only so far as is necessary to decide the issues I must determine and to explain my reasoning.

The claimant

28. The claimant is now aged 50. He was 42 at the time of the crash tests. He was married with three young children and appears to have enjoyed a stable and happy family life. There is strong evidence that prior to the crash tests he was an exceptionally fit man. Video footage from the time shows that he was slim but with strong musculature. There are clips of him balancing and walking on his hands and scaling a building using vacuum gloves he created. In 2012, the BBC required him to undergo a physical assessment before undertaking a project involving a human powered aircraft, which he had designed. The results suggested he was performing at the level of a competitive athlete.

29. There had been some debate about whether the claimant had a history of attending his G.P. with medically unexplained systems. However, by the time of trial that had resolved itself, with the defendant's experts accepting that he had provided good explanations for the entries over which there had been some concern. I would not necessarily accept the contention that he was an 'infrequent attender' at his G.P. bearing

in mind his general good health. However, the defendant did not contend that he attended more frequently than might be expected or that there was anything of significance in his past medical history. The claimant did have a history of problems with his left knee. Again, I would not necessarily accept Mr Grant's description of this as a "niggle". I note that in an email to Dr Freeman 11 days after the crash tests, the claimant acknowledged that he was inclined to "witter on" about the problem with his knee and said he was "still a little bit desperate". Equally though the defendant does not rely upon the pre-existing knee complaint as being of significance.

30. The claimant appears to have been a man who pushed himself. The account he gives of his career up to 2013 indicates he was working long hours. He was very committed to the BBC and particularly to Bang Goes the Theory. He prioritised that work over other opportunities. His agent, Mrs Murray, expressed the view that he was modest, humble and grateful. She noted that he was politically left wing and, before having children, had perhaps felt guilty about earning more than he needed, so tended to undersell himself.

31. It was notable that all the lay witnesses spoke very highly of the claimant. There may have been a degree of hyperbole, for example Dr Freeman described him as "somewhat superhuman". Certainly, the picture painted was of a very talented man who was physically and intellectually very able and who had a great deal to offer in the world of TV presenting. The BBC did not challenge that impression or call any evidence to the contrary. It was apparent that the claimant did not wish to appear immodest when giving his evidence. However, when pressed, he confirmed his belief that he had "a unique set of talents". In his written evidence, the claimant described himself as "a small shadow of his former self". He said:

> "After I was injured it was like that top, professional grade internal toolkit had been replaced by a much cheaper, weaker one."

32. Dr Summers, the consultant psychiatrist called by the claimant, observed a behavioural pattern known as alexithymia. Literally, this means "no words for emotions". This, he explained, was a personality trait rather than a psychiatric condition. It is more common in males than females and may be related to upbringing. It was likely to have been a pre-existing trait, fitting with Mr Stansfield's apparent perception of himself as a "tough guy". This provides some context for Mr Stansfield's presentation. It appeared to me that he was very focused on his perceived loss of physical and mental fitness and that losing his "superhuman" reputation was very difficult for him.

33. There was one piece of evidence which appeared possibly significant but upon examination was conceded by the defendant not to be. In February 2012, the claimant and Dr Freeman, were filming in Maryland. The night after the long flight, Dr Freeman said that the claimant knocked on her hotel room door and "seemed in a dark mood". When he did not meet her at the time she expected the following morning, she became worried. This lead to her emailing the series producer, Paul King, on 8 February 2012 and stating:

> "Yesterday he admitted to suicidal thoughts and we did a lot of talking and I can't tell you how worried I was when he overslept this morning, knowing he had taken sleeping pills."

34. The claimant denied that he had been feeling suicidal and Dr Freeman accepted that her email arose out of a misunderstanding or misreading of the situation at a time when she was particularly sensitive having recently lost a friend to suicide. That explanation was accepted by the defendant and it is not part of its case that the claimant had any pre-existing psychiatric or psychological condition or vulnerability.

35. It follows that the evidential picture of the claimant before the crash tests is one of a high functioning individual, who worked hard in a job he loved and who was happy in his home life. He told me that he had no expectation that he would be injured in the crash tests and had felt reassured that there had been a risk assessment. On 8 February 2013, he went to work as normal. He had not discussed what he was filming with his wife. There is no hint that he was anything other than his usual self as he went into filming the crash tests.

Mechanism of injury

36. Evidence was obtained from Brian Henderson, a forensic scientist and collision investigator, for the claimant and from Andy Wooller, a photographer who specialises in the analysis of video evidence for collision investigation for the defendant. They were referred to as "biomechanical engineering experts". Whether that is a wholly apt description certainly of Mr Wooller's qualifications and experience is debatable. However, this was not explored at trial and nothing turns on it. The experts had reached a large measure of agreement and so were not called to give oral evidence. It is accepted that their evidence is of value in considering the accident mechanics.

37. Despite some initial confusion about the number of tests carried out, it appeared that four were done on 8 February. Two forward facing tests were done first and two rear facing ones after. Video footage was available of all the tests but only slow-motion footage was available of the last rear-facing one. Some tests were carried out three days earlier when the claimant was testing his rig. It is agreed that no cause of action arose in relation to the earlier tests but it was confirmed by Mr Watt-Pringle that even if some injury had resulted from the earlier tests no point was taken about that lying outside the scope of the liability agreement. It was therefore unnecessary to explore further whether the earlier tests played any part in what developed and the focus of the trial was on what happened on 8 February.

38. The experts agreed that the speed at which the tests were conducted was 10.5-11.5 mph, save that the speed reached on one test was 8mph. It hardly requires expert evidence to identify that the collisions were not directly comparable to a modern car crashing with a lamppost at a similar speed. Although the rig had been fitted with a 'crumple zone', this was a normal metal household bowl. It was a cosmetic device for the purpose of the televisual effect. It did not provide any effective cushioning from the impact. The force of the impact in these 'barrier collisions' was equivalent to a vehicle-to-vehicle collision at up to twice the speed. The exact forces experienced by the claimant and the precise movement of his neck and head is difficult to determine. Mr Henderson, who has been involved in research into vehicle occupant movement and associated body and head accelerations, concluded that in addition to linear acceleration-deceleration forces, Mr Stansfield's head will also have experienced rotational forces. He concluded that the brain is likely to have collided with the inside of the skull multiple times during each collision.

39. It is plainly an unusual feature distinguishing this case from the usual road traffic collision that the claimant was exposed to successive impacts within a short period. Mr Henderson made the point that he would not have undertaken any one of the tests and that research groups have consistently avoided consecutive impacts with live occupants even at impact speeds below injury thresholds because of the risk of cumulative damage.

40. In conclusion, Mr Henderson and Mr Wooller agreed that all the tests conducted on the day of filming were conducted at a speed above the threshold generally considered to be safe and that conducting repeated tests over a short period of time is likely to have exacerbated the effect of any one test.

41. It is accepted that Mr Stansfield suffered some injury. The orthopaedic experts, Mr Khan and Professor Clarke, agree that it is likely that he sustained a whiplash injury. Professor Clarke explained that whiplash is a collective diagnosis of the symptoms that follow indirect injury to the neck, spine and adjacent structures and set out the following definition:

> "An acceleration-deceleration mechanism transferred to the neck. The impact may result in bony or soft tissue injuries (whiplash injury), which in turn may lead to a variety of clinical manifestations."

42. The claimant reported neck pain within 24 hours of the tests. The orthopaedic experts agreed that there was no evidence of structural damage to the cervical spine. Mr Stansfield has some normal degenerative changes in his neck but the experts agree that this is not a case of the acceleration of symptoms that he would have experienced anyway. Rather, there is a causal connection between the crash tests and the ongoing neck pain. They agree that these accident-related neck symptoms are now likely to be permanent. They also agree that the claimant is not likely to return to his previously physically active lifestyle. However, the whiplash injury to the neck cannot itself explain the range of symptoms of which the claimant complains. The orthopaedic experts deferred to other experts for consideration of whether there had also been damage to the brain and/or vestibular system and as to whether non-organic factors were playing a part.

43. The neurologists, Dr Sekhar and Dr Heaney, agreed that the claimant was subjected to "a highly unusual mechanism of injury involving a succession of acceleration-deceleration & rotational forces to his brain." They also agreed that conducting repeated tests over a short period of time is likely to have exacerbated the effect that would be expected to follow any one test. It appeared from their joint statement that they had agreed that the claimant had sustained "a symptomatic mild traumatic brain injury". However, giving evidence, Dr Heaney said that he had intended only to say that Mr Stansfield had suffered a "possible" mild brain injury. He certainly did not consider that any brain injury could account for enduring symptoms, which were more likely to be attributable to psychological and personality factors.

44. Dr Sekhar's opinion is that the claimant has suffered a mild traumatic brain injury which continues to make a significant contribution to his ongoing symptoms. He considers the rotational forces identified by Mr Henderson are significant because:

> "the long axonal tract which traverses and forms connections between the cortex, sub-cortex and the brain stem is vulnerable to shearing stresses imposed by rotation and once injured, it takes a great deal of time to reform the connections, and invariably you are left with symptoms replicated by disturbed connections, secondary to axonal injury. "

45. The claimant has undergone a series of brain scans over a period of two-and-a-half years, the first scan being conducted two years after the crashes. The agreed opinion of the neuroradiological experts, Dr Das and Dr Butler, is that there is no evidence of traumatic cerebral injury on the scans. Neuropsychological testing conducted by the claimant's expert, Mr Friedland, identified significantly reduced processing speed.

46. I shall have to return to a more detailed analysis of the evidence about brain injury. In short, it appears to be uncontentious that the crash tests could have had a concussive effect, producing a mild brain injury. However, there is a significant dispute about the extent to which any brain injury has contributed to the symptoms of which Mr Stansfield has complained over the past eight years.

47. Amongst the claimant's reported symptoms are those which may result from audio-vestibular disturbance, including balance problems, visual vertigo and tinnitus. The evidence from the audio-vestibular experts, Dr Dasgupta and Dr Surenthiran, confirms that injury to the audio-vestibular system may result from a blow to the back of the head and/or acceleration-deceleration injury. The experts disagree as to whether the crash tests caused Mr Stansfield to sustain any damage to his audio-vestibular system. Again, that requires analysis of the available evidence, including the contemporaneous evidence of the onset of relevant symptoms.

48. There is also evidence that the claimant is suffering from psychological symptoms amounting to a psychiatric disorder. The claimant called psychiatric evidence from Dr Sumners. The defendant had instructed a psychiatrist, Dr Mallett, and a joint meeting of those experts had taken place. However, the defendant chose not to rely on Dr Mallett's evidence at trial. In the circumstances, I considered the joint statement only insofar as it was relevant to the final opinion of Dr Sumners. It is Dr Sumners' opinion that the claimant's psychological symptoms have been caused by the crash tests and are part of a complex interaction with organic factors. As I have noted, it is expressly not part of the defendant's case that the claimant had any pre-existing psychiatric or psychological condition or vulnerability.

49. Having reviewed all the medical and engineering expert evidence, it seems to me that the following relatively uncontroversial points emerge:

    i) The repeated crash tests, involving acceleration-deceleration and rotational forces, were capable of causing physical injury, including whiplash injury, mild traumatic brain injury and audio-vestibular damage.

    ii) The claimant's symptoms cannot be fully explained by any organic injury which may have been caused by the crash tests.

    iii) Psychological / psychiatric factors are undoubtedly playing a part in the claimant's presentation.

50. The fact that a type of injury is capable of being sustained through the forces applied in the crash tests does not, of course, establish that such injury was sustained. As I have already indicated, in order to assess what injury was in fact sustained it is necessary to analyse the factual evidence and the expert opinion together. Consideration needs to be given to the onset and development of the claimant's symptoms.

The claimant's presentation after the crash tests

51. It is perhaps surprising that neither side called anyone who was present with the claimant when he was filming the crash tests. However, I do not consider that it would be appropriate for me to draw any adverse inference either way from the absence of such witness evidence. I simply do not know what attempts, if any, were made to contact the witnesses and/or the reasons why either side did not seek to call them. I must consider the evidence that I do have.

52. The only lay witness called by the defendant was Paul King, the series producer for Bang Goes the Theory. He did not attend the filming but stated that he had spoken to the producer, Nikki Seare, after filming and that she reported that things had gone well and raised no concerns about the claimant. Without hearing from Ms Seare directly I consider this evidence to be of limited value. I do though accept that it appears that there was no immediate concern on the part of anyone present that the claimant had suffered significant injury or had been made unwell by the crash tests.

Video clips from the afternoon of 8 February 2013

53. I have watched all the video clips from the day of the accident. I have also taken account of the opinions expressed by the medical experts about the video evidence. The first three tests are captured in real time. The recordings continue after the impact so that the claimant's state immediately after can be observed. It is apparent that the claimant felt the effects of each impact. He appeared stunned on each occasion. After the first test, he appeared to recover quickly, exited the rig fairly quickly and appeared spontaneous and engaged as he discussed the data from the pressure pad he was wearing. After the second test, he looked more stunned and was noticeably slower to compose himself. He expressed that it was "not very pleasant". Following the third (rear-facing) test, the claimant looked worse. He put his hands to his head and sat for a while before speaking. He professed to feeling "alright". In my view though he was visibly dazed. The overall impression of these three video clips is that the claimant looked worse after each test. However, there was plainly no loss of consciousness or obvious neurological impairment.

54. The fourth test (second rear facing test) occurred at about 15:30. There is a short slow motion clip of this test but no real time footage. There is therefore no video evidence showing the claimant's state immediately after the final test.

55. The next clip was filmed at 16:11. When the clip starts, the claimant looks somewhat stunned. He requires prompting but then appears to get into his stride and is able to discuss the results from the pressure pad. Having viewed the clips that follow, it is clear that there was no gross disruption of functioning. It is though apparent that he was struggling to some extent and was experiencing some ill effects from the collisions. It is also notable that he appeared to be seeking support by repeatedly leaning on the table.

56. The next series of clips were filmed between 17:21 and 17:44. The claimant was filming a short piece to camera to be shown in the programme after the tests. He was very clearly struggling to remember his script. There are multiple 'outtakes'. Dr Heaney, the defendant's neurologist suggested during his evidence that the difficulty was remembering complicated details of EU regulations. Having watched the videos, that is simply not right. The claimant was plainly struggling with remembering quite basic details. There was evidence that he was usually very good at remembering his lines, known for being able to record many pieces in just one take. Here it took 17 or 18 attempts to film a 28 second piece. Even acknowledging that even the most experienced presenter may on occasion stumble over their lines or encounter a block, the claimant's presentation a couple of hours after completing the tests was unusual. Dr Heaney accepted in his written and oral evidence that the videos demonstrated some cognitive impairment.

The claimant's condition later on 8 February 2013

57. The claimant says that he has difficulty with his memory for events on the day he filmed the crash tests. He has no confident memory of getting home that night. He cannot account for the hours between finishing filming and getting home which his wife says was around 9.30pm. He has a memory of pushing his bike and being unable to ride it and of sitting on the bed at home with a terrible headache and feeling that if he closed his eyes he would never wake up.

58. Mrs Stansfield described the claimant coming home in an unusual state. She said he was usually thoughtful when he came home from work late but that night he came in noisily. He was ranting and raving and behaving in a very strange manner. He did not look himself. She knew something had happened at work but could not establish from him what it was. She was concerned for his mental state, something that had never previously caused her any concern. He was "agitated, frightened and wild-eyed." He was confused, incoherent and repetitive. He did not know how he had got home. He was convinced if he went to sleep he would not wake up and so set an alarm to go off intermittently.

59. Mrs Stansfield said that she offered to take her husband to A & E but did not insist he went. It was put to her that if the picture she painted was accurate, she would have sought urgent medical help. I think there is some merit in that point. The reality is that, although she was concerned about her husband, she did not attach as much significance to his condition then as she does now. She said she did not then understand the severity of what had happened. The defendant does not suggest she was being untruthful but her evidence must be viewed as having been given with the benefit of hindsight. However, I can and do accept Mrs Stansfield's evidence that the claimant was agitated, confused and behaving uncharacteristically when he got home that night.

60. In 2014, the claimant began seeing a clinical neuropsychologist, Dr Doreen Baxter. In 2017, he underwent further sessions with her. In the course of those sessions, the claimant revealed that his daughter, who had been aged 7 at the time of the crash tests, remembered him coming into her room that night. Dr Baxter interviewed the claimant's daughter. She told Dr Baxter that she remembered the claimant coming in when she was in bed and:

> "He was different, in a rush, bumping: speaking quietly, his voice was empty … His face didn't move at all; his eyebrows fell down over his eyes, his eyes were unfocussed. He didn't stay in room long. He seemed to walk really weak."

I bear in mind that this account has not been tested in cross-examination and that it was given by the child in the presence of her father. On the other hand, the account was taken by a clinician and not for the purpose of litigation. In my view, it adds some support to Mrs Stansfield's account and is further evidence that the claimant's presentation when he returned home that evening was a cause for some concern.

Presentation in the days following the crash tests

61. The claimant attended his G.P. out of hours service on the morning of Saturday 9 February 2013. The notes record the following initial history:

> "… Went Go Karting. Did multiple "crash tests" for a TV program > headaches after being shaken around. Wore helmet. Sl[ight] nausea. No visual disturbance …"

Further details were obtained by the doctor who examined him:

> "… Today the pain is at the root of his nose and maxillary/frontal sinuses. No neck stiffness / photophobia / headache. Has felt sl[ightly] nauseous, no vomiting. Feeling anxious that he might lose his mental capacity, on which he depends for work. Slight pain in neck / shoulders from repeated whiplash injuries yesterday."

On examination, he was said to look well with "no meningism". The doctor diagnosed whiplash injury with no evidence of head injury. He was shown exercises and told to take over the counter analgesics for his whiplash injury. He was advised to attend A&E if he developed new symptoms relating to head injury.

62. There are some oddities about the record of the out of hours attendance. Dr Heaney the defendant's neurologist suggested that he read the entry "No neck stiffness / photophobia / headache" as meaning the claimant had none of those symptoms. I would agree that this is the most natural reading. However, the reporting complaint was headache and the claimant had a whiplash injury. For what it is worth, I take this as confirmation of the "no meningism" entry. However, I would not read too much into it. It is also an odd feature that so early on the claimant was expressing concern he might lose his mental capacity upon which he depends for work.

63. That afternoon, the claimant sent an email to Dr Freeman. He said that he had been a little worried about how poorly he could string the closing piece to camera together after the crashes. He complained of a "strong persistent headache" and said that he did not feel quite himself. In the evening, he sent an email to his friend Chris Hill in which he said he was "still suffering from the last collision (or just the accumulation of biggest hits)". He said he had a "strong consistent headache and none too sharp thinking ever since." The claimant told Mr Hill he was a "little worried".

64. The following day, 10 February, the claimant sent a text message to Dr Freeman in which he said his headache was "roughly half of what it was". He said he was improving and was not sure what to report as he did not want things to get out of hand. Dr Freeman explained she had advised him that the producer/ director of the shoot should be aware of his situation and an accident form should be filed. The claimant said he was still concerned and would follow the advice to go back to hospital the next day if it had not cleared up.

65. The claimant did attend A&E on the morning of 11 February. The presenting complaint was "head injury". It was recorded that since the crash tests he had headaches over both eyes and from the back of his head to the top. On examination, his Glasgow Coma Scale score was 15 (normal) and no signs of head injury were detected. Whiplash / musculoskeletal pain was diagnosed and the claimant was discharged with a head injury advice sheet.

66. The claimant did not attend filming that day. He said that this was the first sick day he could recall taking in 15 years. It was unheard of for a presenter to miss filming. The claimant said he would not have called in sick or gone to A&E unless he was feeling really bad. That afternoon, he responded to an email from Ms Seare, enquiring as to how he was. He said that he had not been in great shape but, having been to the hospital, reported that it had been unpleasant but he did not think it was too serious. He went on to reflect on how the head moves within a collision and to suggest that something could be added into the voiceover about this. He closed by saying he was taking it easy that day.

67. In his evidence, the claimant indicated that his memory of that Monday was patchy. He had a memory of leaning against some railings talking to someone on his phone. The railings are about a mile from the hospital and he did not know why he was there. He also recalled being in a coat shop. Although he could not remember buying a coat, he had acquired one shortly after the crash tests and presumed he had been feeling cold, as he often did after the tests, and had bought the coat that day.

68. Dr Freeman spoke to the claimant on the Monday. She recalled he said he was feeling "crap". He said he was coming to London. They were going to meet up but he only contacted her as she was about to get the train home and she continued on her journey. She accepted that if she had been really worried about the claimant she could have met him or told him not to come to London. She said that when she spoke to the claimant in the days immediately after the crash tests, he never sounded confused but he was repetitive. She said:

> "So it was weird because he sounded like he was completely compos mentis but then he was so repetitive; that was weird."

Dr Freeman said she was concerned about the claimant during these early days but not to the extent that she thought it necessary to intervene and insist he needed medical attention.

69. In his written evidence, the claimant said he had no memory of the next day, 12 February. He assumed he had gone back to work. In fact, it emerged at trial that he had flown to Toulouse that day for a presentation to Airbus. His friend Chris Hill, a producer, had flown from America to accompany him. They returned the following

day. In his written evidence, the claimant recalled the trip to Toulouse, which he thought had been around February/March 2003. He remembered being in the hotel room holding his head and "feeling absolutely destroyed" and wondering what had happened to him. He recalled parts of the meeting and not wanting to be seen as incapable of doing the job. He could not recall the flight home. It is notable that Mr Hill made no reference to the Toulouse trip in his statement. He said in evidence that at the time it did not seem an enormous thing. Mrs Stansfield recalled her husband going to Toulouse but not the exact date. She said he had been embarrassed because Chris Hill carried him.

70. On 14 February, the claimant was filming a piece about making plastic from potatoes. I have viewed the video footage from that day. It is fair to say that the claimant's presentation in that film is unremarkable. There was a script for the filming. Recognising that the clip is the final edited version and that there may have been outtakes, it nevertheless appears that the claimant was able to follow the script. There are no obvious signs that the claimant was having any difficulty at all.

71. The claimant's neurology expert, Dr Sekhar, suggested that there were two subtle signs of abnormality. When the claimant was mixing vinegar in a pan, he was frowning. Dr Sekhar suggested that was consistent with the claimant's account that he could not smell the vinegar. He also pointed to a moment where the claimant was crouching on the ground and appeared to be resting his right knee on the ground. Dr Sekhar suggested that could be an indication of balance problems. Set against this, there is a sequence where the claimant used his body to demonstrate how molecules line up. At one point that involved him standing on one leg and leaning in quite an awkward way. He did not lose his balance then. I am unable to accept that the video clip provides any evidence that the claimant was experiencing difficulty with his balance that day. While I think it would be difficult to view the frowning as positive evidence of loss of smell, the video is not inconsistent with a loss of smell and there is other contemporaneous evidence of this. In an email to Nicola Seare sent that evening, the claimant wrote:

> "Neck up and down but still improving overall. Been ok filming today. I just haven't got my full sense of smell back yet, but I'm going to see that soft tissue expert again next week and one more bout of his skills should do the trick."

72. The first recorded account of balance problems appears in the accident report created on 20 February. This includes the following account:

> "On the day of filming, only 2 repetitions of the experiment were made in each direction, with no noticeable injury or di(s)comfort … The shoot was completed as expected with no cause for concern. However, 3 days later production were informed by Jem that his neck had begun to hurt later on the Friday evening, that he had suffered loss of balance and dizzy spells, and had hardly slept on Fri night."

73. From this, it is apparent that a complaint of loss of balance and dizzy spells occurring on the night of the crash tests was made as early as 11 February, although not recorded in the A&E records of the same date.

74. Mrs Stansfield's evidence was that in the two weeks after the crash tests it was obvious that the claimant was not well. He had constant headaches and was not behaving normally for him. He had no energy and could not concentrate. She did not think he was fit for work. She described him as "totally bewildered that he couldn't work through how he was feeling." She said that he "just wasn't functioning."

75. Having reviewed all the available evidence about the first week after the crash tests, I conclude:

    i) The claimant was sufficiently troubled by his symptoms to attend the out of hours service and then to go to A&E on the Monday. He was generally feeling unwell that week.

    ii) It was highly unusual for him to take the day off work and this is another marker that he was experiencing significant symptoms.

    iii) There were no gross signs of neurological impairment. The claimant's condition when examined on 9 and 11 February did not give rise to any medical concern.

    iv) The claimant was showing much concern about what had happened to him from a very early stage. Mrs Stansfield and Dr Freeman also had some concern. They recognised that the claimant was not himself. However, they were not unduly concerned. Mrs Stansfield allowed the claimant to go to the out of hours service and to A&E alone. Further, no one suggested that he should not travel or work that week.

    v) The claimant was well enough to fly to Toulouse and to get back to filming that week. His presentation on film was relatively normal.

    vi) The claimant's reporting of symptoms was fairly non-specific and not always consistent. He did though report symptoms including headache, dizziness, loss of balance and loss of smell within the first few days after the crash tests.

Events of 20 to 22 February 2013

76. On 20 February 2013 (12 days after the crash tests), the claimant was filming a piece about the future of medicine and health tracking. This took place In Harley Street and involved a doctor, Dr Jack Kreindler. I note that Dr Kreindler did not give evidence. According to the claimant, during a break in filming, Dr Kreindler commented on how unwell he looked.

77. There is video footage from that day. While it would be very difficult to draw any strong conclusions from viewing the video footage in isolation, I do consider the claimant's presentation to be consistent with him feeling unwell at the time. Although his speech seems normal and there is no gross disruption of any functioning, the claimant does not appear entirely at ease. Significantly in my view, the claimant is obviously repeatedly placing his hand on the table in front of him as he is speaking on camera. This looks unnatural. Some attention was given to this in the course of the expert evidence. The defendant's audio-vestibular expert, Dr Surenthiran, said that he disagreed that this apparent tactile reinforcement was a sign of vestibular problems. He suggested that the claimant was standing with one foot in front of the other making him

less balanced than if standing straight with his feet apart. He pointed out that the claimant was able to lift his hand and remain "rock steady" while speaking coherently. Dr Surenthiran considered that the clip showed the claimant had excellent balance. The claimant's expert, Dr Dasgupta suggested that it could be expected that the claimant would put on extra effort while filming and that might mask more obvious signs of vestibular symptoms. Dr Sekhar suggested that the cross-legged position adopted by the claimant might itself be suggestive of proprioception uncertainty. He thought it surprising that an experienced TV presenter would stand in that way and suggested it could point to discomfort or loss of confidence.

78. It seems to me that, even to the casual observer, the claimant's presentation in the video clip with Dr Kreindler is abnormal. The repeated touching of the table does suggest some impairment in the claimant's sense of balance. On the other hand, I do accept Dr Surenthiran's observations that he was able to retain balance while his hand was raised. I bear in mind that the claimant had exceptional balance before the crash tests, as demonstrated for example by his ability to walk on his hands. My interpretation of the video evidence, aided by the experts' views, is that there was no gross disruption of the vestibular system but that the claimant did have a sense that his balance was impaired.

79. There are some further clips of the claimant leaving the Harley Street premises. He was recording a very simple piece to camera, involving talking as he left the building. Several takes were required. After the first, someone is heard telling him he was "stilted" and that he should tuck his shirt in. Other clips show him walking in the wrong direction and forgetting what he was going to say and becoming frustrated. Even after multiple takes, he was struggling to get things right.

80. Although I did not hear from Dr Kreindler, the contemporaneous evidence plainly confirms that he was concerned about the claimant's condition at the time. At 17:51, he sent an email to the claimant in the following terms:

> "I have spoken to my Neurologist colleague Dr Paul Jarman at Queen Square who agrees with me that you should immediately go to A&E or a private Neurologist to be assessed and scanned to rule out a sub-dural haematoma or haemorrhage given your 12 days of headache following an 8g deceleration injury with subsequent symptoms of dizziness and peri-orbital bruising. These are red flags for a major intra-cranial injury.
>
> Please let me know if I can help further. Paul Jarman has been Cc'd."

This is a significant piece of evidence. Dr Kreindler must have been sufficiently concerned as to not only give the claimant some advice but to follow up after they parted by speaking to a neurologist and sending that email advising him to seek immediate neurological assessment.

81. The claimant gave evidence that he was really frightened by what Dr Kreindler had said to him. He thought he might drop dead, in which case he wanted to get home to his family rather than be wandering around London looking for a hospital. He said that Dr Kreindler had spoken to Mr King and had become very angry as Mr King wanted the

filming to continue. It was plain when the claimant was giving evidence that he was angry with what he perceives as a lack of concern from Mr King.

82. The producer the claimant was working with, Eileen Inkson, gave evidence for the claimant. She remembered the claimant mentioning headaches and him speaking to Dr Kreindler and being told to seek specialist advice. She did not understand this to be so urgent as to require filming to stop. She had the impression that the claimant was not very well but was endeavouring to "push through". Ms Inkson was clearly sympathetic to the claimant, yet she apparently did not perceive any inappropriate response from the BBC at the time.

83. Mr King said that he did not remember speaking to Dr Kreindler. He did recall contact with the claimant. After hearing the claimant's evidence, he searched for text messages and notes from the time. He said he was supportive of the claimant and encouraged him to go for a scan. His notes appear to confirm his concern and that he was attempting to convey to the claimant that he should go to be checked as soon as possible.

84. I do not consider the dispute about what Mr King did or did not do to be particularly relevant to the issues I must decide. In my view, the contemporaneous evidence does not demonstrate an inappropriate reaction from Mr King. Rather, it suggests that the claimant was not thinking clearly at the time. On any basis, he had been clearly advised by a doctor to seek medical assessment but chose to go home. It seems to me that he genuinely believes he was not looked after by the BBC as he thinks he should have been and that he holds Mr King responsible. I note that this view seems to have developed by 21 February 2013 when the claimant emailed Mr King complaining that he had received mixed messages from the BBC which was unhelpful for his state of mind. He said he had been having trouble sleeping and felt less robust than usual.

85. Dr Freeman recalled speaking to the claimant on 20 or 21 February when he told her that the doctor he was working with had said he might have a bleed on the brain. He sounded very frightened. After filming, the claimant went to a pub with Nick Watson, who he was collaborating on for a series called "None of the Above". At 20:26, he sent Mr King a text message which said:

> "I'm on my own. Confused, frightened and tired and I don't know what to think anymore. I'm on my way home and won't be available for the shoot tomorrow morning."

86. Looking at the contemporaneous evidence and the accounts of Ms Inkson and Dr Freeman, I do not think that the claimant's evidence about what happened on 20 February 2013 is entirely accurate. I believe that his recollection has been coloured by an emotional reaction. I accept that he was not feeling at all well and had not been sleeping properly. I consider that he was not thinking clearly and that his memory is confused. I do not find that he was being untruthful in relation to the events of 20 February 2013.

87. Having taken account of all the evidence about 20 February 2013 and the submissions about the evidence, I find as follows:

i) The Claimant was noticeably unwell. However, he was not so unwell as to be incapable of filming. He was also able to have a meeting after filming and to make his own way home to Brighton by train.

ii) Dr Kreindler was concerned that the claimant may have been suffering neurological effects from the crash tests and considered this required urgent investigation, albeit not on an emergency basis.

iii) The claimant was not thinking clearly which explains why he went home rather than immediately seeking medical assessment in London.

iv) The claimant was frightened by what Dr Kreindler had told him.

88. Having returned home on the night of 20 February, the claimant sent an email to his agent, Hilary Murray, in the early hours of the following morning (at 02:13). It is notable that the email was sent late at night, which perhaps ties in with his account of not sleeping. He explained that he had been struggling with persistent headaches since the crash tests and expressed concern about what Dr Krieidler had said. He told Mrs Murray that he had cancelled filming for that day pending a scan and neurological opinion. He ended the email by reporting good progress in his meeting with Mr Watson. This email is coherent. It appears that the claimant was informing his agent of the concerns about his health and explaining that he was missing filming to seek medical input but was also looking ahead and expressing optimism about None of the Above.

89. The claimant returned to Harley Street on 21 February to undergo a scan on a private basis, apparently arranged via Dr Kreindler. The scan showed no evidence of a subdural haematoma. The claimant accordingly returned to filming. In the final edited piece, the claimant appears lucid and animated with no obvious signs of ill-health. However, I note Ms Inkson's evidence that he could come across alright on screen while behind the scenes it was clear he was not feeling great. That evening, Mr King sent a text message thanking the claimant for filming that day but telling him that he must stay at home the next day.

90. The claimant did not film on Friday 22 February. That evening, Stuart Krelle of the BBC Legal Department sent Mrs Murray an email, which was either copied to or forwarded to the claimant. It indicated that discussions had taken place and it had been decided that the claimant could not be allowed to return to work until a medical practitioner had analysed the results of his scan and certified that he was fit to return to work. The email stated that unless that confirmation was received by 6pm on Saturday, Monday morning's planned filming would have to be cancelled. The email offered "without liability" to meet the costs of a consultation and report if required. It concluded by explaining it was necessary to be sure the claimant was well enough to contribute to filming and to ensure the BBC had advice about any precautions or arrangements required for his safety and well-being.

91. This email greatly upset the claimant. It is unfortunate that it was sent so late on a Friday. Obtaining the required report on a Saturday was bound to present practical problems. The claimant thought the letter was "intimidating". He understood his job was at risk. Mrs Stansfield said she found him in tears. It was probably the first time

she had ever seen him cry. He was looking through the phone book to find a doctor. She advised him that he should not be signed as fit to work. She did not think he was.

92. The claimant phoned his brother, Ben Stansfield. He gave evidence that the claimant was in a state and worrying about his job security. This was the first time Ben Stansfield had heard anything about the crash tests. The claimant told him what had happened and that he had been for a scan. Ben Stansfield said he said that he was also concerned about the email from the BBC. He thought the BBC were trying to cover themselves. He helped his brother with his response to the email. He said the claimant was scared about how he was and scared for his job.

93. The email sent by the claimant at 22.38 that night was generally positive. He said that he was much less fearful after the scan. He referred to still having continuous head pain but said he had full movement in his neck. The claimant highlighted the difficulty of having a medical assessment over the weekend but acknowledged that it was probably a good idea to get a formal sign off given his ongoing symptoms.

94. For my part, I do not think the email from the BBC was inappropriate or that, read objectively, it should have given rise to any great cause for concern. I do though accept that the claimant became very upset by it and that his wife and brother viewed it as worrying. I bear in mind that the claimant was self-employed and that his income depended on him being able to film. I accept that his brother helped him to respond in an appropriate way and that there was an element of playing things down. I do not regard this as evidence of a lack of honesty. Given the claimant's personality and personal circumstances, I find it unsurprising that he would seek to be positive with the BBC even while worried and confused by his ongoing symptoms.

Developments in the last week of February 2013

95. I find that the claimant had an active weekend over 23 - 24 February. He was wearing a tracking device for the piece he was filming about the future of medicine. This recorded that he had taken over 16,000 steps on the Saturday. When filming the second half of the piece on 5 March, Dr Kreindler joked that he appeared to have been training for a marathon. The claimant replied that he was "looking after the kids". The tracking device also appeared to show that he was averaging 8.34 hours sleep per night. The claimant disputed the results from the tracker. He said it was not always working. I accept that the device was unlikely to have been wholly accurate. I do not know how sleep was purportedly tracked and would be cautious about relying on the results as showing the claimant was truly asleep throughout that time. However, the high step count is consistent with other evidence that he had an active weekend. In an email sent at 14.31 on the Sunday, the claimant said he had tried to have as normal a weekend as possible "cooking, cleaning and kid wrangling". He expressed confidence that the demands of filming would be no greater than those of the weekend and expressed confidence that he could return to work.

96. The claimant played table tennis on the evening of Sunday 24 February and he experienced a worsening of his symptoms when he did so. The claimant made reference to this both in an email sent to Max Brunold on the Monday morning and in another email to Dr Freeman sent on Tuesday 26 February. In both emails, he referred to the pain in his head increasing but did not mention tinnitus or any other "new" symptoms. Writing to Dr Freeman, the claimant said:

> "Head pain fairly low now but had a shock playing table tennis. Firstly, I wasn't as good as I remembered and secondly it made my head hurt like hell. I now strongly suspect it's sinus damage and it seems to have a jigging around limit that's ok for most stuff but not table tennis."

In his written evidence, the claimant explained that he played table tennis competitively with a local team. He played only once after the crash tests and said that he could not see or follow the ball so had to abandon the game. He said that he had not been back since.

97. On Tuesday 26 February, the claimant saw Dr Webborn, a doctor at the Sussex Centre for Sport and Exercise Medicine. Dr Webborn was known to the claimant and the BBC and the parties had agreed he would be suitable to assess his fitness for work. Having examined the claimant, Dr Webborn provided a letter to Mr Krelle. The defendant places significant importance on this letter.

98. Dr Webborn began by saying that he had seen the claimant with regard to "the ongoing problems of facial pain". He noted that the claimant had initially had a lot of neck pain and signs of a whiplash injury which had been "fairly successfully treated". He then said that the claimant remained very tender over his frontal sinuses. Dr Webborn indicated that he was going to ask the doctor who organised the scan whether there was any evidence of inflammation or fluid in the sinuses. He concluded that he hoped matters would resolve with symptomatic treatment but advised that the claimant should not be exposed to sudden acceleration / deceleration forces for the next two months.

99. After checking the scan, Dr Webborn emailed the claimant on 28 February confirming that the scan was "clear". He enquired as to whether treating the sinuses was helping. The claimant replied that sinus pain was still present but improving and that it was hard to tell if treatment was making a big difference as "with general activity it's now pretty low but still flares up with anything more vigorous." On the same day, Dr Webborn confirmed to Mr Krelle that he thought the claimant was fit for filming, although that depended on what he might be put through. He suggested that if the symptoms were not responding over the next couple of weeks he may require further investigation.

100. I note that there is some footage of the claimant on 28 February, when he filmed a piece about infectious diseases. He can be seen riding a bicycle, apparently without difficulty, although this video evidence was not given any particular attention in the course of the trial.

101. In his written evidence, the claimant said that he had deliberately downplayed his symptoms as he was desperate to go back to work and did not want to be the cause of shoots being cancelled. The claimant was cross-examined about this at some length. Mr Watt-Pringle invites me to draw an adverse inference from the manner in which the claimant answered questions. He also submits that, if what the claimant says is right, that means that at an early stage he was "prepared to mislead a doctor where he considered that it would serve his financial interests."

102. It was apparent that the claimant did not find this part of his questioning easy. The way in which he answered questions is something I have considered carefully. I noted at the time that the claimant could be considered somewhat evasive and that my

impression was that he was a poor historian. I also noted that I did not have the impression he was being dishonest. Ultimately, my assessment of the claimant's evidence is informed not only by what I saw and heard when he gave evidence but also by all that I heard about him in the course of the trial. He is plainly a complex character. It is also apparent that his presentation now is very different to that seen in 2013. There has been an obvious loss of physical conditioning and of self-confidence. I consider that he is giving evidence from a very different perspective than the one he had at the time he saw Dr Webborn.

103. Although I accept that the claimant was reluctant in the witness box to say whether or not he had deliberately downplayed his symptoms to Dr Webborn, I think it would be unfair to place too much weight upon this. The claimant's response that "It's not a yes or no answer" is understandable. When it was suggested to him that he was prepared to mislead Dr Webborn, he said:

> "I can see that looks quite serious, but my consideration at the time is, I was worried for my job and what I wanted to do was to be back at work and give them the letter that they wanted."

I do not think this is evidence of dishonesty, or indeed something that is particularly unusual or surprising in the case of a self-employed person.

104. Having considered all the relevant evidence and the submissions made about this aspect of the case, I find as follows:

i) The claimant continued to be troubled by symptoms at the end of February. The major symptom was headache but the claimant continued to feel generally unwell and was worse after activity. For example, playing table tennis had not only caused an exacerbation of his headache but he had found it difficult to play.

ii) The claimant was concerned about the persistence of his symptoms. However, he was not then anticipating that they would remain into the long term.

iii) The claimant did wish to resume work. He believed he was fit to film, although still symptomatic.

iv) When he saw Dr Webborn he was presenting a positive outlook to assist with his return to filming. That was not dishonest but is the sort of thing many people do when attempting to get on with things.

v) The claimant's recollection now is shaped by his experiences over the following years and is not reliable. His condition in late February 2013 was not as bad as he may now believe.

<u>The fall in the snow on 12 March 2013</u>

105. On 12 March 2013, it snowed and the claimant decided to take out a snowboard that he had made a few years earlier. He took it to a fairly gentle slope and made a few runs. He fell lightly once at the bottom of the slope, then went up again to have another slide. He then slipped backwards landing fairly heavily on his bottom. He did not hit his

head. Immediately after the fall, he said he had a headache and felt deeply exhausted. He was unable to carry on.

106. The earliest account of the fall in the snow is contained in an email from the claimant to Paul King dated 17 March 2013. The first part of the email is unrelated but the claimant adds at the end "on a separate note" that he had a fall on Tuesday last week and his headaches had come back straight away. He explained he was going to see his doctor.

107. The claimant attended his G.P. on 19 March 2013. This was the first time that he had been to his G.P. since the crash tests. He was still complaining of pain behind the nose. He gave the history of the crash tests. The records contain no mention of the fall in the snow. The claimant was referred to an ear, nose and throat consultant, Dr Das. In a letter dated 9 April 2013, Dr Das wrote:

> "He was performing a crash test approximately six weeks ago which simulated a head on collision of a car at quite extreme forces. He was exposed to the crash three times and each time noticed severe neck ache and nasal/facial pain. Fortunately the neck ache has now resolved but two weeks following the testing he fell in the snow and sustained further nasal and facial pain."

108. An account of the fall in the snow is to be found in an email dated 10 April 2013 sent by the claimant to Philippa Miles at the BBC. In that email, the claimant explained what had happened when filming the crash tests. He said that he had initially been a bad way but had improved. He then said:

> "After three weeks I got to the point where I only had mild headaches at night. Then I fell quite heavily (but nothing unusual) in the snow. I felt disproportionately shaken that afternoon and the headaches behind my nose came back 24 hours per day, stronger at nights. I still felt that during the day these were ok for working …"

I consider that it is of note that the claimant was saying that the fall was nothing unusual and that the effect upon him was disproportionate. The claimant went on to say:

> "… over this last weekend my condition got much worse again and is now almost as bad as just after the crashes. I've gone back to feeling utterly exhausted and shakey by the evenings and have a slight ringing in my ears in quiet places."

I note that this is the first account I have seen in the contemporaneous evidence of symptoms of tinnitus.

109. A further reference to the fall in the snow appears in a letter from Dr Loosemore dated 8 May 2013. The claimant saw Dr Loosemore together with a physiotherapist privately on 3 May 2013. Again, Dr Loosemore recorded the history as dating back to the crash tests. He referred to the CT scan on 21 February and then noted:

> "The pain improved but he then fell backwards in the snow, the pain in his face got worse, he felt unwell disorientated, unsure and got severe tinnitus which stopped him sleeping, the pain was waking him at night."

He went on to say that the claimant was feeling better after one month and played table tennis for his local team and that afterwards "the headache became bad again and the tinnitus got worse."

110. In June 2013, the claimant saw Dr Jarman, consultant neurologist. After that consultation, Dr Jarman wrote to Dr Loosemore (letter dated 27 June 2013). He suggested that the claimant's symptoms were "very suggestive of the post head injury or post-concussion syndrome" related to the crash tests. He also said that some of the symptoms had a "slightly vestibular flavour" and noted that the claimant had a lot of tinnitus. Within this letter, Dr Jarman wrote:

> "As you know he fell heavily in the snow three weeks after the crash tests and although he didn't have a head injury as far as he can remember he felt much worse afterwards."

111. Having seen this letter, the claimant wrote to Dr Loosemore suggesting that a couple of things in the letter were inaccurate. He said he felt he ought to clear them up as the letter could be used as a point of reference by other practitioners. He said:

> "The fall in the snow referred to was really not heavy at all – which is why it stood out as seeming to have a very disproportionate effect on me. I am also conscious that it may be a red herring … I've noticed that any day with high activity levels tend to increase my symptoms dramatically."

112. Looking at this letter in context, I am entirely satisfied that it was not written with litigation in mind but rather was written for its stated purpose to ensure accuracy in the history. It is apparent that the claimant was seeking an explanation for his ongoing symptoms and was keen that treating clinicians should have any possibly relevant information.

113. Having reviewed all the available evidence about the fall in the snow, I find as follows:

i) The claimant fell backward from his snowboard causing him to sit down heavily on his backside. It was the sort of fall commonly experienced by snowboarders and not one which would usually be expected to cause any significant injury.

ii) The claimant experienced a significant exacerbation of his symptoms after the fall. He felt quite unwell afterwards.

iii) At the time, the claimant recognised that the fall had a disproportionate effect on him.

iv) Throughout the period up to and immediately after the fall in the snow, the claimant continued to relate his ongoing symptoms to the crash tests.

v) The evidence is consistent with him experiencing an exacerbation of his condition rather than having recovered and then experiencing a wholly new set of symptoms.

The onset of tinnitus

114. The evidence as to when the claimant first experienced, or first noticed, symptoms of tinnitus is far from clear. The claimant invites a finding that he had tinnitus, which worsened after playing table tennis on Sunday 24 February 2013. The argument advanced by Mr Grant is that the court can be confident that the account given to Dr Loosemore (recorded in the letter of 5 May 2013) that the claimant's tinnitus got worse after playing table tennis is reliable. The contemporaneous evidence shows that the claimant played table tennis on 24 February, and his evidence is that he only played table tennis once after the crash tests. Therefore, Mr Grant contends, the claimant must have had tinnitus within 16 days of the crash tests and before the fall in the snow.

115. I am unable to make the finding Mr Grant invites. To do so would be to take one part of the letter out of context and to ignore other inconsistent parts of the same letter. It would also involve ignoring other evidence in the records. As I have noted above, Dr Loosemore, recorded that the claimant got severe tinnitus after the fall in the snow. His letter went on to say:

> "After one month he was beginning to feel better and played table tennis for his local team, he was ok at the time (60% of normal) but afterwards the headache became bad again and the tinnitus got worse."

That account does not fit with the claimant's account of playing table tennis on 24 February, when he says he had to stop because he felt so unwell, or with the contemporaneous accounts to Mr Brunold and Dr Freeman. The only thing that is clear is that the account recorded by Dr Loosemore is confused to some extent. In the circumstances, I am unable to rely upon that account as establishing that the claimant had tinnitus before the fall in the snow.

116. As I have indicated, the first reference to tinnitus which I have seen is that contained in the email to Ms Miles on 10 April 2013. In July 2013, the claimant saw Dr McKenna, a clinical psychologist in connection with his tinnitus. The history obtained by Dr McKenna was that after the crash tests, the claimant's symptoms eased slightly but three weeks following their onset they became very pronounced again. A week after that he developed tinnitus which had persisted ever since.

117. Having reviewed all the evidence, I find it is more likely that the onset of any complaint of tinnitus was in March rather than in February. Although the claimant complained of other symptoms after playing table tennis, he did not mention ringing in his ears then. Equally, his contemporaneous accounts of symptoms after the fall in the snow did not reference tinnitus. On a balance of probabilities, I find that the claimant first became aware of tinnitus a few weeks after the crash tests but that its onset did not coincide precisely with the fall in the snow.

The progress of the claimant's condition later in 2013 and beyond

118. To avoid adding unnecessarily to the length of this judgment, I do not propose summarising the factual evidence of the claimant's symptoms and progress after the initial period in detail. Mr Grant had prepared a helpful chronology for use at trial. Save where I have been told otherwise, I have taken this to contain an accurate and fair summary of the voluminous material, including medical records and emails. I stress that I have considered the entire evidential picture, cross-referencing the contemporaneous material with the lay and expert evidence I heard at trial.

119. By way of a brief summary, it is apparent that from April 2013, the claimant had become concerned that he was not getting better and was seeking medical input from various sources. The chronology suggests that his symptoms would improve when he rested but worsen when he had been busy. A pattern of struggling, getting better, then seeking to resume his normal lifestyle and becoming wiped out emerged. On 19 April 2013, he saw his G.P., who recorded an "odd collection of symptoms". He was worried about his capacity to work as the family's main breadwinner. The claimant did continue filming and made trips to Sweden and Toulouse. There plainly continued to be concerns about him and the BBC referred him to a private rehabilitation service.

120. The claimant has seen multiple medical clinicians and practitioners of alternative remedies in disciplines including neurology and neurosurgery, maxillo-facial, audio-vestibular medicine, physiotherapy, chiropractic therapy, psychiatry and mental health. There have been multiple attendances on his G.P. and at A&E, including on occasion by ambulance. He has undergone brain scans. He has been prescribed amitriptyline. A review of the medical records supports Mr Friedland's observation about the claimant seeking to find a logical explanation for his symptoms. A pattern emerges of him seeing multiple clinicians in the same field and seeking answers with increasing desperation.

121. In June 2013, the claimant took a month away from work on medical advice. When he returned to filming, he reported to his agent that he had become ill by the end of a long day. It is apparent that he was struggling with the schedule. In October 2013, the claimant experienced an exacerbation of his symptoms when he came off a small roundabout in a playground while playing with his children. Having heard his evidence about this and having seen a photograph of the roundabout, I am satisfied that this was not a significant event but rather is another example of his symptoms being exacerbated by relatively minor occurrences. At the end of October, the series director, Ed Booth, expressed concerns about his physical and mental condition.

122. In November 2013, the claimant travelled to Abu Dhabi for a science fair. While there, he recorded a podcast which I have listened to. It is fair to say that the claimant presents well on it. He is upbeat and displays no signs of being unwell. The claimant explained that he paid a lot of money to travel first class to allow him to rest. He was supported by Mr Hill, who did the bulk of the preparation work out there. He carefully managed his time so that he did only two half-hour events and rested a lot. He managed the podcast carefully and felt he did that well but reached his limit at the end of the 20 minute recording.

123. The claimant continued to experience symptoms after his return from Abu Dhabi. On 28 November 2013, Ms Adcock, a private occupational therapist engaged as part of his

rehabilitation programme, noted that he continued to present with "subtle but significant difficulties." By the end of that year, he was reporting feeling worse again.

124. In January 2014, the claimant began filming the eight series of Bang Goes the Theory. In February, he informed Mrs Murray that he felt the filming was taking its toll on him and that he did not think they should look for any more jobs for him in the near future. On 12 February 2014, Chris Hill emailed the claimant suggesting he quit Bang Goes the Theory for that year. He wrote:

> "I've watched you decline over the past 12 months, not get better. I looked at you today and reckoned there isn't much further a fella can decline."

The claimant ceased work on Bang Goes the Theory at the end of that month, halfway through the eighth series. The claimant has done some limited work since but has never returned to working at anything close to his previous levels. In the tax year ending April 2014, he had worked just 58.5 days.

125. The evidence from Mrs Stansfield, Ben Stansfield, Dr Freeman and Mr Hill consistently confirms a significant and persistent change in personality and functioning. This evidence was not challenged. It is perfectly apparent that the claimant is not the man that he was prior to the crash tests in February 2013. His wife explained how he had tried to carry on at first but after the first year it became apparent he was not getting better. She had become desperate by 2015. There has been a huge impact on their relationship and family life. Ben Stansfield indicated that for short bursts the claimant could come across well but this was not sustained. He said that he had made some improvements but was still a "different Jem". If he does too much, including working, he becomes fatigued quickly. Mr Hill also describes a dramatic and sustained change in the claimant's personality.

126. On the basis of all the evidence before me, I find that the claimant's condition has plateaued and that he is leading a significantly impoverished life compared to the full and active work and family life he had before the crash tests.

Analysis of the expert medical evidence

127. As I have already indicated, many of the experts viewed this as an exceptionally complex case. Before reaching any conclusions on the expert evidence, I have considered the evidence as a whole and have cross-referenced the evidence from different disciplines and my findings of fact.

128. The medical evidence essentially covers four areas – spine; brain; audio-vestibular system and psychiatric/psychological consequences. The most contentious issues are whether the claimant sustained a mild traumatic brain injury and whether the crash tests caused any damage to the audio-vestibular system.

Spine

129. I have already summarised the agreement between the orthopaedic experts in relation to the spinal injury. In short, they agree that there was no significant damage to the cervical spine but accept that the claimant suffered a soft tissue injury to the neck which

has left him with ongoing neck pain, which is now likely to be permanent. They agree he will not return to his previously physically active lifestyle.

130. I do not accept Mr Grant's submission that this means that the neck pain is sufficiently debilitating in its own right to preclude the claimant returning to working as he did before the crash tests. That appears to misrepresent the agreement between the orthopaedic experts. I note that Mr Khan stated in his report that the neck symptoms were of a moderately intrusive nature and that the disability the claimant continues to report was overwhelmingly due to other factors. Neither expert suggested that the ongoing neck pain by itself would have prevented the claimant returning to his previous work. Rather, the neck pain is one factor in a complex presentation. I note that before the crash tests the claimant had continued to work despite experiencing troubling knee pain.

131. In their reports, both experts advised that whiplash injury can be associated with a poor outcome with a complex set of symptoms. The defendant's expert, Professor Clarke, noted that whiplash injury is often associated with a behavioural response which is disproportionate to the trauma sustained and physical signs demonstrated. He highlighted a study in which 70% of patients who had sustained a whiplash injury still had symptoms after 15 years. Symptoms did not improve after settlement of litigation.

132. Professor Clarke found some inappropriate signs on examination. This did not lead him to the conclusion that the claimant was malingering. Rather, he suggested that it might imply a psychological component to the claimant's presentation and continuing symptomology.

133. During cross-examination, the claimant sought to explain away these inappropriate signs. His suggestion that he would be amazed if anyone could sit upright with their legs at 90 degrees was a surprising one, which he maintained even after clarification of what was meant by that. As Mr Watt-Pringle observes no attempt had been made to challenge Professor Clarke's findings or to require him to attend for cross-examination. I accept Professor Clarke's evidence that there were inappropriate signs. I also accept his view as to the likely explanation. On that basis, it seems to me that the claimant's evidence on this was part of the disproportionate behavioural response to which Professor Clarke refers.

134. I conclude that the claimant suffered a whiplash injury which has been directly responsible for moderately intrusive neck pain. The physical injury to his neck inhibits his previously active lifestyle. By itself, the neck injury cannot explain the level of the claimant's disability or the very significant restriction on his ability to work. The fact that the claimant suffered a whiplash injury does not itself prove that his complex set of symptoms are attributable to the crash tests. However, the fact that both experts acknowledge that whiplash injuries can be associated with poor outcomes is a factor I have in mind. The neck injury therefore forms a significant part of the jigsaw, although it is necessary to look elsewhere for the full picture.

Brain

135. Whether the claimant suffered a brain injury is a central issue between the parties. This is not straightforward and involves consideration of the neurological, neuroradiological and neuropsychological evidence in the context of the findings of fact I have made.

136. As the medical literature placed before me makes plain, the medical understanding of concussive head injury and mild traumatic brain injury has evolved over recent years but remains incomplete. Some research has focused on the aetiology of symptoms following mild traumatic brain injury, including diffuse axonal injury and microvascular disruption. Other research has considered the correlation between the apparent severity of injury and long-term outcome. It is apparent that there is scope for legitimate disagreement between informed experts, particularly in relation to the aetiological aspects. One factor that does clearly emerge from the recent research is that, although a full recovery would generally be expected following mild brain injury, a significant minority of patients are left with long-term symptoms. A paper by Baxendale et al "Neuropsychological outcomes following traumatic brain injury" (2019), to which two of the experts in this case (Dr Heaney and Mr Friedland) contributed concluded:

> "Multiple factors determine neuropsychological outcome following traumatic brain injury, and the outcome does not depend solely on the severity of the brain injury. There is increasing support for the biopsychosocial model that conceptualises outcome as a result of a complex interplay between premorbid factors, the extent and nature of the sustained structural damage, the person's neuro-psychological reserve and non-neurological factors impacting on the recovery process."

137. The claimant has seen numerous different treating neurologists over the years. The majority diagnosed mild traumatic brain injury and/or post-concussion syndrome. Some suggested that other factors were involved with references to whiplash injury and psychological effects. Having reviewed the medical records for the purpose of his first report, the defendant's neurologist, Dr Heaney, noted that the claimant had consistently described his symptoms to his G.P. and the various specialists. He advised that it was reasonable to apply the "controversial but useful clinically" diagnosis of post-concussion syndrome.

138. In his first report, prepared in 2015, Dr Heaney concluded that it was likely that the claimant had suffered a mild traumatic brain injury, although it was not possible to say whether that was due to the final impact or the cumulative effect of the series of impacts. He said that the claimant had undoubtedly experienced concussive symptoms. However, he felt the symptoms had improved and then deteriorated in November 2013, which was not typical of post-concussion syndrome. He advised that the symptoms from 2014 were medically unexplained. In his later report (2020), Dr Heaney concluded that the claimant did not suffer any significant brain injury during the crash tests. He explained that in coming to that conclusion he had taken account of the research and the evidence which had emerged since his first report.

139. The signed joint statement between Dr Heaney and Dr Sekhar recorded agreement as to a diagnosis of a "symptomatic mild traumatic brain injury". However, Dr Heaney suggested that it had been an error on his part to sign the statement without amending it to record only that he thought a mild traumatic brain injury was "possible". Clarification of his opinion revealed that he was prepared to accept that there may have been a mild brain injury but not of the nature that would result in any enduring symptoms. While this perhaps illustrates the need for care when preparing and signing joint statements, in the end I do not think the error was particularly significant. It was

clear throughout that Dr Heaney's opinion was that the claimant's enduring symptoms could not be attributed to an organic brain injury.

140. Dr Sekhar's opinion was that the claimant's initial symptoms of headache, dysregulated autonomic symptoms and sleep disturbance were indicative of distinct meningeal vascular injury. He referred to the "neurometabolic cascade" which has been reported in the literature following acceleration, deceleration and rotational forces in the brain. He highlighted that the repeated tests involved a highly unusual mechanism of injury. Dr Sekhar considered that the claimant probably had suffered mild traumatic brain injury, which was making a significant contribution to his ongoing presentation, albeit affected by other factors including pain, vestibular injuries and psychological factors. He considered that the prominent cognitive fatigue was likely to be multi-factorial.

141. As already noted, the neuroradiology experts confirm that there is no radiological evidence of cerebral traumatic injury. Some incidental findings including a pineal cyst were noted. Dr Heaney expressly confirmed in the witness box that the pineal cyst could not cause the claimant's symptoms. Dr Heaney did advise the claimant that the pineal cyst should be followed up. Neither party suggested that the incidental radiological findings had any bearing on the issues in this case.

142. Dr Heaney, highlighted that the claimant had undergone six MRI scans over a period of two and a half years, all of which show no damage. He said it was also significant that there was no evidence of brain atrophy. However, he acknowledged that the scans could not exclude a mild brain injury. His evidence was that the scans provided an important piece of evidence pointing against there being a traumatic brain injury. In the joint statement, the claimant's expert, Dr Sekhar, had pointed out that it was a limitation of the neuroradiology evidence that the first scan did not occur until two years after the crash tests. In court, he stressed that not all diffuse axonal injuries are captured radiologically. Having heard what both neurologists said, I conclude that the radiological evidence is an important piece of evidence against traumatic brain injury which must be put in the balance. However, it is in no way conclusive.

143. Both sides instructed neuropsychological experts. However, the defendant abandoned reliance on its expert shortly before trial. For the claimant, Mr Friedland gave evidence at trial. I was impressed by his evidence which was plainly carefully considered and was informed by his research as well as clinical practice.

144. When undergoing neuropsychological testing, the claimant passed the performance validity tests and appeared to be well motivated when undergoing testing. Mr Friedland considered that his disrupted sleep was likely to be affecting his performance. However, the claimant's processing speed was strikingly impaired. That impairment was consistent across three assessments. Processing speed is something that is often impaired following traumatic brain injury. The level of fatigue reported by the claimant is unusual and beyond what is commonly seen even following severe brain injury.

145. In his closing submissions, Mr Watt-Pringle suggested that Mr Friedland does not consider that the claimant sustained organic brain injury. This assertion does not fully reflect the evidence. When cross-examined, it was put to Mr Friedland that he did not consider there was organic brain injury in this case. He replied, "I think it is possible rather than probable." He added that this was based on the approach adopted at Imperial College where he is part of the multi-disciplinary brain injury team. That service uses

specialist scanning (diffuse tension imaging) and regard evidence from imaging as an important factor when diagnosing diffuse axonal damage. The claimant is unable to undergo such imaging as a piece of metal in his hand, which cannot readily be removed, means he cannot have the scan. It is clear that Mr Friedland would not have expected to find evidence of diffuse axonal damage had a scan been undertaken but that remained a possibility. Mr Friedland also acknowledged that there is room for a range of opinion and that treating neurologists have concluded that the claimant has diffuse axonal damage.

146. It is also clear that Mr Friedland approached the case on the basis of his (reasonable) understanding that there was a consensus amongst the neurologists (treating and expert) that there was an initial traumatic brain injury but that the issue was whether organic brain injury was still responsible for the claimant's ongoing complaints. The view he expressed in the joint statement with Mr van den Brook (which I have considered only insofar as it details Mr Friedland's final opinion) is that if there was a mild traumatic brain injury it would be unlikely to lead to neuropsychological and cognitive difficulties for more than 3 months. The persistence of symptoms after that time would be due to other factors.

147. Mr Friedland's unchallenged evidence was that there was little doubt that the claimant's life had dramatically changed for the worse following the crash tests and that he was unlikely to have experienced the cognitive difficulties otherwise. While noting that post-concussional syndrome was a contentious term, Mr Friedland pointed to a paper (Hiploylee et al 2017) which concluded that the prognosis for patients who had symptoms for three years or more was very poor.

148. In cross-examination, Mr Friedland observed that the evidence including the video clips suggested that the claimant was able to perform extremely well for short periods of time but could not sustain that. That was consistent with his findings during neuropsychological testing.

149. In the absence of radiological evidence of brain injury, it is necessary to look at the other evidence to determine whether or not the claimant is likely to have suffered a brain injury. There is no single test for assessing neurological injury. The evidence of both neurology experts highlighted the particular difficulty in making any retrospective assessment. In his first report, Dr Heaney identified that considerations would include the speed of impact and nature of deceleration; observations or estimates of brain function at the time of injury and the presence of associated injuries. Various classification systems have been developed and are in use in clinical practice. Some involve single indicators such as the Glasgow Coma Scale or assessment of duration of post-traumatic amnesia ("PTA"). Other systems look at more than one factor. One such system which was given particular attention in the evidence was the Mayo Classification System for Traumatic Brain Injury Severity. While the experts retrospectively considered the application of that system on the basis of the available evidence, no such assessment was made around the time of injury. The Mayo System is a more inclusive one and allows for "possible" brain injury even where there has been no loss of consciousness or amnesia and where brain imaging is normal. "Symptomatic (Possible) TBI" is generally not associated with enduring problems.

150. Dr Heaney puts the claimant into this category on the basis of his immediate symptoms but concludes that such symptoms are non-specific. His opinion is that there was an

absence of post-traumatic amnesia and this, coupled with the absence of relevant radiological findings, leads him to the conclusion that the claimant probably did not suffer any lasting brain injury. Dr Heaney agreed that there can be degrees of diffuse axonal injury. One end of the spectrum might involve mild stretching which did not produce symptoms. At the other end, obvious symptoms would be immediately apparent. In between those extremes, patients may not lose consciousness or be in post-traumatic amnesia but may display other symptoms which imply some disruption of neurological function. Dr Heaney accepted that there can be a delayed onset of symptoms. This is sometimes seen in the sporting context. He also agreed that a patient who had suffered concussion would be advised to rest and that it would not be wise for him to exert himself mentally or physically. It would not have been advisable for the claimant to cycle home if he had suffered a brain injury.

151. Dr Sekhar included within his report a fairly detailed consideration of the cellular and neurochemical processes which may occur in the brain following trauma. While Mr Grant sought to descend into the scientific detail in cross-examination, Dr Heaney was more inclined to a pragmatic overview. He considered that the neurometabolic cascade which Dr Sekhar referred to was really just the normal physiological healing process. To the extent that the claimant's submissions are critical of Dr Heaney's overall approach, I would reject that. I accept that Dr Sekhar's opinion is backed by reputable scientific research. However, it is equally apparent that there is a range of scientific opinion. I am also conscious of Mr Friedland's observations that applying a scientific way of thinking to a medical problem is not necessarily helpful. It seems to me that it is unnecessary to descend into great scientific detail in order to resolve the issues which arise in this case.

152. Dr Sekhar considers that the evidence supports an interruption in the laying down of continuous memory consistent with a period of post-traumatic amnesia of less than 24 hours duration, probably of the order of 6 hours. He relied particularly on the claimant's difficulty in remembering his lines immediately after the crash tests; his evidence about trying to cycle home and forgetting where his bike was and his subsequent patchy memories of that night. He also relied upon the claimant's reported difficulty in sleeping. In light of these symptoms, he concluded that the claimant had probably suffered a mild brain injury.

153. I do not accept the general criticism of Mr Sekhar's evidence made in the defendant's closing submissions. This was the first time he had given evidence in court and, under robust cross-examination, he perhaps displayed his inexperience at times. However, I was satisfied that he, like Dr Heaney, was doing his best to assist the court in this difficult case.

154. However, I have some reservations about Dr Sekhar's analysis of the video evidence. I note that he had not relied upon the video clips in reaching his opinion, having reviewed them only after preparing his report. I do think that he was looking for evidence to support his view and that at times this led to a less than wholly objective analysis. I also think he may have descended into speculation in proposing persistent postural-perceptual dizziness (PPPD) as a possible cause of the fall in the snow. Having said that, the introduction of the concept of PPPD in the joint statement was done in the context of explaining a developing and complex area of medicine. Having carefully reviewed the contents of the joint statement and the way in which Dr Sekhar raised PPPD, I would not be critical of him for introducing it. However, I consider that his

evidence on the topic was weak and that he was wrong to propose that PPPD caused the fall in the snow, as he did in the witness box. I have these legitimate criticisms of Dr Sekhar's evidence firmly in mind and take a cautious approach in relying on his evidence when making my findings.

155. In my view, the video clips from the day of the crash tests are not themselves capable of establishing that the claimant suffered post-traumatic amnesia. However, neither do they rule this out. For a start, there are significant gaps in the filming. There is no video evidence of the claimant's presentation immediately after the final crash test. Dr Heaney agreed that the untrained observer could miss signs of PTA. This means it is perfectly possible that the claimant could have been in PTA without raising any obvious cause for concern for others present. When he resumes filming, he does talk about the perceived effect of the impacts. However, it would be unsafe to conclude that he was drawing on memories laid down after the final test, rather than following the script and/or drawing on the earlier tests. The available video clips do demonstrate clear evidence of the claimant being dazed and confused.

156. Dr Heaney accepted that there was evidence of neurological impairment after the crash tests although he did not think that the claimant was presenting as someone who was in a state of post-traumatic amnesia. My findings of fact on the video evidence were to the effect that Dr Heaney had downplayed the cognitive impairment which was apparent during filming between 17:21 and 17.44. I have also found as a fact that the claimant was agitated, confused and behaving uncharacteristically when he got home that night.

157. I am not able to accept Mr Sekhar's opinion that the claimant suffered post-traumatic amnesia lasting for at least six hours. Having considered the footage, the expert evidence and the literature to which I was referred, I find on balance that the video evidence points to the claimant not being in a true state of post-traumatic amnesia when the filming resumed about 40 minutes after the last crash test. I also accept that PTA does not come and go and that a retrospective assessment based upon the evidence of the claimant and his wife cannot be relied upon. Accordingly, there is no clear evidence of PTA and any PTA that there was must have been short-lived. However, I am entirely satisfied that the claimant was displaying signs of neurological impairment when the filming resumed and that this continued into the night. It appears that such impairment became more apparent when he had exerted himself in trying to cycle home such that by the time he arrived home he was displaying very unusual behaviour.

158. Dr Heaney accepted that early reports of anosmia (total or partial loss of smell which may be associated with changes in taste) would be an important factor pointing towards brain injury. He explained that it was not the case that the anosmia would be caused by the brain injury. Rather, damage to the olfactory nerve is often found in conjunction with axonal injury and so loss of smell may imply damage to the brain. He suggested that this would weigh less heavily than the absence of radiological findings. However, if a patient had anosmia and a definite vestibular injury, he would then be more suspicious of traumatic brain injury. There are repeated entries in the medical records referring to loss of smell, "phantom smells" and loss of taste. I have found on the facts that the claimant had reported symptoms which included loss of smell, dizziness and loss of balance within the first few days of the crash tests.

159. Dr Heaney acknowledged that the published literature and his own experience demonstrates that there are individuals who have been described as having mild traumatic brain injury and who would be expected to make a full recovery but who go on to have ongoing symptoms. He said that such patients are subject of great interest and focus. He admitted that neurologists see patients in clinics who have had a bang on the head which appeared innocuous but who have ongoing symptoms. He said "we puzzle over them, we worry about them". Questions would be asked about whether the clinicians have made the right formulation or whether there was a more severe brain injury. However, it cannot be assumed that actual neurological injury is causing the ongoing symptoms. Other factors may be involved. This ties in with the paper referred to above to which he and Mr Friedland contributed.

160. The issue of whether the claimant suffered a brain injury is plainly an important one. I have given the evidence for and against brain injury anxious consideration. I must decide whether the claimant has established, on a balance of probabilities, that he suffered a mild traumatic brain injury. That involves a different assessment from that being made by a doctor applying the Mayo Classification System, which is a quick and ready method to predict outcomes and inform treatment. Logically, it must be the case that the Mayo System envisages that some patients in category C "Symptomatic (Possible) TBI" have in fact sustained a brain injury, although the majority have not. It is not therefore sufficient to look solely at the Mayo categorisation to determine the issue.

161. It would be impossible to set out in this judgment all the points that I have considered in reaching my conclusions on the brain injury issue. I shall highlight the most important considerations.

162. The absence of any radiological findings and of clear evidence of PTA are very important factors which point against traumatic brain injury. These factors are to be given significant weight.

163. Set against that, the following considerations point towards a brain injury:

i) The claimant was a fit and healthy man, who was presenting entirely normally at the time of the crash tests.

ii) During the crash tests the claimant was exposed to multiple impacts. My interpretation of the expert engineering and medical evidence is that each impact had the potential to expose the claimant's brain to potentially damaging forces.

iii) Sustaining repeated impacts in such a short period is unusual and is acknowledged to increase the risk.

iv) The claimant was plainly cognitively impaired after the crash tests.

v) The claimant had suffered a whiplash injury to his neck but there is no evidence of him being in significant pain immediately. The cognitive impairment is therefore unlikely to be accounted for by pain. No other obvious explanation emerges.

vi) The claimant continued to display signs of neurological impairment into the night. He was agitated and confused and behaving uncharacteristically.

vii) There were early complaints of anosmia, which is recognised as a marker which increases the likelihood that brain injury has occurred.

viii) There were also early complaints of dizziness and loss of balance.

ix) Multiple treating neurologists have diagnosed a concussive brain injury.

164. Having weighed all the evidence in the balance, I conclude that the claimant probably did sustain a mild traumatic brain injury.

165. A more difficult question is the extent to which any organic brain damage is continuing to play a part in the claimant's ongoing symptomology. The nature of the injury was such that a full recovery would usually be expected. However, clinical experience and the published literature shows that some individuals will continue to experience symptoms. On balance, I have concluded that the brain injury is continuing to play some part in the claimant's presentation. However, I accept that, taken by itself, it could not fully explain the extent to which the claimant remains impaired. As with the whiplash injury, it is another piece in the jigsaw. I shall return to where it fits within the overall presentation having dealt with the remainder of the medical evidence.

Audio-vestibular system

166. Dr Dasgupta's opinion was that the claimant sustained a significant acceleration/deceleration injury to his head causing moderate left sided damage involving the gravitational and angular motion sensors, migraine and benign positional paroxysmal vertigo (BPPV). The BPPV has resolved. Other symptoms have improved. The claimant had been left with persistent dynamic decompensation which had generated moderately intrusive balance problems which are disproportionate to the actual physical damage in the vestibular system. Peripheral hearing is intact but there is some cochlear damage manifested by tinnitus in addition to higher hearing processing difficulties.

167. Dr Surenthiran's opinion, as set out in his report and the joint statement, was that there was no evidence to suggest that the claimant sustained any type of vestibular injury as a result of the crash tests and nothing to suggest that they caused the onset of tinnitus.

168. During cross-examination, Dr Surenthiran made some important concessions. First, he admitted that he had wrongly assumed that the claimant had suffered a head injury in the fall in the snow. He now understood that was not correct. Second, and significantly, he accepted that Dr Dasgupta's findings on examination demonstrated that the claimant had sustained vestibular injury at some time. Dr Surenthiran also agreed that the crash tests potentially provided a potent mechanism to cause vestibular injury.

169. It is submitted on behalf of the defendant that Dr Dasgupta's view on causation was difficult to follow and speculative. I do not agree at all. I found Dr Dasgupta to be an impressive witness. He was plainly knowledgeable and had an extremely good grasp of all the evidence in the case. He was respectful of the findings of other experts in the field and prepared to contemplate the possibility that he could be wrong. However, he

consistently maintained his opinion and gave good explanations for his conclusions. For example, he explained how a test result which was within a normal clinical range but at the high end of that range could properly be queried as possibly evidencing some abnormality when other clinically relevant information was considered. Dr Dasgupta did not question the validity of the earlier findings, rather he applied his clinical judgment to the results in light of all the evidence he then had, including his own testing. I note that Dr Dasgupta was challenged at some length on the validity of his tests, only for Dr Surenthiran to accept in his evidence that the results obtained by Dr Dasgupta were valid and to propose a new theory to explain the results. This necessitated the recall of Dr Dasgupta.

170. Throughout his evidence, Dr Dasgupta was measured and balanced in his response to questioning, including when it was expressly put to him that he was not acting impartially. Put to him that he was speculating, he accepted that he had engaged in "informed speculation" based upon clinically relevant information. I reject the defendant's criticism of his approach. I also reject any criticism of him for modifying his opinion on migraine in the course of the joint statement. It seems to me that Dr Dasgupta was doing exactly what is expected of an expert in analysing all the evidence and being prepared to reflect on the views of his opposite number. I was entirely satisfied that he was fulfilling his duties as an expert and that the suggestion that he was descending into advocacy for the claimant was unfair.

171. In relation to the suggestion that Dr Dasgupta had performed the wrong test for dysdiadochokinesia (DDK), I accept that the majority of clinicians would favour the rapid hand clapping test explained by Dr Surenthiran and confirmed by Dr Sekhar. Dr Dasgupta accepted that the finger-nose test was suggestive of DDK rather than diagnostic of it. I note that he is not the only doctor to have found signs of DDK. On 30 July 2015, the claimant's G.P. recorded "finger nose normal but some clumsiness with dysdiadochokinesis bilat". I do not consider Dr Dasgupta's evidence in relation to DDK undermines his expertise or his evidence generally.

172. I had less confidence in Dr Surenthiran's evidence. Dr Surenthiran said that when looking at balance problems, it is like a jigsaw puzzle and involves putting different pieces of evidence together. That includes the patient's complaints, his symptoms, observations from treating doctors and physiotherapists and medical records. Here, it also involved consideration of the video evidence. He used the jigsaw analogy on several occasions in the course of his evidence. However, in contrast to Dr Dasgupta's evidence, I was not convinced that he was truly putting all the available evidence into the jigsaw. It seemed to me that he simply rejected those parts of the evidence that did not fit with his opinion.

173. Dr Surenthiran had placed significant weight upon his interpretation of the video evidence. He confirmed that if the video clips had not been available, he could not say that his opinion would have been the same. However, his view that the video evidence demonstrates no impairment of vestibular function does not fit with my findings of fact. In particular, I found Dr Surenthiran's analysis of the clips with Dr Kreindler on 20 February 2013 unconvincing. I have found that the claimant's presentation was abnormal, albeit not grossly so. I was not persuaded by Dr Surenthiran's attempt to explain away the claimant's repeated touching of the table.

174. Dr Surenthiran also relied upon the absence of any reference to balance problems in the G.P. records until six months after the crash tests. However, there is good evidence that the claimant was complaining of dizziness and balance problems in the early days. Three days after the tests, he reported to the production team that he suffered loss of balance and dizzy spells on the night of the crash tests. The email sent by Dr Kreindler on 20 February also referred to dizziness and the need for neurological assessment. When faced with the early evidence of balance problems, Dr Surenthiran suggested that they must have been due to fatigue and/or to the claimant being tired and confused. He accepted there was no reason for him to have been fatigued prior to the tests and acknowledged that the likely explanation for any early dizziness or balance problems was the effect of the tests. However, he would not attribute them to a vestibular injury. Again, I did not find his evidence on this issue convincing. In my judgment, Dr Surenthiran failed to give sufficient weight to the very early complaints of dizziness and balance problems.

175. Having acknowledged that his understanding of the mechanics of the fall in the snow had been wrong, Dr Surenthiran nevertheless maintained his opinion that any vestibular injury was more likely to have been caused by the fall in the snow. He said that it is well known that a fall onto the buttocks can cause a head injury. Dr Dasgupta thought the suggestion that the fall in the snow as described by the claimant could have caused vestibular damage was "farfetched". In my view, Dr Surenthiran failed to properly reflect on the effect of his misunderstanding and to take account of all the evidence, including the claimant's relatively contemporaneous account that the effect of the fall has been "disproportionate". He said that the reference to the reaction being disproportionate had really stood out from the records. When asked about the significance of that, he replied:

> "That potentially, I mean I defer to other experts, as I put in my report, but potentially that the fall was transmitted upwards and did have some effect. But as I say, I defer to other experts."

It is not clear what expert opinion he was referring to here. Again, I found his explanation unconvincing.

176. In the course of his evidence, Dr Surenthiran accepted that tinnitus could come on 3 to 4 weeks after a trauma and that relatively innocuous activity could cause an increase in tinnitus. It seems to me that this offers a far more credible explanation for the findings I have made about the onset of tinnitus.

177. Perhaps the most concerning aspect of Dr Surenthiran's evidence was the introduction of a wholly new theory part way through cross-examination. He did so having conceded that Dr Dasgupta's test findings were likely to be reliable and to demonstrate that the claimant had sustained a vestibular injury at some time. He said that this was more likely to be due to the episode of BBPV which the claimant had in summer 2013 (and which he viewed as idiopathic). When asked why he had not raised that in the joint statement, he sought to blame Dr Dasgupta for not anticipating it. With respect, that cannot begin to explain the omission. It is frankly not sensible to suggest it was for Dr Dasgupta to anticipate a point he might later rely on rather than for him to properly deal with it in his written evidence and to raise it in the joint meeting.

178. His evidence did not improve when he sought to explain Dr Dasgupta's findings of abnormality in the semi-circular canal, which he acknowledged could not be explained by BPPV. He suggested that damage must have been caused later. However, he could not explain how it was caused. (Pages 694-5 of the transcript.) Dr Dasgupta's evidence gave a far more compelling explanation for the absence of any findings of abnormality when the claimant underwent clinical testing in 2014 compared with his findings in 2018. The difference could be explained by a combination of the fact that he performed, some tests not being done previously and the process of vestibular compensation and decompensation. I note that in April 2014, Dr Bamiou wrote:

> "Overall his symptoms are currently to some extent controlled. However, that is only because he has limited his activities quite significantly."

Dr Dasgupta considered that vestibular decompensation between 2014 and 2018 was likely to be related to the effect of comorbid conditions. It is impossible to view the audio-vestibular problems in isolation. Dr Dasgupta suggested that the waxing and waning of vestibular symptoms could be caused by a patient's reaction to stress and the impact on coping strategies.

179. In preparing my judgment, I have found it helpful to review the whole transcript of the evidence of the audio-vestibular experts. That careful review affirms my view that the evidence of Dr Dasgupta was more compelling than that of Dr Surenthiran and is generally to be preferred.

180. I find that the claimant sustained subtle damage to the left utricle and semi-circular canal as a result of the crash tests. The vestibular injury was the cause of the early complaints of dizziness and balance problems, which I find to have been evident by the evening of the crash tests.

181. I find that the claimant suffered no significant injury as a result of the fall in the snow and that this was not the underlying cause of any audio-vestibular injury, although it did result in an exacerbation of symptoms.

182. I have found that the claimant's tinnitus probably came on around the time of the fall in the snow but did not coincide with that fall and was not caused by it. I accept Dr Dasgupta's opinion that the tinnitus can come on later and has been caused by the crash tests.

183. The claimant developed BPPV in the summer of 2013 and experienced a recurrence in November 2014. Having considered the expert evidence and the medical literature to which Dr Dasgupta referred, I conclude that this condition was caused traumatically rather than being idiopathic. I acknowledge that it came on later than would usually be expected. However, the claimant's age and sex suggests that he was unlikely to have developed BPPV absent trauma. There is undoubtedly room for a range of opinion but on balance I prefer that of Dr Dasgupta. The BPPV has since resolved following treatment.

184. I consider that the extent of the claimant's audio-vestibular symptomology is disproportionate to the relatively modest damage he sustained. Again, by itself, the audio-vestibular injury cannot explain the claimant's ongoing significant impairment.

However, it is another piece in the jigsaw which contributes to the overall symptomology and to the claimant's complex presentation.

Psychiatric condition

185. The claimant called Dr David Sumners, a consultant psychiatrist with a special interest in brain injury rehabilitation. The defendant had instructed a psychiatrist, Dr Mallett, but did not rely on his evidence at trial. Dr Sumners and Dr Mallett had prepared a joint statement which was placed before me on the basis that it formed part of the written evidence of Dr Sumners. I note that the Dr Sumners and Dr Mallett agreed that this is a complex case and accepted that their opinions were "to an extent contingent on the problems identified by other experts, and how these may or may not have impacted upon the Claimant." I approach the psychiatric evidence against the background of the findings I have made in relation to the other injuries.

186. Dr Sumners first saw the claimant in late 2016 and reported in 2017. On the basis of the evidence then available, Dr Sumners considered that there had probably been a minor brain injury but that this could not itself explain why the claimant continued to suffer as severely as he did. He concluded that there had been a psychological reaction as a result of the index event causing a major depressive disorder with post-traumatic symptoms. His view was that there was no preceding emotional vulnerability. The claimant was a well-adjusted and high achieving individual with a normal family life and good income and there was no reason to think that situation would have changed. Dr Sumners recommended treatment with anti-depressants and input from a neuropsychiatrist.

187. Dr Sumners next saw the claimant in 2019, following which he produced a report in 2020. He found that there had been some improvement but noted that there continued to be a very stark contrast with his condition before the crash tests. He noted that the claimant did not accept that he was depressed and considered that suggestion to be an insult. I shall return to this in the context of considering the alleged failure to mitigate.

188. Dr Sumners stressed the importance of considering the medical evidence across the different disciplines. He recognised the complexity of the interaction of different factors and had benefitted from a multi-disciplinary conference with the claimant's experts. It is apparent that he had also carefully reviewed all the other available evidence. Having done so, he approached the case on the basis that it appeared the claimant had suffered whiplash, mild traumatic brain injury (with no extended PTA) and some vestibular damage as well as cochlear damage, predominantly caused by the index injury. This approach accords with the findings I have made. In the joint statement, he explained that in the face of his other ongoing problems, the claimant became progressively more distressed. His view was that the claimant's condition deteriorated due to his experience of physical limitations and was to be seen in the context of an individual who had always been extremely fit and able. Dr Sumners considered that the claimant was unlikely now to resume the glittering career he would have enjoyed had he not been injured in the crash tests.

189. Dr Sumners followed the evidence at trial. His observation of the claimant, so far as he could tell having followed the proceedings remotely, was that he was less depressed now than he had been previously.

190. In the joint statement, Dr Mallett had expressed the view that the claimant had pre-existing somatic symptom disorder / somatisation disorder. This was not the defendant's position at trial. Dr Sumners acknowledged that there was room for a range of opinion with regard to the nature of the claimant's psychological reaction. He and Dr Mallett agreed:

> "… that depression and somatic symptom disorder may be co-morbid, that is to say, one does not exclude the other …"

Dr Sumners dealt further with the suggestion that the claimant suffered from somatic symptom disorder in a letter dated 26 April 2021. He maintained his opinion that the claimant did not have that condition before the crash tests but said that he accepted that a diagnosis of somatic symptom disorder after the event was "entirely reasonable". He again made the point that a range of diagnosis was appropriate.

191. Under cross-examination, Dr Sumners stated that he considered that the claimant was suffering from somatic symptom disorder. He said that he found the joint statement process very constructive. His view that the appropriate diagnosis was depression was formed early on but, as the symptoms of depression have lessened, he now sees the merit in Dr Mallett's diagnosis of somatic symptom disorder. He clarified that his view now is that there is a dual diagnosis of depression and somatic symptom disorder.

192. Mr Watt-Pringle was critical of Dr Sumners, suggesting that this represented a change of opinion which had not been identified as such in his written evidence. He repeated and developed these criticisms in his closing submissions. Dr Sumners accepted in cross-examination that he should have spelt out that his view had changed and that he now considered the dual diagnosis to be appropriate. He acknowledged he should have explained this, giving reasons. It is said by Mr Grant that Dr Sumners left the witness box chastened and that he was contrite about his imprecise use of language in his written evidence.

193. For my part, I do not consider there is any need for self-criticism on Dr Sumners' part. Certainly, my interventions were not intended to be critical but only to seek clarity. My impression overall was that Dr Sumners was a knowledgeable and sensible expert who had reflected carefully on all the available evidence at each stage of the case. At one point, it was suggested that he was changing his opinion to assist the claimant in the event of the court finding that there was no organic injury. Mr Watt-Pringle did not maintain that in his submissions, rightly in my view. I would unhesitatingly reject any suggestion that Dr Sumners was inappropriately tailoring his evidence to assist the claimant's case. I am satisfied that he was complying with his duties as an expert. I accept, as he did, that he could have expressed his final view more clearly in the joint statement but the way in which his evidence developed was understandable. In the normal run of events, both experts who contributed to the joint statement would have been called and I do not think the clarification proffered by Dr Sumners would have presented any difficulty at all.

194. Given that Dr Mallett was not giving evidence, I was concerned about any possible prejudice to the defendant arising from Dr Sumners adopting his diagnosis of somatic symptom disorder. I raised those concerns during Dr Sumners' cross-examination to allow the defendant's representatives the opportunity to consider any application they might have wished to make in response. It seemed possible that the defendant might

have wished to further explore issues potentially relevant to any pre-existing vulnerability and/or the claimant's early response. I was also alive to the possibility that the defendant's decision not to call Dr Mallett might have been different it been appreciated that Dr Sumners would positively assert that the claimant had somatic symptom disorder caused by the crash tests. However, Mr Watt-Pringle confirmed that the defendant did not wish to revisit any evidential matter and did wish the court to proceed on the basis of the evidence before it. I am satisfied that the defendant was not prejudiced by the late clarification of Dr Sumners' opinion.

195. Having heard Dr Sumners' evidence and having carefully cross-referenced his evidence with the other evidence in the case and the findings I have made about the organic injuries, I accept his opinion. I consider that Dr Sumners was right to approach the case on the basis that the claimant had suffered organic injury upon which a significant psychological reaction was superimposed. I accept that this included a major depressive episode and post-traumatic symptoms. The symptoms of depression have improved but this has not resulted in a significant improvement in the claimant's overall functioning and it is clear that his condition remains far removed from that of the man he was before the crash tests. In the circumstances, I consider that Dr Sumners was right, on reflection, to come to the view that there was likely to be a dual diagnosis of somatic symptom disorder. The criteria for making a diagnosis of that condition are to be found in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). Those criteria and the explanatory information accompanying it are illuminating. It is clear that this is another area in which medical understanding has evolved. It is now understood that somatic symptoms can exist alongside organic conditions and depression. It is my view, on the basis of all the evidence I heard, that there plainly is an element of somatisation involved in the claimant's presentation. Dr Sumners' final opinion that a combination of depression and somatic symptom disorder has been imposed upon organic injury to the neck, brain and audio-vestibular system is both logical and entirely consistent with all the evidence in the case. I find that this is the probable psychiatric diagnosis. I also accept Dr Sumners' opinion that the psychiatric condition was caused by the effects of the crash tests.

196. Dr Sumners acknowledged that the conclusion of the litigation would reduce the claimant's stress and have a beneficial effect on him. I observe that it is apparent that the claimant has devoted a great deal of time and energy to his claim and I would expect that taking away this activity would free some capacity to pursue other avenues, which logically could include paid work. However, Dr Sumners was clear that the end of litigation would not resolve the claimant's psychiatric problems. I accept Dr Sumners' evidence that it is unlikely that the claimant will ever be able to return to functioning as he was before the crash tests.

197. Dr Sumners was asked whether from a psychiatric perspective and his overall impression, he would expect the claimant to be able to increase his work. He replied:

> "I honestly don't know. I would hope so. I mean, we know that his personality is a very striving one. I'm sure he would want to increase his work if he possibly can, and one would hope that a virtuous circle would be set up in which the more he could do the better he would feel."

He made it clear that the ongoing effect of the physical injuries also had to be considered in looking at the overall prognosis and the prospect of increased working capacity.

Overall assessment of the claimant's medical condition, causation and prognosis

198. I endorse the view expressed by many of the medical experts that this is a particularly complex case. There are some inconsistencies and loose threads within the evidence. The interplay between the different medical disciplines is complex. Further, I consider that there are features of the claimant's presentation which cannot be fully explained medically and where different opinions have been expressed over the years. However, I am satisfied on the evidence before me that the claimant is genuinely suffering a range of significant physical and emotional symptoms which mean that his life is substantially impoverished compared to the position before the crash tests.

199. I have found that the claimant suffered injury to his neck, brain and audio-vestibular system in the crash tests. Individually, none of these injuries were particularly serious and in respect of each it would reasonably have been anticipated that the claimant would have made a full functional recovery. However, research and clinical practice demonstrates that each of these injuries can be associated with unexpectedly poor outcomes. I find that the claimant is one of the unfortunate minority of people to suffer disproportionately severe symptoms following relatively minor injury.

200. There is little doubt that the claimant's presentation cannot be explained solely by reference to his physical injuries. Others may have responded better to the limitations the claimant's organic injuries caused. Unfortunately, the claimant appears to have become unduly focused upon his symptoms and the search for an explanation. That is not through any deliberate choice on his part. I am confident that the psychiatric condition diagnosed by Dr Sumners has played a significant part, as has his pre-morbid personality.

201. I am satisfied, on the balance of probabilities, that the symptoms of which the claimant now complains have been caused by the crash tests. I acknowledge that there has been some improvement and that the end of the litigation is likely to bring about some further improvement. However, it appears that the symptoms are now entrenched and that they will continue into the long term. The claimant is unlikely to be fit to resume working at anything like the level he did previously. Further, he is unlikely to regain the fitness that he displayed at the time of the crash tests. His family life and social activities will probably continue to be affected. Improvements are to be hoped for but I cannot say that significant change is likely to occur.

Failure to mitigate

202. Having made the findings that I do, I must address the defendant's claim that the claimant failed to mitigate his loss by failing to follow Dr Sumners' recommendation that he should be treated with antidepressants.

203. Consistent with his independence as an expert, Dr Sumners raised this issue and also discussed with the claimant the possibility of failing to take antidepressants being seen as a failure to mitigate on his part. The claimant's reaction was unusual, as Dr Sumners highlighted, but it plainly represented a genuinely held and entrenched view. It is notable that the claimant had taken antidepressants at an early stage after the crash tests

to treat his insomnia. He had also engaged in psychological therapy. However, there had been other occasions when he had expressed resistance to treatment for his mental health.

204. While I would accept the submission on behalf of the defendant that a prejudice about mental illness could not properly excuse a failure to follow reasonable medical advice, I regard the position here as far more complex than that. As I have found, the claimant's personality together with his psychiatric condition has caused him to focus upon his symptoms and to seek a scientific explanation for them. He has not always been open to the possibility that much is in his mind. He finds emotional factors extremely difficult to consider and discuss. Despite this, I found the claimant's evidence on this issue to be reflective and considered. He explained his view that it was offensive to describe him as depressed. He felt he had tried very hard to overcome his symptoms and that he could not have sustained that effort if depressed. However, he now appeared more open to the possibility that mental illness was playing a part. He acknowledged that Dr Sumners knew more depression than he did and indicated a willingness to explore treatment with antidepressants now. He explained that he had previously been worried about side-effects and felt he could not cope with them but now felt he had a little more capacity. Asked whether he accepted now that he was depressed, he paused to consider that before saying he did not know but that he did know that he kept trying and really was doing his best. He denied that he was resistant to therapy or medication, stressing that he had tried many things.

205. It is of note that the claimant's depressive symptoms have eased to some extent even without treatment. Dr Sumners' observations suggest that at trial the claimant was in a better state mentally than when he had examined him. It is also notable that the claimant has sought multiple medical opinions and had received different recommendations for treatment. The claimant's scientific approach as described by Mr Friedland appears to have led him away from taking a holistic view. The suggestion he was depressed appears to have been taken by him as a suggestion that his symptoms were not 'real'. He now genuinely appears more open to contemplating taking antidepressants, although perhaps at a time when he is less in need of them than he was previously.

206. I have carefully considered the evidence of the claimant and of Dr Sumners on this issue. Having done so, I am not persuaded that the claimant was acting unreasonably in not following Dr Sumners' recommendation. His unwillingness to do so cannot be viewed as a simple matter of prejudice or personality. Rather, it was part of the claimant's complex presentation. Sadly, I do not believe the claimant has always helped himself. However, I fully accept his evidence that he has been trying his very best to overcome his difficulties. Indeed, the evidential picture is perhaps of a man who has tried too hard rather than someone who has not tried enough.

207. The defendant has not established on the evidence before me that the claimant has failed to mitigate his loss by not undergoing the treatment recommended by Dr Sumners. Even had I found that the claimant had acted unreasonably, it was not clear how the defendant contended that this should be reflected in the claim. When I pressed Mr Watt-Pringle on this he was unable to assist beyond inviting the court to make a finding that the claimant had acted unreasonably. Despite bearing the burden of proof on this issue, the defendant called no evidence on it. There was no evidence, for example, that the claimant would, on the balance of probabilities have made a good recovery with treatment nor was there evidence upon which I could assess the extent to which the

claimant's condition would have been better with treatment. Given my finding that the claimant did not act unreasonably and my rejection of the allegation that he failed to mitigate his loss, it is unnecessary to consider this further. However, I would have had some difficulty in working out how a finding of failure to mitigate should be reflected in the value of the claim absent any specific representations from the defendant.

Quantification of the claim

208. The parties are agreed, and I accept, that it is appropriate to assess damages on a full and final lump sum basis. The assessed sum is to be reduced by one-third to reflect the liability split.

General damages

209. The claimant seeks general damages for pain, suffering and loss of amenity of £85,000 and a separate award of £25,000 for loss of congenial employment. The defendant's primary submission was that the claimant was entitled to no more than £25,000 to compensate for his whiplash and depression. In the event of a finding that there was organic brain injury, the defendant submitted that the appropriate sum would be £60,000. The defendant makes no allowance for loss of congenial employment.

210. In relation to loss of congenial employment, the Law Commission said in their report on Damages for Personal Injury: Non-Pecuniary Loss published in 1998 (LC257 at [3.20]):

> "In our view damages for "handicap on the open labour market" are compensation for pecuniary loss; while "loss of congenial employment" is merely an aspect of pain and suffering and loss of amenity. Despite the practice in some cases, we do not believe that there is any need for, nor advantage in, separating out new heads of "non-pecuniary loss" beyond pain and suffering and loss of amenity."

This was not taken up by the Court of Appeal in *Heil v Rankin* [2001]QB 272 or subsequently, leading the editors of Kemp and Kemp to suggest (correctly in my view) that "this – arguably anomalous – head has survived even if it has not prospered."

211. In this case, I do not consider that it is appropriate to make a separate award for loss of congenial employment. The loss of the claimant's career is fundamental to the loss of amenity he has suffered as a result of his injury. It was apparent at trial that this factor has been the most distressing consequence of his injury. By restricting his work, he has been able to participate more fully in family life and to manage his symptoms. In these circumstances, it is simply not realistic to seek to separate out the different elements of his non-pecuniary loss. The award I make for pain, suffering and loss of amenity takes account of the significant restriction in the claimant's ability to pursue his career, the real loss he has felt as a result and the impact on his self-esteem. Otherwise, it is likely that the award for pain, suffering and loss of amenity would have been significantly lower.

212. In my view, this case does not fit neatly into any category within the Judicial College Guidelines. As a starting point, I have considered the "moderate brain damage"

category. Although the heading might suggest something more severe than the mild brain injury I have found, the description fits the findings I have made better overall than other categories. Given the complexity of the medical evidence and the overlapping nature of the various injuries, before settling on an appropriate award, I have also considered the guidelines applicable to other relevant injuries including whiplash, psychiatric damage and tinnitus. I have stood back and looked at the overall impact upon the claimant, the extent of his ongoing disability, the impact on personality and the loss of a successful career.

213. Mr Grant referred to *Siegel v Pummell* [2014] EWHC 4309 (QB), a decision of Wilkie J, in a case in which he appeared. He contends that the claimant's case is comparable, although some of the claimant's symptoms are more severe than Mr Siegel's. I note that Wilkie J assessed general damages on the basis that Mr Siegel was on the cusp of category c(ii) and c(iii). While I see some similarities between the cases, my firm view having heard all the evidence in this case is that the claimant falls within category c(iii). While the claimant would no doubt contend that his ability to work is "greatly reduced" that is only one factor. Looking at the overall level of disability, I place him in the lower of the two brackets even after taking account of the impact on his career.

214. In my judgment, the appropriate award of general damages for the non-pecuniary loss is £65,000.

Loss of earnings

215. As I have indicated, this is by far the largest part of the claim. It is not straightforward. The claimant contends that he was on the cusp of significantly increased earnings at the time of the crash tests and therefore his loss of earnings cannot fairly be assessed by reference to his actual net earnings before and after the crash tests. The claimant's actual taxed earnings in fact show an increase in the period immediately following the crash tests. The claimant's case is that this reflects the realisation of the value of work that he had done before he was injured. There is a significant dispute between the parties as to how this income should be treated in calculating loss of earnings. The claimant maintains that this represented the start of significant growth in earnings and that such growth would have continued in the following years before plateauing.

216. Although the areas of agreement between the parties have not been set out for me as clearly as they might have been, I understand the defendant's calculation of the claimant's earnings as reflected in his tax returns in the four years up to and including 2013 to be agreed as follows:

	Gross	Net after tax
2010:	£87,870	£43,345
2011:	£103,568	£51,718
2012:	£90,808	£46,922
2013:	£99,369	£40,183

It was the claimant's evidence that after the crash tests in February 2013, he fell behind with his paperwork including invoicing. It is reasonable to accept that the crash tests had some impact on his 2013 earnings. However, it is not contended that there would have been a marked increase at this stage had he not been injured. The claimant accepted in cross-examination that it was reasonable to view his net income in the years before the crash tests as being in the region of £47,000 to £48,000.

217. The claimant presents his claim for loss of earnings on the basis of gross annual earnings of £200,000 in 2013, rising to between £460,000 to £675,000 by 2016. His claim for future loss of earnings represents an assumption that his net annual earnings would now be in the region of £290,000. The claimant's calculations are based upon expert forensic accountancy evidence from Gail Rifkind.

218. The defendant assumes much more modest increases in earnings. Their calculations, based upon those produced by their accountancy expert, James Stanbury, assume that uninjured the claimant's current net annual earnings would have been approximately £82,000.

Relevant legal principles

219. It is trite that the object of an award of compensatory damages is to put the claimant, so far as possible, in the position he would have been had he not sustained the wrong for which he is being compensated. When considering a claim for loss of earnings in the context of personal injury what is required in simple terms is a comparison of the claimant's likely uninjured earnings with those he has had since the injury and is now expected to have in the future. That is easily stated but not always as easy to apply.

220. As Potter LJ said in *Herring v MOD* [2003] EWCA Civ 528 [23], [2004] 1 All E.R. 44:

> "In any claim for injury to earning capacity based on long-term disability, the task of the court in assessing a fair figure for future earnings loss can only be effected by forming a view as to the most likely future working career … of the claimant had he not been injured."

He continued [25]:

> "… it is a truism that the assessment of future loss in this field is in a broad sense the assessment of a chance or, more accurately, a series of chances as to the likely future progress of the claimant in obtaining, retaining or changing his employment, obtaining promotion, or otherwise increasing his remuneration."

221. It is well established that this assessment should generally involve the conventional multiplicand/multiplier approach with adjustments being made as required on the evidence rather than a percentage assessment for 'loss of chance'. Although the mathematical calculations performed may appear to involve precision, the reality is that the assessment of loss of earnings inevitably involves uncertainty. The multiplicand will reflect the court's overall judgment of what was and is now likely, after taking account of all the evidence placed before it. Often that involves looking at a range of

possibilities before arriving at what is in reality a best estimate. Ultimately, the court must make an assessment which is evidence-based and fair to both parties.

222. The treatment of income for the purpose of a claim for loss of earnings does not necessarily involve the same principles as assessing income for the purpose of tax liability, see *Ward v Newalls Insulation Co Ltd* [1998] 1 WLR 1722. As was made plain in that case, what is required is an assessment of the claimant's real loss of earnings or real loss of earning capacity. More often than not the answer is to be found by looking at taxed earnings. However, there may be instances where the treatment of earnings for tax purposes does not reflect the reality. In *Ward*, a husband and wife were in partnership and legitimately divided the earnings from that partnership so that each were allocated the same share and taxed accordingly. In fact, only the husband provided the labour from which the income was earned. His loss of earnings was therefore to be assessed on the basis of their entire share rather than that allocated to him for tax purposes.

223. This is one illustration of the courts reflecting the reality of how income has been earned. It demonstrates that it is sometimes necessary to look behind the treatment of income for tax purposes and to base the claim for loss of earnings on findings of fact. Here, the issue of fact which arises is whether income which was received and taxed after the crash tests was the product of work done previously. If so, consideration must be given as to how that can be fairly reflected in the calculations.

The lay evidence about loss of earnings

224. In addition to giving evidence himself, the claimant put forward a significant amount of other evidence on this topic. The BBC chose not to call any factual evidence but put the claimant to proof of his claim and the underlying factual assertions.

225. The claimant's evidence was that he had a very rare set of skills. That meant that it was difficult for him to propose any direct comparator on which his career and resultant earnings might be based. It was also apparent that, perhaps understandably, there was a degree of reluctance on the part of others in the industry to reveal their earnings.

226. The claimant gave evidence of various opportunities which he said existed at the time he was injured and which did not come to fruition because of the limitations he faced afterwards. He had provided much documentary material, which was considered by Mrs Rifkind when she prepared her report.

227. In November 2012, the claimant decided that he required the services of an agent and engaged Hilary Murray of Arlington Enterprises. She was entitled to 12.5% commission. The agency specialises in managing and developing the careers of lifestyle and factual presenters. Mrs Murray has worked there for at least 23 years. She had been aware of the claimant for some time and thought he was very talented. She regarded his skills, personality and Northern accent as very saleable. Mrs Murray was aware that the claimant had loyalty to the BBC. She also regarded him as "left-wing" and noted that he was not driven by money, although he was conscious of his financial responsibility to his family. She advised him that he should move away from working with the BBC because it was likely that he would be able to find greater freedom and higher pay elsewhere. She saw him as having international appeal. Her evidence was that she felt the claimant was ready to move away from the BBC although she

confirmed in cross-examination that she did not ever have the idea that he was likely to move to the United States. Mrs Murray foresaw other opportunities such as book deals, endorsements and personal appearances. She would also have encouraged him to become more involved in the development of programmes opening up further opportunities for remuneration from the sale of format rights.

228. Mrs Murray acknowledged that it is hard to "crystal ball gaze" but her view was that he was entering into the golden years of his career and that his earnings were likely to peak over the following five years. In her statement, she suggested that the claimant was "probably earning around £150,000" at the time of the accident. By now, she would have expected him to be earning between £300,000 to £500,000. She suggested the spectrum of earnings based on her experience of working with people similar to the claimant of £100,000 to £1million. She confirmed in the witness box that these figures were gross. She acknowledged that the type of work the claimant was doing could have a "shelf life" but said she thought the claimant would have been around "for a very long time". She confirmed that there had been no downturn in the interest in him after his injury. Rather, he was not able to take up the job opportunities that came his way. She considered it a great tragedy that his career had been interrupted because of his injuries.

229. Mr Grant invites me to attach significant weight to Mrs Murray's evidence on the basis of her substantial experience in the industry and her knowledge of the claimant. However, it is notable that the claim is not calculated on the basis of her evidence. The claimant's calculations use a range of gross earnings of £460,000 to £675,000, which is very significantly higher than the range Mrs Murray predicted. Mr Grant submits that the claimant's approach allows for the possibility that, on Mrs Murray's evidence, his earnings could have been as much as £1million and for the chance that he could have earned further income from YouTube outside the arrangements with Mrs Murray. With respect to Mr Grant, I do not think that these submissions provide a proper basis to reconcile the sums claimed with the evidence of Mrs Murray.

230. It is clear that Mrs Murray was not seeking to provide the court with detailed figures or to offer any real analysis for the range she put forward. On her own admission, she was offering no more than "ballpark figures" based on her experience and judgment. However, she had taken account of a wide spectrum of potential earnings and had settled on a range for the claimant's likely earnings of £300,000 to £500,000 gross per annum. In my judgment, it would be quite wrong to take that as the likely range and then to uplift it significantly to represent the fact that the claimant might have earned more while ignoring the other possibility that he might have earned less. Further, Mr Grant's submissions effectively invite me to rely heavily on Mrs Murray's experience and judgment but then to assume that she has not taken account of other opportunities available to the claimant in coming to that judgment.

231. I accept that Mrs Murray's experience gave her a good eye for talent and that her impression that the claimant was a highly marketable client is likely to be right. I note that is consistent with other evidence I heard about the claimant. I also accept that the fact that claimant engaged Mrs Murray shortly before the crash tests evidences a desire to manage the opportunities available to him more pro-actively. It is unlikely that the claimant would have engaged an agent and agreed to pay her a percentage of his income unless he was seeking to increase his earnings. I consider that Mrs Murray's evidence about likely figures was somewhat vague and was given from a perspective that was sympathetic to the claimant and based upon optimism.

232. The claimant called another talent agent, Sophie Laurimore of the Soho Agency. She too was a very experienced agent and represents a number of well-known presenters. She was approached by the claimant in 2013 or 2014, after he had been injured. She understood that he was no longer represented by Hilary Murray and that he was seeking guidance about an opportunity with NBC America. In the end, that came to nothing. She heard very little from the claimant after his initial contact.

233. Ms Laurimore confirmed Mrs Murray's view of the claimant's talents and the likelihood that he had a "stellar career" ahead of him. She also said that Mrs Murray was an excellent agent. She said that if the claimant were still able to work and she were representing him she would expect him to be making a living as a presenter and in off-screen roles involving production and engineering. Her evidence was that there were opportunities to make significantly more income from "spin-offs" and that television is often just a "shop window". In her statement, she said this:

> "It is really difficult to give an example of who Jem might have become had the accident not happened but I can confidently say that anything up to £300,000 + a year from TV and Spin off work is possible. Of course, it could have been much more or indeed it could have totally dried up."

She went on to say that she would not have expected someone to have done as much work as the claimant and then totally disappear.

234. Ms Laurimore's statement was dated January 2020. She said then:

> "The television industry has become difficult in recent years and some stalwart presenters are finding that work is drying up as broadcasters continue the very important job of opening up on screen opportunities for Black and Ethnic minorities."

She indicated that some of her own clients were struggling to make a living on television but said that when that happens she was generally able to find other opportunities for them. In the witness box, she agreed that the Covid pandemic had created further challenges and the need to seek out new opportunities such as writing books.

235. Kim Shillinglaw, formerly the Controller of BBC2 and BBC4 and before that Head of BBC Commissioning for Science and Natural History, gave evidence for the claimant. She had been involved in casting the claimant for Bang Goes the Theory. She spoke of his talent and the high esteem in which the claimant was held. She suggested that the claimant could have found work as an expert presenter without much problem, although she would not have expected him to step out into more general presenting. She suggested another potential career path would have been off-screen television production, which she said was a variable area but one that could generate significant income for someone with a good idea who can get a format off the ground. She talked about making "money whilst you sleep" from back end shares in distribution rights. She also referred to the possibility of making money from ancillary activities such as speaking engagements, tours and book deals.

236. In the witness box, Ms Shillinglaw confirmed that Covid had initially had quite a severe impact but that the industry had proved resilient and had shown ingenuity. She said that anything that could be filmed outdoors or shot with a remote camera or even on an iPhone had an advantage. If a programme could be made there were huge opportunities to sell it. It seems to me that the claimant would probably have been well placed to adapt to the challenges presented by Covid. His natural inventiveness and hands on approach would probably have stood him in good stead to find ways around the difficulties and working outdoors is unlikely to have phased him. It would be difficult to predict that the claimant would have positively benefitted from the pandemic. However, I find that he is likely to have been able to weather the storm better than others. There may well have been some peaks and troughs.

237. What emerges from the evidence of Mrs Murray, Ms Laurimore and Ms Shillinglaw is that the career paths of television presenters are extremely variable. Once a television presence has been established, multiple opportunities are likely to present themselves. However, different people take different courses and not everyone will pursue the same options. Predicting the career of any individual in the television industry is therefore very difficult.

238. The claimant called four witnesses who worked in television, Ed Booth, Chris Hill, Jake Cardew and Dick Strawbridge. All had worked with the claimant at one stage or another. None of them can be viewed as direct comparators. Their evidence was further testimony to the uniqueness of individual careers in television. Each of these witnesses spoke highly of the claimant.

239. Mr Strawbridge is a fairly well-known presenter. He started his television career at the age of 38 and is now in his 60s. He did not think age was a limiting factor for male engineering presenters. He had worked with the claimant on engineering programmes but it was apparent that he had diversified, taking advantage of his television profile. He and his wife present "Escape to the Chateau", a reality style programme following their move to France and the purchase and renovation of a chateau. Their children also feature in the programme. The couple have been able to take advantage of "spin offs" including a book deal, product launches and events. It was apparent that he was commercially astute. When working together, he had talked with the claimant about "how you optimise what you are doing". Mr Strawbridge said in evidence that the claimant was "always missing that commercial element." He thought he was "somewhat naïve" and "needed somebody to strategize for him". It was readily apparent that Mr Strawbridge and the claimant are very different personalities.

240. Mr Strawbridge was rather vague about his own earnings. I accept that he was not deliberately being evasive but, despite his commercial astuteness, he apparently defers to his wife, agent and accountant on matters of personal finance. He said that he had been under pressure of work and did not have documents to hand to evidence his earnings. It was apparent that it was not easy for him to separate out his earnings from different aspects of his portfolio. However, he agreed with Mr Watt-Pringle that his gross earnings from all the various sources were about £265,000. He also agreed that if allowance was made for overheads and income tax at UK tax rates, a crude net figure of £152,000 would be reasonable. However, he suggested that his tax affairs were not straightforward and that he would have to ask his accountant what percentage he was left with after tax. He had apparently not asked that question before giving evidence.

241. It is clear that Mr Strawbridge's income is derived from a diverse portfolio. While the claimant may have had opportunities which were comparable to his presenting and appearances, Mr Strawbridge also had sources of income which would not have been available to the claimant, such as from events at his chateau. Mr Strawbridge said that he did not feel he had maximised his income as much as he might have done recently, preferring to focus upon his family.

242. Mr Booth is a producer and director. He knows the claimant well and regards him as a friend. He has over 25 years' experience and has worked on high profile programmes. He said that when he had worked with the claimant, he as producer/director and the claimant as engineer/presenter, their earnings "were pretty much on parity". His own earnings had increased after 2013 but had "stagnated a little bit". Without further detail, proper documentary evidence or any real analysis on the claimant's side, I consider Mr Watt-Pringle's submissions as to Mr Booth's own earnings are perfectly reasonable, suggesting gross earnings of £88,800 and net earnings after tax of £55,980.

243. In his statement, Mr Booth highlighted the unique talents the claimant had. In his statement, he said that it was his view that uninjured he would have gone on to be a major star of television. He imagined him as a "Bear Grylls of science". He considered that the claimant "would be earning at least what he was paid on BGTT if not more." In the witness box, he said that he could imagine the claimant having had his own show on YouTube, like the presenter Dan Snow, who had "made a killing", and having done very well during the Covid crisis.

244. Mr Hill is a very close friend of the claimant. They worked closely together over a period of about 20 years. They were both engineers but the claimant's talent was spotted and he moved into presenting whereas Mr Hill stayed behind the scenes. Mr Hill spoke highly of the claimant's unique talents. Mr Hill now lives in New York and works as a producer and said that his engineering work had really dried up without the claimant. He said that rates of pay were much higher in America. His weekly wage is $3600, a rate which is very common for a specialist producer. Again, I accept Mr Watt-Pringle's calculations as being reasonable, suggesting earnings net of overheads but before tax of £106,672. If taxed in the UK, equivalent net earnings would be £72,766.72. Mr Hill said that if the claimant were still working:

> "… he would have been earning a similar rate, or probably far more, due to the extra elements he used to bring to the table. This is if he were a Producer. If he were still presenting TV shows he would have been incredibly successful, in the UK or US. Of that I have no doubt."

245. Mr Cardew is an executive producer based in Los Angeles and working on "Wheeler Dealers" which he describes as "Discovery Channel's most successful show and number one in the world". He moved to the United States several years ago, having previously worked mainly for the BBC. He has plainly been successful. He worked on series one of Bang Goes the Theory, where he met the claimant. He held him in high regard. He compared him to Colin Furze, a presenter who has been very successful on YouTube. Mr Cardew said that if he had employed the claimant as a producer he would have paid $4,000 dollars per week, which accepting Mr Watt-Pringle's calculations done on the same basis as with Mr Hill's figures would produce net income after tax in the UK of £74,736. However, Mr Cardew made it clear that he would have

expected the claimant to couple producing with other roles, consulting, presenting and engineering when his salary would be "considerably more". He said that "the sky's the limit" in America and working for a network channel could produce earnings of $1million plus per year.

246. Even allowing for the time difference and the inevitable difficulty of giving evidence by video-link, I was not sure that Mr Cardew was wholly engaged with the importance of giving accurate and reliable evidence. I do not think that his vague and perhaps somewhat hyperbolic statements take matters much further.

None of the Above

247. In January 2011, the claimant pitched various ideas for a television series to Jon Rowland, Head of Production at an independent production company, Renegade Films. Of the three ideas, Mr Rowland said one was too similar to a series that had already been produced. He showed interest in another and said he would speak to BBC America about it, although it appears this was never pursued. The third was a show called "None of the Above". In February 2011, Mr Rowland informed the claimant that there had been a "big bite from Discovery" on None of the Above. However, the idea was not progressed with a television company until late 2012, when National Geographic took it up. The programme went into production in 2013. Contracts for a first series were negotiated through Mrs Murray and signed in August 2013. The claimant was paid for this series in 2013. Contracts were entered into for a second series 2014 with further payments being made that year.

248. It follows that the claimant's actual post-injury earnings include payments in the tax years ending April 2014 and April 2015 for None of the Above. However, it is the claimant's case that he had done nearly all the work which generated this income in 2011 and 2012. He acknowledges a small amount of earnings from post-injury work but claims that the rest (which I shall refer to as "the relevant sums") should be treated as pre-injury earnings. Mrs Rifkind has dealt with this by transposing the relevant sums into the tax years 2012 and 2013 which has the effect of uplifting his earnings for those years and conversely reducing his post-injury earnings.

249. This is a significant area of controversy between the parties. The case was opened to me on the basis that the treatment of the None of the Above earnings and particularly whether they should be transposed back into earlier years was the key issue in relation to loss of earnings. In his closing submissions, Mr Grant suggested that:

> "… the Court needs to determine whether the £133,428 net income from NOTA … received and accounted for in the 2013/14 and 2014/15 should be considered pre- or post-accident income for the purposes of valuing his loss of earnings claim."

Putting it slightly differently, he said:

> "The question for the Court is whether as a matter of law, in assessing a personal injury claim, any account should be made of the fruits of the inspiration and time spent developing the format and intellectual property for NOTA that subsequently earned him £133,428 over the 2014 and 2015 financial years."

250. In my view, the dispute about loss of earnings cannot be framed as a discrete matter of law. The law is clear and as stated as above. The assessment of loss of earnings involves a comparison of what the claimant is likely to have earned but for his injury and the earnings he has in fact received and is likely to receive in future. This must reflect the factual reality. It follows that the issues in relation to loss of earnings cannot be determined without determining the facts first.

251. It was the claimant's evidence that during 2011 and 2012, he developed the series. He devised and tested scientific experiments and made notes. A lot was done in workshops or while travelling, often in the company of Chris Hill, on whom he would test his ideas. Mr Hill confirmed that he had been involved in the conception and development of the show and that a lot of that was done very informally, discussing things as they drove around. The claimant did not produce his notes or other documentary evidence of the work done in this period.

252. On 1 November 2012, in an email to Mrs Murray, the claimant said that he had got a text from Jon Rowland "out of the blue" saying that National Geographic were now very interested in the idea he had given Renegade a year and half earlier. He was concerned he had also given the idea to BBC Worldwide and that his own contract with the BBC would prevent him hosting the show. In the event, it appears that the decision was made to go with the National Geographic option and that there would be another presenter, which had always been an option. The claimant said some people at the production company would have favoured him hosting it whereas others preferred Tim Shaw, the eventual presenter. In any event, there is no suggestion that the claimant would have taken the presenting role had he not been injured.

253. The day before the crash tests, the claimant was contacted by Nick Watson, who thanked him for "writing this idea with Jon" and said that he and another person had been asked to work it up over the next two weeks. He suggested that seemed "quite a tall order" but not uncommon in television. Mr Watson asked the claimant to call him to chat through. He said he understood that the claimant was consulting but was unsure if that was paid or "taking the mick". Jake Cardew was to be the director for the series. On the day of the crash tests, Mrs Murray confirmed that she had registered the claimant's "interest as format owner/exec/consultant etc."

254. Mr Watson's email of 7 February 2013 provides the context for the meeting that took place in a pub after the filming on 20 February and the subsequent email which the claimant sent Mrs Murray in the early hours of the following morning. In that email, the claimant said:

> "I met up with the producer from Renegade yesterday evening and made a lot of good progress in developing good content for them and he's very keen to get as much of my time as possible. I think between him and the director they currently have on board (who I also know) we should be able to turn that round quite well."

The claimant said in evidence that he gave his folder of handwritten notes to Mr Watson at the meeting in the pub. It appears that heads of agreement were agreed between Mrs Murray and Renegade around 25 February and reflected the contracts which were later entered into.

255. Pilots for the series were filmed in March/April 2013 and were transmitted in the United States, where they did well. Following that, National Geographic commissioned 18 half hour shows "to be delivered really fast". The second series in 2014 consisted of 12 programmes.

256. When questioned in relation to his work on None of the Above, the claimant's tangentiality was sometimes evident. He was though very keen to impress that he had essentially done all the work necessary to generate the income he received from None of the Above (save for the small amount which has been acknowledged in his claim) in 2011 and 2012. After the crash tests, he accepted he helped his friends who were working on the production side with engineering queries, which included developing and testing the ideas, but he stressed this was not something he was contractually obliged to do. He said the only thing he could be required to do under his contract was attend in-person meetings if required but, after his injury, he was unfit to attend meetings. He was not fit enough to fly to Las Vegas to be available on the shoot in March/April 2013.

257. There appears to be a perception on the claimant's side that the defendant has not understood the nature of the agreement, namely that he was essentially selling his format rights rather than being contracted for future work. I do not see that there has been any fundamental misunderstanding on the part of the defendant or its representatives.

258. The terms of the contract between the claimant and Renegade provided that he would be entitled to a services fee of £3,000 per episode and a 10% share of the production fee. The terms in relation to the services fee stated:

> "In consideration for the provision by you of formal consultancy services as and when reasonably required by us during pre-production and production of the programmes, we shall pay you the sum of three thousand pounds (£3,000) in respect of each episode of the programme produced by us. This sum shall be payable upon receipt of an invoice from you …. You agree that should we require, and subject to your availability, your consultancy services shall be provided in person on location subject to payment by us of agreed travel and accommodation expenses …"

It appears that it is from this that the claimant derives the idea that in-person meetings were within his contractual obligations but other consultancy work was not. That is a rather odd interpretation, which does not fit with a plain reading of the contract. The contract clearly envisaged that the claimant would provide such consultancy to the production team as was reasonably required and that, if necessary and if he was available, he would do that on location.

259. The contract is not expressed in terms which relate purely to the sale of intellectual property rights. The £3,000 fee per episode was a fee for "services". The services required were the consultancy necessary to assist the production team in translating the claimant's idea into a viable series of programmes. The contemporaneous evidence supports this and demonstrates that the claimant was providing consultancy work after the crash tests. This includes the meeting with Mr Watson on 20 February 2013 and

the subsequent email to Mrs Murray. In an email to Mrs Murray sent on 31 May 2013, the claimant said he planned to do a bout of consultancy work for Renegade next week. On 3 June 2013, he thanked Mr Hill for "the suggestions on the renegade job", which he said he would get on to today/tomorrow. On 16 October 2013, he attended a meeting at Renegade's offices which was cut short because he was feeling unwell. The claimant went to Mrs Murray's office and lay on the floor to recover. The following day he emailed Dr Freeman and said:

> "Was back in at renegade yesterday but had to make excuses and leave just after 4 as I was really rough …
>
> I think part of the problems is I've ended up trying to work as if I was perfectly ok for the past few weeks – it was just too much."

The same day, he reassured Mrs Murray that he was still providing Renegade with plenty of content. The claimant accepted when giving evidence that the October 2013 meeting was probably not one of the days for which he billed separately.

260. Having reviewed the contemporaneous evidence and what the claimant said in the witness box, I find that he did work of a consultancy nature in relation to None of the Above after his injury. He may have regarded this as outside the contract and a case of merely helping friends but I find this work was as was envisaged by his contract. Having said that, I fully accept that the contract was not a straightforward contract for services. It provided the mechanism by which the claimant was to be paid for the series which he had devised and developed. The £3,000 fee per programme did not relate directly to the value of the consultancy he would provide during pre-production and production. Rather, it was part of the way in which the claimant was to be remunerated for what Mr Grant describes as the fruits of his inspiration and development time.

261. I accept that much of that development time occurred before the crash tests. It was only because the claimant had the ideas ready to go that he could capitalise on the project after he was injured. I find that he was well supported by his friends who were involved in the production and by Renegade who were sympathetic to him. I accept that he was less involved than he would have been had he not been injured. This project is not therefore to be regarded as representative of the claimant's post-injury earning capacity. Rather, it was something he had worked on and developed pre-injury and on which he was able (with support) to do enough to bring to fruition afterwards. Even on that basis, it placed a strain on the claimant and contributed to his realisation that he could not continue with his pre-injury career.

262. The accountants are agreed that from an accounting and tax viewpoint, the income from None of the Above should be recognised as it was, namely at the point at which invoices were raised. That much is perfectly clear.

263. The court is not engaged in an accountancy exercise. My role is to assess the earnings lost as a result of the claimant's injury. That does not involve asking when income should be recognised as having been earned. Rather, it involves asking two fundamental questions:

i) What would the claimant's earnings have been but for the injury?

ii) What have the claimant's earnings been and what will they be in the future now that the claimant has been injured?

In respect of income that would have been received uninjured and has in fact been received post-injury, it matters not when it was received. The None of the Above income in question was received at exactly the same time as it would have been had the claimant not been injured.

264. Analysis of how and when the income was earned can inform consideration of the pre- and post-injury earning capacity. If the claimant had secured an opportunity which, on the evidence, represented a new and ongoing income stream but where there was a time lag between doing the work and being paid such that he only began receiving the income after the injury, that would plainly have to be brought into account when looking at what he could have expected to earn absent the injury. The question to be addressed remains: What was the claimant's real earning capacity had he not been injured?

265. That question must be answered by looking at all the evidence in the case, rather than by simply interpreting the accounts. The calculations have to follow the findings of fact. It is fair to say that both accountants recognised this when giving evidence. Each of them recognised that the final calculation of the claim would have to be based upon the court's findings of fact and might therefore have to await my determination of the factual issues. They offered to produce alternative calculations post-judgment.

266. Mrs Rifkind's approach was to transpose the earnings from None of the Above back into the two earlier years and then to use the adjusted figures as a basis to calculate an uninjured growth pattern. She calculated compound growth of 31% in the years ended April 2011 to 2013 and a 50% increase in the last year. She offered two scenarios with growth patterns continuing at either 31% or 50%. The growth was capped at £500,000 in scenario 1 and £675,000 in scenario 2. Mrs Rifkind said that she had taken account of the evidence of Mrs Murray and the lower end of her range of earnings but allowed for additional earnings on top of those she would have been involved with. She acknowledged that £675,000 was significantly higher than the top of the range identified by Mrs Murray but said that this figure would take account of the loss of a chance of higher earnings from work in America or via YouTube.

267. In the joint statement, Mr Stanbury said that he considered the claimed growth in annual income was a matter of evidence for the court to decide upon and was not one of accounting expertise. I agree.

268. In my judgment, Mrs Rifkind's approach is not sustainable on the facts. First, her assumption that all the work in relation to the sums she has transposed was done before the injury and that no significant work was done afterwards does not accord with my factual findings. When giving evidence, Mrs Rifkind acknowledged that if her assumption was incorrect, she could not sustain her approach. When I asked her how she would account for a situation where a significant amount of work had been done post-injury, she said:

> "Right now, I do not know. I would need to discuss that with –
> I would need to look at the evidence"

This illustrates the difficulty in applying her method on the facts of this case.

269. Even if it had been appropriate to treat all the relevant income as having been earned pre-injury, it seems to me that there is an even more fundamental problem. The evidence simply does not support the notion that the 31% or 50% increases she calculates represented the start of steady growth that would have continued but for the claimant's injury. That "growth" represents payments made for a particular project. It was something the claimant had been able to work on alongside his other commitments, which had in recent years been providing a fairly steady but variable income stream. It did not come about through any change in direction or because of Mrs Murray's involvement. It is simply the case that a concept the claimant had developed and pitched some time before came to fruition around the time of the crash tests. It is reasonable to accept that other opportunities would have presented themselves at different times. That proposition is supported by the evidence. However, the payments for None of the Above cannot be seen as part of a pattern. There is plainly inherent uncertainty involved in monetising any concept. There is a lack of tangible evidence upon which to base a finding that the None of the Above payments represented the start of a regular and increasing income stream.

270. For these reasons, I reject Mrs Rifkind's approach and am unable to utilise her calculations. On the other hand, Mr Stanbury acknowledged that his calculations did not seek to put any value upon the added value that Mrs Murray might have brought or to future opportunities. He considered the projection of future income streams was very challenging in this case and had deliberately left it to the court to make findings on the facts. His calculations were therefore based simply upon an analysis of the historical figures from the accounts. Mr Stanbury acknowledged that his approach would effectively mean that the recruitment of Mrs Murray is assumed to have had a negative impact on the claimant's net earnings, in that he would have continued on the same trajectory as before but now paying his agent a percentage of his earnings. That is not a realistic proposition, as he appeared to recognise. In the circumstances, I do not consider it appropriate to adopt Mr Stanbury's calculations either.

271. Instead, I assess the likely gross annual earnings based upon my findings on the evidence and set out the parameters within which to calculate the damages. Having provided my judgment to the parties in draft, I am grateful that they have jointly calculated the resultant figures for past and future loss of earnings.

Assessment of the claim for loss of earnings

272. I intend to take a fairly broad approach to the assessment of the claimant's likely uninjured earnings. This should not belie the very detailed consideration I have given to all the evidence. My conclusions represents the culmination of a series of assessments of chance.

273. My relevant factual findings are as follows:

i) The claimant was well established in his television career and had enjoyed a relatively steady income stream in the years immediately before his injury.

ii) His talent and skills were recognised and he was entering a phase where he was likely to enjoy even greater success. He was in demand and many different opportunities were coming his way.

iii) The claimant was not money orientated. He was principled and tended to do work that he viewed as having a broader value rather than looking only at monetary value. He was concerned to provide for his family financially. He was also a hands-on father and would consider his family's emotional and other needs alongside their financial needs. He already worked long hours and is unlikely to have expanded that. He would have been selective in the opportunities he accepted.

iv) Although the claimant states that he would have gone to the United States for the right opportunity, I find that he is unlikely to have moved his family there. This accords with Mrs Murray's view at the time. I also note that he had recently applied for a mortgage to purchase a property.

v) The claimant had recruited Mrs Murray to assist him in managing the opportunities. He did so in the expectation that his earnings would rise and was willing to pay her commission on that basis. Mrs Murray brought a more commercial approach and had given, and would have continued to give, advice about ways the claimant could maximise his earning potential.

vi) On balance, Mrs Murray's involvement is likely to have brought about an increase in earnings. However, there are contingency factors associated with this. The claimant had recruited an agent previously but had then gone his own way after a relatively short time. Mrs Murray had been engaged only a few months earlier and the relationship was not fully established. The claimant may not have followed her advice, particularly the advice that he should have moved away from the BBC given his loyalty. Even had he remained at the BBC though, Mrs Murray is likely to have directed him into more lucrative ancillary work and/or to have negotiated better fees for appearances and the like.

vii) The claimant's talent was such that Mrs Murray believed he could be earning £300,000 to £500,000 by now. Ms Laurimore's expectation was "up to £300,000 +". As might be expected of successful agents, both presented as having an optimistic outlook. These figures were not underpinned by detailed and meaningful evidence. I accept them as their professional judgment of what it might have been hoped that the claimant would earn. However, there is a need for cautious assessment of what the claimant would in fact have done, bearing in mind his personality and all other considerations.

viii) I consider that there was a realistic prospect that the claimant would have achieved gross earnings in the region of £300,000 in at least some years. There was a chance that he could have earned more as suggested by Mrs Murray. I do not consider there was any real prospect that he would have fallen into the £1million category identified as the top of Mrs Murray's broad range. This would have required too fundamental a change in approach for a man who had apparently been content with a steady stream of much more modest earnings in the run up to his injury.

ix) Predicting the career of any television presenter is difficult. Styles and the viewing public's taste change. The claimant's work was popular in 2013, and is likely to have remained so. As Mrs Murray observed, it could have had a "shelf life". However, aging is unlikely to have presented significant challenges to a male presenter in the science and engineering field. There is uncertainty as to the age at which the claimant would have retired. I will take his retirement age as being 67 but in doing so I acknowledge that I am assessing future loss over a relatively long time and that it is unlikely that earnings would have been constant across the whole period. The claimant's varied skills ought to have offered further protection for him. For example, if presenting opportunities reduced, the claimant could have done more production and engineering work. As None of the Above demonstrates, his earning capacity did not depend solely on his ability to present.

x) There are likely to have been variations in the claimant's earnings from year to year. In the period of past loss, the impact of the Covid pandemic is to be factored in. Although I find that the claimant was well placed to weather that storm, there is likely to have been an impact in the short term. International travel would have been restricted. In relation to the future, there are likely to have been good years and less profitable years. The further into the future one looks, the less certainty there can be.

xi) In relation to the claimant's residual earning capacity, the claimant was able to earn £15,381 net in the last financial year. Some improvement in his condition is anticipated following the completion of this litigation. Further, it is apparent that the claimant has spent a significant amount of time on his claim. When the litigation is over, he ought to have more time to devote to exploring whether there are other sources of work that he is able to pursue in his injured state. Through Mr Grant, the claimant conceded a net residual earning capacity of £22,500 per annum. I regard this as reasonable. I believe there is some prospect that the claimant will be able to do even better than that, by directing the energy he has invested in his claim elsewhere. However, on the basis of the approach I am taking to the uninjured earning capacity, I believe it is reasonable to adopt Mr Grant's figure. The uncertainties inherent in this case are such that there must be a balancing of many different factors. The prospect of doing better in the future is another factor I put in the balance against the chance that the claimant would have earned more than I am allowing for with the uninjured multiplicand.

274. My assessment is the best I can do to reflect all the chances and uncertainties which exist in this unusual case in a way that is fair to both sides. There is an element of imprecision but I have sought to simplify things so far as appropriate, building in all the considerations I have identified above and standing back and taking an overview of all the evidence I have seen and heard. The years to which I shall refer are the tax years ending in that year, so 2013 means the tax year ending April 2013 etc. I invite the parties to check my calculations, noting that the figures were not always consistent throughout the accountancy evidence.

275. For 2013, I adopt the suggestion of Mr Stanbury that the claimant would have earned a little more in that tax year but for his injury. His figure of £108,042 for gross earnings, as set out in the joint statement, should be adopted for that year.

276. For 2014, I assume a 20% increase on the 2013 figure, in addition to the None of the Above earnings. This allows for additional work which the claimant is likely to have done on None of the Above and/or the value Mrs Murray would have brought so as to "earn her keep". My calculation is that this produces a figure of £129,650 ("the underlying earnings") to which the sum of £35,683 for NOTA (the figure being taken from Schedule 2 to the Joint Statement) should be added, producing a gross sum for that year of £165,333.

277. I assume a further 10% rise on the underlying earnings in 2015 as the impact of Mrs Murray's assistance was felt. Again, that is in addition to the NOTA earnings, so the calculation is £142,615 + £98,305 = £240,920.

278. In 2016, I assume that the relationship with Mrs Murray would have been established and bearing fruit. I consider that the sum earned in the previous year, with the substantial contribution from NOTA would have provided a benchmark which the claimant and Mrs Murray would have wanted to match. It is clear that there were multiple enquiries and opportunities and some would have been expected to come to fruition by 2016. However, as the NOTA income did not represent a steady income stream, it would have taken real effort to maintain earnings at the same level as in 2015.

279. On the evidence before me, I do not think I can do more than to take a broad view for the period from 2016 to date. This was the period in which Mrs Murray expected the claimant's earnings to peak. The opportunities were already there. I find that the period is likely to have been marked by a series of peaks and troughs as the claimant decided which opportunities to exploit. In the early phase, this is likely to have been more challenging but it was reasonable to anticipate that the claimant would have capitalised on his past success with a resultant rise in earnings. At the end of the period of past loss, Covid would undoubtedly have had an impact such that suppressed earnings could have been anticipated in 2021 and the current financial year, although the claimant is likely to have found work to do. Making a broad assessment of those likely peaks and troughs, I conclude that the claimant's gross income in the period from 2016 to date should be taken to be £250,000 per annum. I think it preferable to use the same sum across the period, recognising that in reality his earnings were likely to be variable. Any attempt to provide a more precise breakdown is unlikely to be realistic.

280. As far as future loss is concerned, I proceed on the basis that the claimant would by now have enjoyed several years at his peak. I have found he is likely to have responded well to the challenges presented by Covid and that his varied skill set would have benefitted him in the future. Nevertheless, it was his "star quality" which witnesses have identified as the reason he was likely to have done really well. His star was in the ascendency in 2013. Precisely how long that would have continued is impossible to predict. For simplicity and in accordance with the approach of both parties, I consider that a single multiplicand should be used for the whole period of future loss. The multiplier should be based upon retirement at age 67, with the standard discount for contingencies other than mortality. Adopting that approach, I shall reflect the competing uncertainties and chances within the gross earnings figure I select. That again involves a broad consideration. I find it is likely that some years would have been significantly more lucrative than others.

281. On that basis, I consider that a fair sum to use for the gross uninjured earnings in order to calculate the multiplicand for future loss is £265,000.

282. I have cross-checked this figure in a number of ways. First, if £300,000 is taken as a realistically achievable figure on the basis of the evidence of the agents Mrs Murray and Ms Laurimore, the sum I have selected represents a discount of around 12%, which I consider a reasonable discount for the particular uncertainties associated with the claimant's career model over and above the normal contingencies of life and of any employment. Second, £265,000 is the figure that Mr Strawbridge agreed represented his current gross turnover from all sources. He is someone who has capitalised on his television exposure to pursue a diverse range of opportunities. He cannot be regarded as a direct comparator and the opportunities he had pursued are undoubtedly different to those the claimant would have followed. I have not selected the sum based upon his earnings. However, it provides a useful cross-check of the sort of figures that can be achieved with a portfolio of options and by someone who continues to prioritise family commitments over chasing all monetary options. Third, Mr Stanbury's scenario 1, allowing for steady compound growth, produces a figure of over £200,000 without taking account of the evidence which supports a likely step change. An uplift of the order of one-third to this figure does not seem unreasonable to reflect the real opportunities likely to have been available to the claimant.

283. It is always unfortunate when a claimant is injured before they can realise their true potential. Inevitably, the claimant and those close to them will focus upon all that might have been achieved and feel an enormous sense of lost opportunity. The onus remains on the claimant to prove his loss. That is not necessarily easy in a case such as this where a career path carries huge variability and uncertainty. The court must strike a balance and be fair to both sides. I consider that adopting the sum of £265,000 for future gross income achieves this.

284. Dealing with the issue of whether pension relief should be allowed for when calculating net earnings:

i) This was an issue that was not dealt with in any detail at trial or in the parties' submissions. With hindsight, I consider that it should have been given greater attention. The issue arose through the accountancy evidence. Mrs Rifkind had interviewed the claimant and recorded that he advised her that, when earning at a higher level, he would have made the maximum contributions upon which tax relief was allowed, as he wanted to build up his pension fund. Mr Stanbury's report was a paper exercise and largely consisted of a review of Mrs Rifkind's report. He did not allow tax relief on pension contributions. He explained that he had not done so as there was no historical evidence of regular contributions. He agreed Mrs Rifkind's approach and calculations if the court concluded that "pension contributions were to be included in the loss calculation". I was not addressed by either party as to the detail of the claimed pension relief. Given the way this issue was presented, I viewed it as a purely factual issue as to whether or not it was likely the claimant would have made pension contributions once his earnings increased.

ii) In the draft judgment which I circulated to the parties, I made a preliminary finding that the claimant would have made pension contributions from the 2015 tax year. In doing so, I acknowledged that Mr Stanbury was right to say that there was a lack of an established history of pension contributions. However, I accepted that once the claimant's earnings had increased significantly and as he entered his mid-40s, he was likely to have made provision for a pension. I made

no findings beyond that. I endorsed Mrs Rifkind's approach of allowing for the tax relief and not maintaining a separate claim for future loss of pension. However, I did not then have sufficient detail to allow proper consideration of the impact on the calculation of the claim for loss of earnings. The parties recognised that final calculations would have to follow my findings of fact and had agreed to perform the calculations after receipt of my draft judgment. The approach I took was to seek to give the parties as much direction as possible as to the basis for the calculations. I anticipated that further findings might be required from me before the final calculations were performed and invited the parties to indicate if that were so.

iii) Having revisited my judgment when finalising it, after receipt of the parties' calculations and representations from Mr Watt-Pringle addressed to an application for permission to appeal, I recognised that I had not in fact made sufficient findings on the issue of pension relief. This was an oversight caused by my desire to give the parties sufficient direction to allow a final calculation. On reflection, I ought first to have sought submissions on this aspect having not previously been addressed in any detail on it. It seemed to me that it was inappropriate simply to deal with this point by way of the application for permission to appeal since the reality was that it had not yet been fully addressed. I therefore arranged a further short hearing to receive oral submissions. Both Counsel confirmed that they considered it was appropriate for me to reopen the issue, prior to finalising my judgment, and to make a determination.

iv) The evidence dealing with likely pension contributions was extremely limited. The claimant's witness statements did not deal with the issue at all. However, he adopted Mrs Rifkind's evidence as the basis of his claim for loss of earnings and confirmed the basis of the claim by way of his Schedule of Loss. There was no cross-examination of the claimant about the assertion in Mrs Rifkind's report that he would have made the maximum allowable contributions. I accept Mr Watt-Pringle's submission that it would be unfair to hold that against the defendant, given the breadth of the claimant's evidence and the fact that this was not included at all in his statements. In reality, no attention was given at trial to the claimed pension relief. That was no doubt because the detail simply could not be considered until my primary findings of fact had been made.

v) What is now apparent is that the claimed pension relief has a substantial value in itself. On a full liability valuation, it represents a sum in excess of £300,000. That sum is considerably greater given my findings than it would have been on Mrs Rifkind's calculations. The lower earnings I have found have the effect of increasing the maximum available relief. Although presented as part of the calculation of the claim for loss of earnings, in my view it is properly regarded as a head of claim in itself. Had the claim for pension relief been presented separately, I am confident it would have received greater attention. Like any other head of claim, the claimant bears the onus of proving it.

vi) Having carefully reflected on the available evidence and the submissions made to me, I have concluded that there is an insufficient evidential basis to allow proper quantification of the pension relief. My finding remains that the claimant would have been likely to make pension contributions but I consider that he has

presented insufficient evidence as to the level of those contributions such as to allow a meaningful assessment.

vii) I have considered whether I should nevertheless make some allowance, either by way of a modest annual sum or as a lump sum, to reflect my finding that the claimant would have made some pension contributions from 2015. I consider that it would be unfair to the defendant to do so. I could do no better than to take an arbitrary figure. It is for the claimant to properly evidence all aspects of his claim and I find that in relation to pension relief he has not done so.

viii) I have acknowledged that there was uncertainty in relation to the claimant's earnings and that there is likely to have been variability. As is apparent from the above, I have sought to strike a fair balance and to make a broad assessment which reflects all relevant considerations. Upon proper consideration of the impact of pension relief, I consider that including any allowance for such relief in the calculations would distort the balance I have sought to strike. In my judgment, the evidence on pension contributions really does no more than establish a further chance that the claimant's net earnings would have been greater. As I have indicated, I have reflected all the chances and uncertainties in the selection of the gross figures. Given that approach, I think it would be wrong to allow the claim for pension relief. In those circumstances, I direct that the net figures for the purpose of the claims for past and future loss of earnings should be calculated without making any allowance for pension relief.

285. I adopt the agreement between the accountants that the gross earnings should be reduced by 10% for commission and by £10,000 for fixed overheads. I direct that the sum of £10,000 is used without applying an uplift for inflation, reflecting a broad approach rather than an attempt to be precise. The use of 10% for commission may be generous to the claimant given Mrs Murray's evidence that she would have charged 12.5% on all income. However, the accountants have acknowledged the chance that some work would have fallen outside the Arlington agreement. I take the same approach.

286. I attach as Appendix 1 a summary of the basis upon which I direct that the claim for past and future loss of earnings should be calculated.

Care / loss of services

287. I heard expert evidence from Kathy Kirby on behalf of the claimant and from Louise Savage on behalf of the defendant. Frankly, I did not think that this was a case calling for expert care evidence. The claimant has not required anything like nursing care and I fail to see what the expertise of the two nurses added to justify the extra court time and expense associated with their evidence. However, insofar as the parties relied upon the expert evidence, I preferred that of Miss Savage to that of Mrs Kirby.

288. I consider that Mrs Kirby had over-inflated the claim and that Mr Watt-Pringle's cross-examination of her on that basis was perfectly fair. A particular illustration is her recommendation for a disability bed costing £10,000. The claimant does not pursue this as part of his claim, accepting that he is now able to sleep in a normal bed. However, even if it was reasonable to make provision for a bed in her report, Mrs Kirby said in cross-examination that she had chosen the top of the range solution and that a

suitable bed could have been secured for £600. Using the most expensive option possible does not seem to me to reflect a proper assessment of the claimant's reasonable needs and I am afraid it calls the impartiality of Mrs Kirby's opinion into question.

289. By contrast, Miss Savage appears to have done her best to make a reasonable and accurate assessment allowing two scenarios depending upon whether the claimant's or the defendant's medical evidence was generally preferred.

290. Having chosen to rely on expert evidence in support of the claim for care and services, the claimant's side acknowledged that the figure Mrs Kirby's evidence produced was not sustainable on the facts of this case. The Schedule of Loss presented the claim on what Mr Grant describes as a "pragmatic and broad brush basis" in the sum of £50,000. I do not feel able to adopt that on the evidence before me. The care claim was given little attention in the trial, other than by way of the expert evidence. In the circumstances and in light of my views on the merits of the respective expert evidence, I will take Miss Savage's evidence as the starting point.

291. Given my findings on the medical evidence, I use the figures described in the Joint Statement as Miss Savage's "Scenario 2" figures. Including both personal care and childcare, she assesses the past provision at just over £23,000. I consider that it is reasonable to accept that there were times when the claimant required more support than Miss Savage has allowed for. She acknowledged when giving evidence that she would have liked to speak to Mrs Stansfield when making her assessment but had not been able to. Reflecting this, I think it is reasonable to uplift the claim for past care and services to £25,000. The parties are agreed that the assessed sum should be reduced by 25% to reflect the gratuitous nature of the care. This reduces the sum to £18,750, which is the sum I award. I accept that the claimant has received a lot of support from his family and friends. However, not all of this will have crossed the line into what is properly recoverable in damages. On the evidence before me, I think this is a reasonable allowance for past care and services. I do not consider that the claimant has proved his claim to be entitled to a sum above that level.

292. I do not consider that there is a proper evidential basis for a claim for future care. In relation to future services, I think it is reasonable to make some allowance for DIY and activities about the home which the claimant would have done. I accept that it is probably unwise for him to do work up ladders and that his ongoing fatigue when he over-exerts himself places some restriction on him. Although the claimant was plainly 'handy' and capable of more skilled DIY, I would limit the claim to odd jobs bearing in mind that the allowance I have made for loss of earnings assumes he would have been working hard. Taking a broad view, I consider a sum of £750 per annum with a somewhat reduced multiplier of 20 would produce a fair sum overall and so will allow £15,000 under this head.

Past miscellaneous expenses

293. This head was not explored at trial. A claim is made for £38,237. The items are broken down individually and I have considered them. The claimant has disclosed receipts to support the sums claimed. In relation to his travel, it does not appear that the claimant has included every single journey he might have done. I think what is claimed is reasonable. The claimant has plainly spent a lot of time (and money) seeking diagnoses and treatment. I find that all the claimed loss is recoverable except for the costs

associated with swimming. While the claimant may have pursued swimming to help with his symptoms, I would view this as replacing other leisure related expenditure he would have incurred had he not been injured. Removing these costs makes only a modest difference. I allow £38,000.

Future treatment costs

294. In their closing submissions, both sides proposed a sum of £10,000 in respect of future treatment in the event the claimant's case on causation was made out. I will therefore treat that as effectively an agreed sum and make an award of £10,000 under this head.

Conclusion

295. The parties had agreed that the claimant should recover two-thirds of the damages assessed as being caused by injuries he sustained when carrying out the crash tests for an episode of Bang Goes the Theory in February 2013. I have found that the claimant was caused injury to his brain, spine and audio-vestibular system in the crash tests. While none of the physical injuries were particularly severe, the combined effect together with a psychiatric reaction have caused a constellation of symptoms and problems which have produced a significant impairment in the claimant's functioning. The effect has been to derail the claimant's successful career in television as well as to restrict his enjoyment of life more generally. Having made those findings, I set out at Appendix 1 the basis for calculating the claim for loss of earnings. Following circulation of this judgment in draft, the parties have agreed the necessary calculations to give effect to my judgment. They have also calculated interest on past loss and agreed that no interest should be awarded on general damages on the basis that such interest is offset by interest on the interim payments which have been made. I am grateful to them for their assistance in finalising the calculations. These figures are set out at Appendix 2. On that basis, there shall be judgment for the claimant in the sum of £1,617,286.20.

Appendix 1: Summary of the basis of calculation of past and future loss of earnings

Gross earnings:

2013:	£108,042
	(based on Mr Stanbury's adjusted figure in the Joint Statement)
2014:	£165,333
	(based upon a 20% increase to the underlying earnings = £129,650 plus the NOTA figure of £35,683)
2015:	£240,920
	(based upon a 10% increase to the underlying earnings = £142,615 plus to NOTA figure of £98,305)
2016 to date:	£250,000 per annum
For future loss:	£265,000 per annum

Deductions:

Commission: 10% of gross

Fixed overheads: £10,000 per annum as a fixed sum

Pension relief:

Net earnings are to be calculated without allowing for tax relief on pension contributions

Residual earnings:

To be calculated for past loss on basis of actual earnings

Allow £22,500 per annum when calculating future loss

Multiplier:

To retirement age 67 with standard discount for contingencies other than mortality

(non-disabled) for both anticipated and residual earnings

Appendix 2: Breakdown of the Final Award – as agreed by the parties to reflect the judgment

1.	General damages:	£65,000.00
2.	Interest on general damages:	£0[1]
	Past Losses	
3.	Loss of earnings:	£808,245.00
4.	Care and services:	£18,750.00
5.	Miscellaneous:	£38,000.00
	Sub-total	£864,995.00
6.	Interest on past losses of £ @ 1.88%[2]	£15,754.31
	Future Losses	
Loss of earnings	£1,455,180.00	
7.	Services:	£15,000.00
8.	Treatment:	£10,000.00
	Sub-Total	£1,480,180.00
	Total (GDs, Past Loss, Interest, Future Loss)	£2,425,929.30
	Less 1/3rd	**£1,617,286.20**

ORDER

BEFORE MRS JUSTICE YIP

UPON hearing Mr Grant of Counsel for the Claimant and Mr Watt-Pringle QC of Counsel for the Defendant,

UPON THE PARTIES having already agreed a 2/3 : 1/3 split on liability in the Claimant's favour,

[1] The claimant had received interim payments of £92,000 before the service of the Claim Form, and this sum has been set against interest on these payments

[2] Interest is reduced by offsetting interest earned on the interim payments that has not has not already been offset against the interest on general damages.

AND UPON the Parties agreeing that the Defendant is permitted to seek credit against any judgment awarded the sum of £92,000 paid by way of voluntary interim payments.

IT IS ORDERED THAT:-

1. There shall be judgment for the Claimant against the Defendant for the sum of £1,617,286.20 net of the agreed liability split, by way of damages inclusive of interest.

2. The Defendant shall pay the sum of £1,525,286.17 (net of the voluntary interim payments) payable to the Claimant's solicitors by 4:00 pm on 20 October 2021.

3. The Defendant shall pay the Claimant's costs of the action to be assessed on the standard basis by way of detailed assessment if not agreed subject to set-off of the costs awarded to the Defendant in the course of the proceedings and shall by 4:00 pm on 20 October 2021 pay the sum of £700,000.00 on account of those costs.

4. The order dated 19 May 2021 dealing with anonymity and reporting restrictions shall be discharged and there shall be no restriction on the reporting of the proceedings and/or judgment.

5. The Defendant's application for permission to appeal is refused.

Dated this **1st day of October 2021**