Neutral Citation Number: [2022] EWHC 924 (QB)

Case No: QB-2018-004679

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/04/2022

Before:

MRS JUSTICE HILL

- -

Between:

MANUEL MATHIEU	**Claimant**
- and -	
(1) TONY MARTIN HINDS	**Defendants**
(2) AVIVA PLC	

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Theo Huckle QC and **Kara Loraine** (instructed by Powell & Co) for the **Claimant**
Marcus Dignum QC and **Hugh Hamill** (instructed by DWF Law LLP) for the **Second Defendant**

Hearing dates: 8, 9, 10, 11, 14, 15, 16, 17, 18 and 24 February 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time of hand-down is 2.00pm on Wednesday 13 April 2022

MRS JUSTICE HILL

Mrs Justice Hill:

1: Introduction

1. This is a claim for damages for personal injuries arising out of a serious road traffic accident that took place on 28 November 2015. The accident occurred when the Claimant was aged 29 and studying for a Masters' degree in Fine Art at Goldsmiths College, London. He was crossing a road in Lewisham at a pedestrian crossing when he was struck by a moped ridden by the First Defendant which he had stolen earlier that day. The moped was insured by the Second Defendant, but the First Defendant was not insured to ride it. The Claimant sustained a serious brain injury in the accident.

2. The Claimant issued his claim on 15 November 2018, seeking damages arising from the negligence of the First Defendant. The Second Defendant admitted liability and on 5 June 2019, Master Gidden entered judgment for the Claimant with damages to be assessed. Accordingly, the hearing before me was limited to quantum issues.

3. The experts agreed that the Claimant has made a very good recovery from his injuries. He has gone on to enjoy a very successful artistic career. He lives in Canada, but his paintings and other works are displayed in galleries and exhibitions around the world including in the USA, the UK and China. However, his case is that the headaches, fatigue and cognitive issues from which he continues to suffer as a consequence of his brain injury have hampered his productivity, such that he is not able to produce and sell as much art as he would otherwise have been able to. The Second Defendant accepts that the Claimant suffered a serious injury for which he is entitled to some damages, but disputes the impact this has had on his productivity (not least because of his prolific artistic output since the accident) and argues that he has not mitigated his loss.

4. As a result, there were very significant differences between the parties as to the value of the claim. The Claimant's final Schedule of Loss provided before the trial sought damages of CAD (Canadian) $56,028,428, in total, equivalent to £33,617,057. The Second Defendant's primary case was that the Claimant could prove no ongoing loss beyond the end of 2018. The Counter-Schedule of Loss proposed awards for general and special damages, an award of £49,500 for past loss (with certain caveats) and nothing for future loss.

5. There were also complex disputes as to the tax treatment of any income-related damages to be awarded to the Claimant and a novel claim for provisional damages in relation to dementia. The latter was heavily contested by the Second Defendant not least because the underlying science is complex and controversial.

6. Accordingly, the key issues for me to determine were:

   (i) Whether the impact of the Claimant's injuries on his daily life is as extensive as he claims;

   (ii) Whether the Claimant has mitigated his loss by refusing to undertake certain treatment;

(iii) Whether any damages to reflect lost income should be awarded gross to reflect the prospect of the Claimant being taxed on them;

(iv) Whether the Claimant's injuries have hampered his artistic productivity and if so to what extent;

(v) Whether any award to reflect a suffer a shortfall in artistic productivity and thus income should be quantified using a multiplicand/multiplier approach or a '*Blamire*' approach; and

(vi) Whether the Claimant should be awarded provisional damages in relation to the chance of developing dementia due to his brain injury.

7. Over the nine days of evidence, I heard from seven witnesses of fact and seven experts. Several other reports and statements were read. The trial bundle ran to almost 4,000 pages. I heard closing submissions on a tenth day and received further written submissions on the mitigation of loss issue. It is not possible in this judgment to record all the evidence given or to note all the arguments advanced. I have given careful consideration to all the material placed before me, but only refer herein to that which is necessary to resolve the key issues. I have reminded myself throughout that, save as otherwise specified, the Claimant bears the burden of proof.

8. This judgment is structured as follows:

Section 2: The facts and the evidence in overview (paragraphs 9-49)

Section 3: General damages for pain, suffering and loss of amenity (paragraphs 50-86)

Section 4: Mitigation of loss (paragraphs 87-131)

Section 5: Taxation (paragraphs 132-157)

Section 6: Past losses (paragraphs 158-231)

Section 7: Future losses (paragraphs 232-288)

Section 8: Provisional damages (paragraphs 289-358)

Section 9: Conclusion (paragraphs 359-360 and Appendices 1-3).

2: The facts and the evidence in overview

2.1: The facts

9. The Claimant was born in Haiti in 1986. He moved to Montreal, Canada, with his family when he was 19 or 20 years old. In 2009 and 2010 he displayed and sold his art through two galleries in Haiti. In 2010, he obtained a Bachelors' degree in Fine Arts and Media Art from the University of Quebec in Montreal.

10. In 2012 he took part in a group exhibition at Museum Montparnasse in Paris and had a solo exhibition at the MIA Gallery in Montreal. He then won a place on the Masters

course at Goldsmiths, one of the leading institutions in the field worldwide. The course began in 2013. In the same year he took part in group exhibitions in Quebec City, Washington DC and France.

11. In 2014 he took a break from the Goldsmiths course. He had found living in London financially difficult and been offered the chance to appear in a remunerative television show. He worked from a studio in Montreal and participated in four group exhibitions in Montreal and one in Paris. He also went to Aruba for a residency (a placement involving a combination of work and holiday). In January 2015 he returned to Goldsmiths and won the competition for a solo show at the Institute of Contemporary Art (ICA) in London from a group of 200 students.

12. The accident occurred on 28 November 2015. The Claimant was admitted to hospital where he remained until 11 December 2015. Shortly thereafter he returned to Montreal with his sister, Fedora Mathieu, to recuperate. The ICA show took place during December 2015, but the Claimant was too unwell to attend. He returned to London in mid-January 2016. His Goldsmiths graduation show took place in July 2016.

13. In early 2017 the Claimant returned to Montreal. He began sharing a studio with Trevor Kiernander and Benjamin Klein. On 27 March 2017 he was involved in a second road traffic accident, in which he sustained a fractured tibia and clavicle, requiring a week in hospital. He was on crutches but was still able to do some work in his studio. In April 2017 he had an exhibition in Montreal, though Maruani Mercier. In the summer of 2017 the Claimant started a relationship with Natalia Correa. During this year, he was taken on by the Tiwani Gallery in London and had a solo show there, entitled 'Truth to Power'. He also began to work with other gallerists, namely Hugues Charbonneau in Montreal and Kavi Gupta in the USA. The latter is particularly well-regarded in the art world for identifying and promoting new talent.

14. In 2018 he had a solo "booth" at the Armory show in New York, a solo show for Mr Gupta in Chicago, two solo shows at Art Brussels in Montreal and five art fairs and group exhibitions. Hadrien de Montferrand, a further gallerist, also began working with the Claimant in 2018.

15. In April 2019 he attended a one-month residency in Sonoma, USA, with Pamela Joyner, a well-known figure in the art world. Later that year she purchased one of his works that had been exhibited in a group show at a Miami museum. In July 2019 he began a 7-month residency in Stuttgart, Germany.

16. In March 2020 he had a solo exhibition at the Maruani Mercier gallery, but due to the impact of the Covid-19 pandemic there was no opening and the show closed early. Due to the Covid-19 lockdown the Claimant's studio in Montreal was closed throughout April 2020. In May 2020 he started a year-long residency at the Darling Foundry in Montreal. During the remainder of 2020 he participated in several shows in Beijing, Belgium and Canada. These included the 'Survivance' exhibition at the Museum of Fine Arts in Montreal and a show at the Power Plant in Toronto. In 2020 his relationship with Ms Correa ended and he started living at his studio.

17. In 2021, he undertook a further residency in Sonoma and participated in shows in Montreal, New York, Calgary, Los Angeles, Toronto, Belgium, London and Beijing.

The Gagosian Gallery in London, considered to be one of the very best gallery groups in the world, featured two of his pieces in the 'Social Works II' exhibition.

18. In early 2022, just before the start of the trial, the Claimant secured a show and representation with the London-based gallerist Pilar Corrias, in preference to White Cube with whom he had also been in discussions. He also arranged to conduct a video interview with Gagosian, who are showing more of his works.

2.2: The evidence

(a): The Claimant

(i): General observations

19. The Claimant's witness evidence was set out in five witness statements, totalling almost 130 pages. He gave evidence over three days. He was cross-examined at length and regularly taken to documents in the extensive bundles. At some points he re-directed counsel to other documents. He was afforded regular breaks but on occasion asked for time when he needed it.

20. The Claimant presented as an intelligent, sensitive, professional man. I found him to be thoughtful and measured in his responses. In my view he was doing his best to answer difficult questions, understandably based on various accounts he had given clinicians over the years and the different estimates he had made of his lost productivity. He clearly has a well-informed insight into his illness, his symptoms and how best to manage them to enable him to retain his creative inspiration and output as much as possible. That is plainly his main focus in life.

21. The Defendant's neuropsychologist, Dr Nathaniel-James, watched the Claimant give evidence. He suggested that the manner in which the Claimant presented was a factor for me to bear in mind when assessing the extent of his cognitive difficulties. I found there to be only limited force in this point. I considered that the Claimant's neuropsychologist, Dr Laura Bach, was fair in saying that the court environment was more focussed and artificial than real life, and that the Claimant is someone who is known to "push" through his difficulties, such that his disabilities may well be "hidden". The difficulties the Claimant has with concentration, memory and other cognitive issues are well-evidenced by the expert evidence, which were partly based on the neuropsychologists' scientific assessments. The fact that English is his third language also had to be borne in mind.

22. There were some slightly more difficult exchanges with the Claimant when he was asked about the extent to which his art had in fact benefitted from the accident. He appeared unwilling to accept this. Ultimately contemporaneous press interviews showed that the accident had been part of the reason why he had changed the subject matter for his very successful Goldsmith's graduation show (alongside the death of his grandmother and a general period of reflection about his Haitian roots). He has also spoken positively at times about the period of introspection and reflection forced upon him after the accident. However, it was perhaps unsurprising that he bristled at the questioning on this topic from the Second Defendant's counsel. His responses on this issue did not therefore lead me to draw any adverse inferences as to his overall credibility.

(ii): The Claimant's accounts of his symptoms

23. A key issue arose from the fact that it was not until the accounts the Claimant gave in late 2019 that he described a pattern of working very hard, and then "crashing", such that he needed to rest, potentially for days. These crashes appeared to be related to the combined effect of headaches and fatigue. Since late 2019, he has reported this pattern as either working in a "burst" of two to four days and then needing to rest for two to three days or if he worked long hours (five to six hours) without a break being unable to work the next day. The Claimant explained this change in his account in late 2019 as due to the fact that he had tried to "block out" his symptoms and had not really appreciated the daily impact they had on him until he saw the statement Ms Correa had provided for his claim.

24. Mr Dignum characterised the Claimant's late 2019 account as a "sea change" from the more positive descriptions of his recovery that he had given previously, such as that recorded by his therapist Dr Debra Gartenberg in March 2018, to the effect that he "no longer reported suffering from severe concentration, memory, nor cognitive fatigue symptoms". At several points during cross-examination it was suggested to the Claimant that he had accepted deliberately understating his symptoms prior to November 2019. I did not consider at the time he gave his evidence that he had done so. Having reviewed my notes of his evidence carefully since the trial I remain of that view.

25. Further, I do not believe the Claimant had engaged in such deliberate understatement of his symptoms before his late 2019 accounts.

26. Dr Bach confirmed at trial that most patients with a brain injury have a difficult period of adjusting to their injuries over quite a long time, even longer than the Claimant. She explained that for many patients the "denial can be emotional they might know something, but they just can't implement the strategies because it's just too painful". This chimed with the Claimant's own evidence at trial: "I wanted to feel better than I did. I aspired to be better than I was…even now it is very hard for me to accept my symptoms".

27. There was some corroboration for the Claimant's account in this regard from the evidence of Trevor Kiernander. He had shared a studio with the Claimant from January 2017 to May 2019 save for a five-month break between October 2017 and March 2018. He confirmed seeing the Claimant sleeping, napping or "zoned out" regularly in the studio. This was not the Claimant engaging in the usual time an artist would take to consider a piece, reassess, reflect and plan. Further, there would be times when the Claimant worked intensely for several days, but could not maintain this, and would then not come in for several days. He was clear that he had continued to see this pattern throughout 2017, 2018 and 2019, prior to the first accounts the Claimant gave of this pattern towards the end of 2019. He rejected the suggestion that he had only seen the Claimant resting in the studio after the second road traffic accident, when he was on crutches, and I found his denial credible. Mr Kiernander accepted that he had only seen the Claimant in his studio on a couple of occasions before the accident, and so did not know how often he slept or rested at that time. However, the overall thrust of his evidence was that there had been a change in the Claimant since the accident, including as to his demeanour. There is no other evidence to suggest that the Claimant regularly slept in the studio before the accident.

28. Overall, therefore, I accept the Claimant's evidence that he initially struggled to accept the impact of this devastating injury and that it was only in late 2019 that he began to accurately describe the daily effects on him. He has been clear and consistent in his accounts since then.

(iii): The changing nature of the Claimant's claim for lost productivity

29. A further significant theme in the questioning of the Claimant was why the pleaded value of his claim had gone from just over £233,000 in January 2019 to over £33 million in November 2021.

30. An objective reason for the increase in the scale of the claim is that the value and popularity of the Claimant's art has risen rapidly in recent years, as has his income. By way of example, his gross annual profit for the year ending 31 December 2016 was CAD $47,392 but for the year ending 30 June 2021 it was CAD $565,573.

31. However, the Claimant's calculations of his lost productivity had also varied over time. His predictions changed from an estimated loss of five paintings a year in January 2019, to 34 paintings a year (10 large, 12 medium and 12 small) in February 2020, to 10 large paintings a year plus a mix of other works including ceramics and mixed media works, estimated to be equivalent to four medium pictures in November 2021. It was put to the Claimant that he was "biddable" in this regard, i.e., that when certain models were suggested to him by others, such as counsel, he unduly readily approved them. I considered this to be an overstated criticism. As was pointed out by Mr Huckle, the Claimant does not work in a factory making identical components in set periods of time every day, which would make his lost productivity easy to assess. Rather, he produces paintings of different sizes and other art forms, he needs to engage in other related tasks such as research, planning, meetings and travel, and his accident took place at a time when his career was just beginning.

32. I accept the Claimant's evidence that when he first formulated his claim in January 2019, he did not want to talk about the accident in any detail and simply wanted the litigation over. This chimes with Dr Bach's evidence about denial referred to above and fits with his own evidence that it was not really until late 2019 that he began to accept the true impact of the accident on him.

33. Further, as the Claimant has adapted to his injuries over the years, and "mastered" his symptoms, he has gained a more nuanced understanding of the daily impact on him. In a sense, this has made assessing the lost productivity harder because there are periods when the Claimant "pushes through" his headaches, thereby completing his work, but doing so in pain.

34. Overall, I consider that the Claimant had at all times done his best to answer a very difficult question, namely how much art, and of what sort, could he produce if he did not suffer the symptoms he does. In the most recent variation of his productivity model, he reduced his claim, which adds further weight to my view that his approach has throughout been honest and reasonable.

(b): The evidence from the factual witnesses

35. As set out above, Trevor Kiernander gave evidence of the breaks he had seen the Claimant taking in the studio between 2017 and 2019. He also described how when the Claimant is painting, he works very fast and is helped by using acrylic paints which dry quicker than oils, such that he was much more prolific than him and Mr Klein, who also shared the studio. He also described the adverse impact of the Claimant's injuries on his social life compared to his "more joyful" pre-accident self.

36. Mr Klein had also shared a studio with the Claimant from January 2017 to June/July 2018. His evidence was admitted as hearsay under CPR 33.2, because a late application to call his evidence by video-link was unsuccessful. I considered the factors set out in the Civil Evidence Act 1995, section 4 in assessing the weight to be given to his evidence. His witness statement provided general corroboration for the broad themes in Mr Kiernander's evidence as summarised above, but I was conscious that his account would have been tested as Mr Kiernander's was if he had attended to give evidence.

37. The evidence of Fedora Mathieu, the Claimant's sister, was read as agreed evidence. She corroborated the support she had provided to him in the immediate aftermath of the incident and the symptoms from which he continues to suffer, which he had described to her and of which she had seen evidence.

38. Natalia Correa had been the Claimant's partner from 2017-2020. Her evidence was also admitted as hearsay, so again I took into account the factors in the Civil Evidence Act 1995, section 4 in assessing its weight. She had been due to give evidence by video-link. The Claimant explained that shortly before the trial, Ms Correa informed him that she was unwilling to give evidence unless he agreed to pay her 3% of any damages awarded, which he was unwilling to do. I found the Second Defendant's suggestion that the contents of the witness statement she gave in November 2019, when she was still the Claimant's partner, had been deliberately given so she could render herself invaluable to him and later extort money from him, unlikely to be correct. The Claimant said that Ms Correa had asked the Claimant's solicitor "What's in it for me?". It therefore seems more likely that her suggestion to the Claimant was a misguided proposal to secure some financial recompense for the inconvenience of giving evidence. However, the unusual circumstances in which she did not attend the trial, and the fact that she could not be cross-examined on her substantive evidence or her proposal to the Claimant, inevitably impacted on the weight to be attached to her evidence to some degree. In any event, her evidence as to the impact of the Claimant's injuries on him was largely corroborated by evidence from other sources.

39. The Claimant called the following witnesses from art galleries with whom he has worked since his accident: Celeste Ricci (formerly of the Tiwani Gallery in London), Hadrien de Montferrand (head of the HdM Gallery in Beijing), Hugues Charbonneau (gallerist and owner of the Galerie Hughes Charbonneau in Quebec) and Kavi Gupta (gallerist and owner of the Kavi Gupta Gallery in Chicago). He also called evidence from David Moos (art advisor and President of David Moos Art Advisory). The last three of these witnesses gave evidence by video-link under CPR 32.3 from Canada and the USA.

40. Overall, this group of witnesses was consistently positive about the Claimant's artistic talent, his work to date, his business skills and his future prospects. I was not persuaded by the Second Defendant's suggestion that their evidence was rendered unreliable because they were all the Claimant's "supporters" and because some of them had a

financial interest in him and thus a conflict of interest. In my assessment these were all professional people doing their best to assist the court on factual matters relating to the market for the Claimant's art. None of the gallerists were able to produce emails or other documentation to corroborate the proposition that if they had more art available from the Claimant, they would have been able to sell it, but I did not consider that this substantially undermined their sworn evidence, based on their own experience of the art market and of selling the Claimant's works, that this was the case.

41. I was not persuaded by the Second Defendant's suggestion that the witnesses who gave evidence by video-link were less willing to subject themselves to forensic scrutiny, such that their evidence should be afforded less weight. The courts have become much more adept at accepting video-link evidence in recent years. The technology worked well in this case. The video-link witnesses were relatively brief. I did not discern any marked difference in the quality of the testimony or credibility issues with any of them.

42. The evidence of Pamela Joyner was read as agreed evidence. She is a long-standing collector of contemporary abstract art by African or African-American artists. She also sits on the boards of various major museums and art institutions in the USA.

43. The evidence of David Mabb was also agreed. He had been a Fine Art tutor and Programme Co-ordinator for the Master of Fine Arts programme at Goldsmiths for many years, knew the Claimant and had watched his progress.

(c): The expert evidence

44. The Claimant relied on a written report from Mr Adel Tavakkolizadeh (an orthopaedic surgeon). He gave an overview of his injuries after the accident.

45. The expert neurology evidence was from Dr Richard Orrell for the Claimant and Dr Oliver Foster for the Second Defendant. The main issues between them related to the cause of the Claimant's headaches once two years after his injury had passed, the potential preventative treatment for headaches which the Claimant has not taken (and was thus said not to have mitigated his loss) and the scientific research relating to the putative brain injury/dementia link. As explained below, there was a quirk in Dr Orrell's evidence about how effective the headache treatment might be and some concerns about how he had presented the dementia evidence. Overall, though, I did not consider that the serious allegations made about him by the Second Defendant - to the effect that he had breached his expert duties to the court - were merited.

46. As indicated above, the expert neuropsychologists were Dr Laura Bach for the Claimant and Dr David Nathaniel-James for the Second Defendant. Overall, there were fewer matters of contention in this discipline than in the neurology. The main areas related to the cause of the Claimant's headaches and whether he had failed to mitigate his loss by not undertaking further fatigue management sessions. Dr Bach's written evidence was very detailed but her oral evidence less clear. Dr Nathaniel-James had failed to record that the Claimant suffers from headaches which was an anomaly in the evidence.

47. Both parties called experts in the art industry to assist in quantifying the Claimant's claim for lost income: Mark Francis for the Claimant and Guy Sainty for the Defendant. Mr Francis had never given evidence before and this did appear to impact on the manner in which he gave his evidence. His written report was rather brief, there had been

difficulties in the joint statement process and he was a little offhand in giving his evidence. He had also had prior contact with the Claimant in a range of ways. However, he does have considerable expertise specifically in contemporary art, having worked in the field since the 1970s and curated early exhibitions for famous artists such as Anthony Gormley and Jean-Michel Basquiat. By contrast, Mr Sainty is an art dealer primarily in French and Spanish art from the early 16th to 20th centuries, with a wider interest in the modern and contemporary art market in London and New York. He was able to offer a broader historical, and fully researched, perspective on the art industry. There were occasions, however, when he appeared willing to opine on areas outside his expertise. In any event, there were relatively few differences between these two experts on the central issues.

48. Finally, the Claimant called James Stanbury, a forensic accountant, who had quantified the Claimant's past and future losses. I did not consider that the criticism levelled at him by the Second Defendant – that he had wrongly failed to "reality check" the assumptions he was being asked to apply – was merited. That was not his role. His role was to assist the court in calculating the Claimant's losses and he had done that with care. The report of the Second Defendant's forensic accountant was David Rabinowitz was taken as read. He had declined to provide any alternative calculation to those provided by Mr Stanbury as he considered it too speculative a model.

(d): Further evidence

49. The parties also placed before me the Claimant's medical records, his "archive" of work, invoices, gallery reports, contracts, sales and price lists, accounts, correspondence regarding his work, extracts from books and articles about his art and a volume of research material on the dementia issue. I watched a 2016 video interview in which the Claimant described his recovery and a short Quebec government promotional video showing some of the Claimant's art.

3: General damages for pain, suffering and loss of amenity

3.1: The evidence of the Claimant's injuries

(a): Overview

50. The Claimant suffered a severe head injury in the accident. He sustained a subarachnoid haemorrhage with frontal lobe contusions, a right shallow subdural haemorrhage, a fracture of the base of his skull and left occipital and a right zygomatic maxillary complex fracture. He also suffered a fracture of the third metatarsal diaphysis of his left foot and multiple grazes and lacerations.

51. The Claimant was in hospital for 13 days because of his head injury. He had to wear an Aircast boot on his foot for 12 weeks. On discharge on 11 December 2015, he returned to Canada. He was housebound for around one month and during that time had to have everything done for him by his family. In early 2016 he returned to London as he was keen to resume his course. He had difficulties with his hearing and vision and required a soft diet for two months. He was able to produce some work for his Goldsmiths graduation show in July 2016.

52. By 15 September 2016 when the Claimant was assessed by Mr Tavakkolizadeh, he still had difficulties chewing hard foods and sleeping comfortably on his right side. His visual issues had largely resolved but he still had difficulties assessing depth. His foot injury had largely healed but he felt some pain on direct pressure and some aching after exercise. He had some scars on both shins. He reported symptoms of fear, a lack of trust, a loss of confidence and anxiety around others. He had not resumed swimming or going to museums and shows which he had previously enjoyed. By this point he no longer needed care and assistance.

53. He described the symptoms of his head injury as gradually "plateauing" towards the end of 2017. The main ongoing symptoms he reported relate to headaches and other neuropsychological issues. As with many artists, the Claimant generally works seven days a week in his studio with only occasional days off, including when his health requires him to rest.

(b): Headaches

54. The Claimant gave clear and consistent evidence that he suffers from regular headaches. Some are "background" headaches which he is able to "push through" and continue working, provided he takes regular breaks. Some are so debilitating he has to stop work, take over-the-counter medication and rest until the medication takes effect. The headaches can last for several hours or even longer if he does not take medication. They appear to be linked with times when he is particularly tired or fatigued. They typically start at 2 pm or so when he is tired from working. When the Claimant saw Dr Orrell on 17 August 2016, he reported having headaches four to five times a week. Since then, he has reported to Dr Bach, Dr Orrell and Dr Foster that they occur approximately two to four times a week. Their pain intensity is a 7-8/10, 10 being the highest level of intensity.

55. The Claimant's account of the frequency of his headaches was supported by the "diaries" he had kept at different points throughout 2020. These were not diaries as such, but *pro forma* tables prepared by his solicitor which he completed to show the hours worked, the breaks he had and the reasons for the breaks, the reason for ending work and the number of artworks completed. These diaries refer to regular headaches. A further note he kept during April 2020 when his studio was closed due to the Covid-19 lockdown shows him experiencing headaches on 12 days that month. I was not persuaded by the veiled suggestion from the Second Defendant that these documents should be afforded limited weight as they had been prepared for the purposes of the litigation. I accept the Claimant's evidence that he was doing his best to record his headaches and work patterns accurately in these documents.

56. There was corroboration for the Claimant's headaches in the evidence of Mr de Montferrand, Ms Mathieu and Ms Correa (but I attached less weight to the latter given the circumstances in which she did not attend to give evidence).

57. Headaches were not mentioned at all in Dr Nathaniel-James' report. It appears that the Claimant did not volunteer the existence of the headaches during the interview, and that the doctor did not ask him about them, despite having sight of other medical reports mentioning them. There is extensive other evidence of the Claimant suffering headaches, such that Dr Nathaniel-James' report seems an anomaly in this regard.

58. Overall, therefore, I am satisfied that the Claimant suffers intrusive and often entirely debilitating headaches, around two to four times a week.

(c): Other neuropsychological issues

59. The Claimant also gave clear evidence of a range of other neuropsychological issues, predominantly the following.

60. Difficulties with memory and concentration. The Claimant has consistently reported issues with his ability to remember things. He now uses adaptive mechanisms such as making notes in a book or on his phone, but still forgets things, even important appointments. He finds concentrating for prolonged periods, or when more than one person is speaking, much more difficult than before his accident. Social events are therefore tiring for him and so he avoids non-work-related social events. He finds tasks that require organisation and planning, such as meetings and travelling, mentally draining.

61. Fatigue. The Claimant struggles with fatigue which can be debilitating and require him to stop work, as was illustrated by his diaries. Dr Orrell attributed the fatigue to the brain injury. Although Dr Foster's view was that the Claimant's busy lifestyle was causing or at least contributing to his fatigue, I prefer Dr Bach's evidence on this issue: excessive and disabling fatigue is a well-known consequence of a traumatic brain injury, and the Claimant records problems of fatigue far greater than one might expect for a young man in his position, even with a very busy lifestyle, especially one who thrived on the "buzz" of his work. The Claimant also detailed the busy lifestyle he enjoyed before the accident, when he did not suffer fatigue of this kind.

62. Post-Traumatic Stress Disorder (PTSD) symptoms. The Claimant suffered with PTSD symptoms after the accident. He felt anxious when he heard the sound of cars or an ambulance siren. He had nightmares for about one month after the accident. When examined by Dr Bach on 16 December 2019, his mood remained elevated for post-trauma symptoms and anxiety avoidance. When he saw her on 11 March 2021, he said he thought he would likely have PTSD-type symptoms if he returned to the scene of the accident.

63. Mood. The Claimant has also suffered with anxiety, low mood and a loss of confidence. His anxiety has been particularly focussed on the potential future impact of his injuries on his ability to produce his art. Dr Bach and Dr Nathaniel-James agreed that the Claimant does not currently suffer from a clinical mood disorder, but is likely to continue to suffer short, mild periods of anxiety and frustration

64. Insomnia. The Claimant's sleep is regularly disturbed. It was suggested to him in cross-examination that there were a series of relationship, family and other stressors mentioned in his therapy notes that could be impacting his sleep. He denied this and pointed out that he had had no sleep issues before the accident. It therefore seems to me more likely than not that the cluster of symptoms he suffers as a result of the accident are adversely impacting on his sleep. He also described regularly dreaming about his work in a way he never did before his accident.

65. The Claimant's account of these further neuropsychological symptoms was corroborated by Ms Mathieu and Ms Correa. Ms Mathieu also described his avoidance

of non-work-related social events and how he tires at family gatherings. Mr Kiernander said the Claimant has limited his socialising in groups since the accident, noting that he "finds it difficult…to cope with the stimuli of having lots of people around him". He also said that the Claimant has been much less sociable on a one-to-one basis since the accident.

66. Overall, therefore, I am satisfied that the Claimant suffers from a series of neuropsychological deficits, primarily difficulties with memory, concentration and fatigue.

67. Subject to the issues relating to mitigation of loss discussed in section 4 below, the experts agreed that the headaches and neuropsychological issues were caused by the accident, either directly or indirectly.

3.2: The parties' submissions on general damages

68. Mr Huckle argued that the Claimant's head injury merited an award of general damages of £60,000. He submitted that it should be classified as within category 3(c)(iii) of the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases (the Guidelines). This "moderate brain damage" category applies to "cases in which concentration and memory are affected, the ability to work is reduced, where there is a small risk of epilepsy, and any dependence on others is very limited". The 15th Edition of the Guidelines indicates that injuries of this nature merit awards of £41,000-£86,000 with the 10% uplift.

69. He drew my attention to *Siegel v Plummell* [2014] EWHC 4309 (QB) in which the equivalent of £88,215.73, with the 10% uplift, was awarded to a claimant who suffered from a cluster of cognitive, physical and behavioural deficits attributed to a brain injury. These included headaches, tunnel vision, difficulties with short-term memory, concentration and organising and planning. He sometimes made inappropriate comments and was susceptible to uncontrollable outbursts. Wilkie J held that the case fell on the cusp of categories (c)(ii) and c(iii) in the Guidelines.

70. He also referred to *Mann v Bahr* (2012) WL 13152631 in which the equivalent of £66,468.96, with the 10% uplift, was awarded to a claimant who suffered various psychological symptoms which affected his ability to work and his future career prospects. These included disinhibition, poor temper control, aggression, impatience, fatigue, difficulties with concentration, memory, organisation/sequencing, planning and multi-tasking, slowness of mind and attention and an intolerance to alcohol. He suffered anxiety, obsessive compulsive disorder and depression.

71. Finally, he referred me to *Van Wees v Karkour* [2007] EWHC 165 (albeit for the purposes of the *Blamire* argument). This case also involved a claim by a highly intelligent claimant who suffered constant headaches, fatigue and various cognitive impairments, who could not function at the same high professional level as she would otherwise have done. At [160]-[161] Langstaff J awarded her £42,500 in general damages, equivalent to just over £62,700 today.

72. Although Mr Huckle provided me with the sections of the Guidelines relating to psychiatric damage and PTSD, I did not understand him to be contending for separate

awards for those injuries. Those issues can properly be compensated within an overall award for the most serious injury, as *Mann* illustrates.

73. He also provided me with the Guidelines for foot injuries, submitting that this case fell within Category 7(G)(p), as a "modest" foot injury. The Claimant had suffered a "straightforward" foot injury from which he had made a complete or near complete recovery. This merited an award of £6,580.

74. Mr Dignum submitted that an award of £60,000 in general damages for the totality of the Claimant's injuries was too generous and would only be merited if the court was making an award relating to a significant risk of epilepsy on a full and final basis. Otherwise, bearing in mind his degree of recovery and function, the Claimant's injury properly fell within category 3(d), on the basis that it involved "less severe brain damage". In such cases:

> "…the injured person will have made a good recovery and will be able to take part in normal social life and to return to work. There may not have been a restoration of all normal functions so there may still be persisting problems such as poor concentration and memory or disinhibition of mood, which may interfere with lifestyle, leisure activities, and future work prospects. At the top of this bracket there may be a small risk of epilepsy. The level of the award within the bracket will be affected by (i) the extent and severity of the initial injury; (ii) the extent of any continuing, and possibly permanent, disability; (iii) the extent of any personality change; (iv) depression".

75. Cases in category 3(d) merit awards of £14,380-£40,410. Within that band, Mr Dignum submitted that an award of £35,000 would be appropriate if the court considered that the risk of epilepsy should be addressed by a provisional damages award.

3.3: Analysis and conclusion

76. There was a consensus among the experts that the Claimant's brain injury falls within the most severe category in the Mayo Classification System for Traumatic Brain Injury. This in itself does not determine where his case is categorised for the purposes of quantifying general damages, but it is a helpful starting point.

77. The experts also agreed that there is a close inter-relationship between the Claimant's various symptoms. Dr Bach explained that if the Claimant struggles with memory and concentration, this can cause anxiety and low mood, which can cause fatigue and bring on a headache, which can then impact on memory and concentration, and the cycle continues. Dr Orrell said that there is a "complex inter-relationship" between them and "they all overlap", and Dr Nathaniel-James agreed that his symptoms are all "inter-linked" and "self-reinforcing".

78. Stepping back and considering all the evidence as I have to do, it is clear that the combination of the Claimant's symptoms has a significant impact on his daily life. I found Dr Bach's evidence that "his symptoms do vary, but they are certainly there relatively frequently; most days he wakes with fatigue and if he pushes himself, he may get headaches" [my emphasis] an accurate summary. It reflected my assessment of the

totality of the Claimant's evidence, the contents of his diaries, the accounts he has given others and the evidence of Ms Mathieu, Mr Kiernander and Ms Correa.

79. There are also clear links between the Claimant's symptoms and his daily work patterns. His evidence, which I accept, was that his insomnia tends to be brought on by a fuller day at work. When this happens, he will have a headache in the morning which can last several hours or all day. The mental energy required for organising and planning activities, such as meetings and travelling, means he has less energy for his art, which by definition needs intense concentration and focus. He remains anxious about the impact of his injuries on his future productivity. If he does not manage his symptoms carefully and pace himself, he will have a "crash" of the sort described in section 2.2(a)(ii) above.

80. He has also suffered PTSD symptoms, which have now largely resolved. Otherwise, the thrust of the evidence is that his symptoms have now stabilised and are to be regarded as permanent. He is unlikely to start the preventative treatment for his headaches for the reasons discussed further in section 4 below.

81. The Claimant has clearly devoted very significant energy to coming to terms with the consequences of this life-changing accident, in understanding what it means for his own identity and in achieving an unusually good recovery. I do not believe it an understatement to say that he has focused on little else since the accident, other than fighting hard to preserve his artistic career, often at the expense of his personal and social life. The latter is also rendered more challenging for him, and this is limited, due to his concentration issues.

82. Taking all these factors into account I accept Mr Huckle's submission that the Claimant's injuries are properly categorised within category 3(c)(iii) of the Guidelines: although he has generally made a very good recovery from a serious injury, his "concentration and memory are affected" and his "ability to work is reduced".

83. This category also applies where "there is a small risk of epilepsy" and "any dependence on others is very limited". As explained below, I consider that the chance of the Claimant developing epilepsy should be addressed by a provisional damages award. There are no aspects of the Claimant's life in which he is now dependent on others. These factors mean that any award should not be at the top of the band for this category.

84. In my view the appropriate award under this head is £60,000. This is appropriately within the middle of the band of damages for category 3(c)(iii). It takes into account the initial pain and suffering the Claimant endured and the ongoing significant adverse impacts on his daily life as described above. It also reflects the fact that the Claimant does not suffer from the behavioural deficits which merited higher awards in *Siegel* and *Mann*; nor has he actually lost his job which was a factor in the *Van Wees* award.

85. I also accept that the Claimant's foot injury merits a separate award and that the appropriate sum is £6,580.

86. This gives a total award under this head of £66,580. Interest is payable on this award at 2% from the date of the service of the claim form.

4: Mitigation of loss

4.1: The law and the issues

87. The well-established general legal principles relating to the mitigation of loss can be summarised as follows:

(i) A claimant must take all reasonable steps to mitigate loss consequent upon the defendant's breach and will be debarred from claiming "any part of the damage which is due to his neglect to take such steps" (*British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No. 2)* [1912] AC 673 at 689, per Viscount Haldane LC).

(ii) In mitigating their loss, a claimant is only required to act reasonably and is not required to do anything outside the ordinary course of events. The standard of reasonableness is not high given that the defendant is an admitted wrongdoer (McGregor on Damages (21st Edition), paragraphs 9-079 and 9-082).

(iii) That said, a claimant must to some degree act with the defendant's interests in mind as well as their own; and while a claimant might have acted reasonably as far as they are concerned, the issue is whether they have acted reasonably as between themselves and the defendant, in view of the need to mitigate their loss (McGregor, paragraph 9-081 and *Darbishire v Warran* [1963] 1 WLR 1067, CA, per Harman LJ at p.1072).

(iv) Whether a claimant has mitigated their loss is a question of fact not law (*Payzu v Saunders* [1919] 2 KB 581, CA).

(v) The defendant bears the burden of proving that it was unreasonable for the claimant to take certain steps in the past or would be so unreasonable in the future (see, for example, *Steele v Robert George and Co (1937) Ltd* [1942] AC 62 and *Sainsburys Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24 at [211]).

(vi) A defendant proposing to argue for a claimant's failure to mitigate must give notice well before the hearing by the statements of case or otherwise (*Geest Plc v Lansiquot* [2002] 1 WLR 3111 PC at [16]) and must put forward a "concrete case" to demonstrate what the claimant might reasonably have done (*Samuels v Benning* [2002] EWCA Civ 858 at [26]).

88. In the context of an alleged failure to mitigate loss by declining medical treatment, the case law suggests that the potential benefits and risks of the treatment in question are relevant. A claimant need not "risk their person too far in the hands of surgeons", but where the treatment would not be regarded by reasonable people as risky, then a refusal to follow it may well constitute a failure to mitigate (McGregor, paragraph 9-081).

89. Applying this approach, a claimant was held not have acted unreasonably in refusing treatment in *Savage v Wallis* [1966] 1 Lloyds Rep 357, CA, where the medical evidence was finely balanced as to whether a slight operation would have cleared up the claimant's headaches. The same applied in *Geest*, where no doctor had advised on the prospects of success of an operation or on the risk, however small, that the operation would lead to a worsening of her back pain.

90. However, individuals who declined medical treatment were found to have failed to mitigate their losses in *Marcroft v Scruttons* [1954] 1 Lloyds Rep 395, CA, *McAuley v London Transport Executive* [1957] 2 Lloyds Rep 500, CA, *Morgan v T. Wallis Ltd* [1974] 1 Lloyds Rep 395, CA and *Noble v Owens* [2008] EWHC 359 QB. Their reasons included an unwillingness to go to a mental hospital (*Marcroft*) and a "mental block" caused by a genuine fear that was beyond the plaintiff's control (*Morgan*). In *McAuley* the plaintiff had not followed a suggestion made to him by the defendant's doctor or gone to his own doctor for an opinion (per Jenkins LJ at p.505).

91. The reasons why a claimant is refusing particular medical treatment also need to be considered. In *Edmonds v Lloyds TSB* [2004] EWCA Civ 1526, the Court of Appeal, unusually, interfered with a trial judge's finding that a claimant had acted unreasonably by refusing injections aimed at improving her back pain because the judge had failed to give proper regard to (i) her understandable anxieties about the proposed treatment, especially given that she had been given no guarantees as to its success; (ii) the fact that her GP (whom she trusted) was sceptical that the treatment would be beneficial; (iii) the fact that the doctor who recommended the treatment could give no guarantee as to its success; and (iv) the doctor's own view that her decision was reasonable.

92. Co-morbidities which impact on the risks associated with and/or the likely success of the proposed treatment are also relevant. In *Stansfield v BBC* [2021] EWHC 2638 (QB), Yip J found that it was not unreasonable for the claimant to have refused to take anti-depressants when he had a complex mixture of brain injury and psychological injuries which influenced his decision. Further, the consequence of his taking the drugs and the impact on his losses was not clear: [204] and [206]-[207].

4.2: The issues

93. In closing submissions, the Second Defendant argued that the Claimant had failed to mitigate his loss by not pursuing (a) treatment aimed at preventing headaches; and (b) further fatigue management sessions.

94. Mr Dignum argued that there is clear expert evidence that the suggested treatments and therapies are, on the balance of probabilities, likely to be effective in either reducing the Claimant's headaches or resolving them entirely and improving his fatigue. In the context of a case where the Claimant seeks very high damages for losses based on headaches/fatigue, his failure even to try the suggested interventions is unreasonable and against the body of medical advice and common sense.

95. Mr Huckle submitted that the mitigation issue had not been properly pleaded and proved. The Claimant has "mastered" his symptoms. The clinical consensus appears to be that he has made a remarkable recovery, such that it is reasonable not to change the Claimant's approach.

4.3: Treatment aimed at preventing headaches

96. The Second Defendant argued that the Claimant has not mitigated his loss by taking medication aimed at preventing his headaches, withdrawing from the use of the over-the-counter headache tablets he currently takes or engaging in a postural/relaxation programme.

(a): The evidence

(i): The potential benefits and risks of preventative medication

97. Dr Orrell and Dr Foster estimated that they had each seen around 20,000 patients suffering from headaches. They agreed that regular use of amitryptiline or a similar drug is a tried and tested preventative medication.

98. Dr Foster's view was that if the Claimant took such medication, while stopping the over-the-counter analgesics he is currently using, and perhaps undertaking a postural/relaxation exercise programme, this was "likely substantially to ameliorate [the Claimant's] headaches to no more than a nuisance level within 3 to 6 months". He said at trial that the sedative effect of amitryptiline might also help the Claimant's sleep. Going forward, he thought that if the Claimant's headaches and sleep improved, then his fatigue would be ameliorated, though the extent to which that would occur is not entirely predictable.

99. Dr Orrell was less enthusiastic. In his 16 October 2018 report he noted that the preventative medication "may reduce the frequency and severity of the headaches and contribute to resolution". However, in his May 2021 report he said "The current headaches are described as being deep in his head, and not on the surface. In this respect it is my opinion that medication for prevention of tension or migraine headache, or headache related to skull damage…would be unlikely to be effective". He carried this view over to the neurologists' joint statement, recording his view that he considered it unlikely that amitriptyline would relieve the Claimant's headaches.

100. Mr Dignum understandably cross-examined Dr Orrell at trial about this apparent "volte face" as to the efficacy of the medication. He agreed that it can be used to treat headaches in the location in the head the Claimant was describing (although he felt the location was unclear). It was apparent that by the time of this report the Claimant had indicated that he did not want to take the medication, but Dr Orrell said that that was not the reason for his comment about the effectiveness of the treatment. I therefore remained unclear as to what Dr Orrell meant in this part of his report. However, he later also said that he was not sure how effective the medication would be on the Claimant's overall presentation: if it was the fatigue which was so disabling that he had to go to bed, taking the headache out of the equation would not necessarily solve the issue.

101. Dr Orrell felt that it was likely that a short course of the medication would not work, and that the Claimant would need to take it longer-term. Some patients take it for decades and it was possible he would need to take it for life. Dr Foster estimated there was a 50% likelihood he would not need to take it forever.

102. Dr Orrell and Dr Foster agreed that a feeling of drowsiness is a well-known side effect of amitryptiline. Dr Orrell said that some people suffer this, some do not. Dr Foster said "many [patients] do not report any sedative effects in the day"; in fact, "the majority don't". Dr Foster explained that generally a clinician will introduce amitryptiline very slowly and withdraw it if it is not working. The aim is to ensure that any sedative effect has worn off in the morning. Dr Foster agreed that it is possible to "tinker" with it. In his May 2021 report, Dr Foster noted that amitriptyline was one option but there were a number of others including duloxetine which is "much less sedating". Dr Orrell agreed that there are alternatives to amitryptiline.

(ii): The potential benefits and risks of continuing with over-the-counter medication

103. The experts agreed that excessive use of over-the-counter medication puts the patient at risk of the recognised problem of "analgesic overuse headache", i.e., the painkillers can themselves cause headaches. They disagreed slightly as to the point at which the use of over-the-counter medication would be considered excessive: Dr Foster put the figure at eight to 10, Dr Orrell at 12.

104. The Claimant had given different accounts of the extent to which he uses over-the-counter medication. In 2016/2018 he had said to Dr Orrell and Dr Gartenberg respectively that he used it two or three times a week. Later he had said he was taking 12 Advil a week. In May 2021, he told Dr Foster in some weeks he was taking 20-30, with eight to 10 in one day.

105. Dr Foster considered that if the Claimant withdrew from using over-the-counter medication, he could expect a 50% reduction in the totality and severity of his headaches.

(iii): The Claimant's position

106. When Dr Orrell first raised the issue of amitriptyline in his 27 August 2016 report, he made clear that it might contribute to fatigue. This is at the heart of the Claimant's refusal to trial it. He explained in his March 2021 statement and at trial that he was concerned at the risk that amitriptyline or a similar medication would make him feel drowsy and interfere with his creative process: it is "the lethargic state that comes with it" which "I refuse to engage with". He confirmed he would try medication if there were no side effects but that he did not want to be a "guinea pig". He said he did not want to "gamble" his health and preferred to deal with his headaches through other means.

107. Mr Huckle also took me to research indicating significant increases in dementia risks after exposure to anticholinergic antidepressants (of which amitryptiline is one), which highlighted "the importance of reducing exposure to anticholinergic drugs in middle-aged and older people".[1] He emphasised that the Claimant is already fearful about further loss of cognitive function in the future due to his brain injury, and has brought a provisional damages claim on the basis that his brain injury could lead to dementia.

(iv): The advice the Claimant has received

108. The Claimant has not discussed the preventative medication option with his treating clinicians. Dr Orrell did not consider it appropriate to advise the Claimant as he was not his treating doctor. Dr Foster and the Claimant had a brief discussion about it and Dr Foster could, understandably, give the Claimant no guarantees that the medication would make the headaches stop. There was some disagreement between them as to whether Dr Foster had said that the medication would, or might, make the Claimant drowsy, but the latteris more likely, especially given Dr Foster's evidence that in the majority of cases, drowsiness does not occur.

(vi): The experts' views of the Claimant's position

[1] Coupland et al, *Anticholinergic Drug Exposure and the Risk of Dementia*, JAMA *Intern Med.* 2019: 179(8): 1084-1093

109. Dr Orrell's impression was that, typically, the Claimant was using over-the-counter medication two to three times a week. This was not excessive, and it would be an escalation of treatment to start taking amitryptiline daily. In those circumstances it was reasonable to treat the headaches as and when they occur, rather than take long-term medication that may have additional long-term effects. Many patients, particularly younger ones, do not want to take medication. As conveyed to him, the Claimant's regime appeared to be working. However, he also conceded that the medication was "an experiment worth performing" such that it would be reasonable for the Claimant to trial it for three to six months. If it had not had a positive effect by that time, it was unlikely that it was going to.

110. Dr Foster firmly disagreed that the Claimant's approach was reasonable. He considered that "plainly" he should seek a treating neurologist's opinion: "most patients with headaches of that frequency and saying they are impacting on their life as much as he is would seek GP / alternative opinion". He thought the Claimant had been "unwise" in not acting on the 2016 steer in this regard that he had had from Dr Orrell.

(b): Analysis and conclusion

111. The Second Defendant had sufficiently pleaded this issue. Although no mitigation argument was advanced in the Defence, the Second Defendant's Counter-Schedule of Loss took the point.

112. I found the issue of whether the Second Defendant has discharged the burden of proving that the Claimant has acted unreasonably in refusing to take amitryptiline or a similar medication a finely balanced one.

113. There is an initial simplicity in the argument that a claimant suffering regular, debilitating headaches is acting unreasonably in declining medication that has a reasonable prospect of preventing those headaches. Further, the evidence suggested that the use of amitryptiline can be carefully titrated, or other comparable drugs used, to reduce the risk of the sedative side-effect, which – on Dr Foster's evidence – impacts less than 50% of patients in any event.

114. However, on closer analysis of the facts of this case, the position is more subtle.

115. This Claimant is a person whose raison d'etre is his art. His ability to produce his art has already been significantly impacted by the combination of headaches, fatigue and cognitive issues. He has made very significant efforts and substantial sacrifices and has achieved a very high level of recovery and function. This has largely been with the aim of ensuring he can maintain as normal an artistic life as possible. In my view there is force in Mr Huckle's submission that the Claimant has now mediated a way of living with his symptoms, and it is not unreasonable for him to maintain that.

116. On balance, in my view, it is entirely understandable for him to decline medication which might generate two side-effects of which he is particularly fearful: further drowsiness that is likely to dull his creativity and further cognitive decline in the form of dementia that would be likely to have the same effect. Indeed, from my assessment of him it is hard to imagine two side-effects he would be less willing to tolerate. Given the focus on his art this is an understandable position for him to take.

117. I am also not satisfied that his use of over-the-counter medication is regularly as high as it was when he gave his account to Dr Foster in May 2021. I accept Dr Orrell's assessment of the more typical use of this medication by the Claimant. This means that the Claimant is not obviously putting himself at risk of developing analgesic overuse headaches by maintaining his current regime.

118. It is also relevant that Dr Orrell considers that the Claimant is acting reasonably in this regard. Ultimately it is for the court to decide what is reasonable but the fact that there are two experts with differing views on the issue makes it harder to find that the Claimant is acting unreasonably.

119. As the determination of whether a claimant has acted reasonably is a question of fact in each case, limited assistance can be drawn from other cases. However, to the extent that comparisons can be made, I consider this case similar to *Edwards*. Like Ms Edwards, the Claimant has made a careful decision about this issue, his anxieties about it are understandable, he had received no guarantees as to its success and the expert instructed on his behalf considers he is acting reasonably and is sceptical as to the impact the treatment would have on one of his major issues (the fatigue). The case is also comparable to *Stansfield* to the extent that in both cases there is a complex mixture of brain and psychological injuries which influenced the claimant's decision.

120. For all these reasons, I do not consider that the Second Defendant has discharged the burden of proving that the Claimant is acting unreasonably by not taking preventative medication or stopping using over-the-counter medication.

121. There has been no suggestion that the use of physical/holistic measures alone would be significant under this head: rather, Dr Foster's evidence only referred to a posture programme "potentially" being used in conjunction with the medication changes.

122. Further, even if I had found that the Claimant had acted unreasonably in this regard, I do not consider that the Second Defendant has discharged the burden of showing the difference it would have made. True it is that Dr Foster expressed the view that the medication changes would be likely to substantially improve the Claimant's headaches, but even he accepted that the extent to which this would impact on his sleep and fatigue could not be easily predicted. Dr Orrell was clear that the fatigue would likely remain, and this significantly adversely impacts on the Claimant's life. In those circumstances I do not consider that the Second Defendant has provided a sufficient evidence base for reducing the Claimant's losses.

123. I am therefore not satisfied that the Second Defendant has proved that the Claimant has failed to mitigate his loss in respect of preventative headache treatments.

4.4: Further fatigue management sessions

(a): The evidence

124. The Claimant has had extensive therapy in Canada: 20 sessions with Dr Gartenberg and a further four sessions with Esther Vahober. These ran from September 2017 to August 2019. In her 26 February 2020 report, Dr Bach recommended that the Claimant have 10-12 further psychological sessions of CBT or Acceptance and Commitment Therapy (ACT), psycho-education and fatigue management. In his report from the same month

Dr Nathaniel-James also recommended neuropsychological intervention. The Claimant has not done these further sessions. At trial he said that he did not recall Dr Bach advising him to have more sessions. Thus, it does not appear that he has consciously declined to follow the neuropsychologists' advice.

125. Dr Bach's view as to the efficacy of further neuropsychological input at this stage changed. When she saw the Claimant on 11 March 2021, he said he felt that it was not the right time to start further input and that he wanted to continue working on his adjustment by himself. She felt it was "appropriate for [him] to try and self-manage as this can reinforce his sense of autonomy, efficacy and confidence in the strategies". She explained in the second joint statement that she felt he was employing CBT and evidence-based cognitive compensatory strategies such that further input would not make any material difference to his fatigue and its impact. I found this explanation from Dr Bach clear and consistent.

126. At trial Dr Bach was "not at all critical" of the approach to psychological treatment which the Claimant had adopted: it was "perfectly reasonable and acceptable" and he was "already engaged and implementing strategies". He had been very focussed on his emotional adjustment to the accident and on cognitive strategies to implement and should be commended for the dedicated work he has done in therapy.

127. The second joint statement recorded that Dr Nathaniel-James was only in "some disagreement" with Dr Bach on this issue. He felt that the Claimant would likely benefit from further CBT fatigue management input at this stage, and at the very least should submit himself for an assessment to ensure he was correctly employing the necessary strategies. At trial, he said he was "not necessarily" critical of the way in which the therapy had been carried out in Canada. He agreed that the Dr Gartenberg sessions had focussed on memory and coping strategies and that the Claimant felt they had been successful which was "as much as you could hope for" as such therapy must to a large extent be patient-led.

(b): Analysis and conclusion

128. In my view, the Claimant had not been given fair notice of this issue by the Second Defendant. The pleading of the mitigation of loss issue in the Counter-Schedule only referred to treatment for headaches. I do not see how it can properly be read as referring to the issue of further fatigue management. There is no mention of Dr Bach's recommendation nor any assertion of the likely outcome if the Claimant had complied with it. I therefore consider that the Second Defendant has failed to comply with the pleading requirements set out in *Geest* and *Samuels* in respect of this element of the mitigation argument.

129. In addition, I do not consider that the Second Defendant has discharged the burden of proving that the Claimant has acted unreasonably in this regard. Dr Nathaniel-James' views about what the Claimant should do at this stage in terms of fatigue management were expressed in a rather "lukewarm" way. Dr Bach was clear that she considers the Claimant has done very well with respect to his psychological input and is acting reasonably with the approach he is taking now. Both experts agreed that this sort of therapy needs to be patient-led.

130. Finally, the Second Defendant has not advanced any clear evidence of what the impact of any further fatigue management sessions at this stage would be on the Claimant's loss.

131. I therefore find that this aspect of the Second Defendant's case on mitigation of loss also fails.

5: Taxation

5.1: The issue

132. There was a dispute between the parties as to whether any award to the Claimant to reflect lost income from his art should be calculated net of tax (the Second Defendant's position) or grossed up (the Claimant's position).

133. In accordance with the net loss principle, damages in English courts generally take into account the incidence of tax. As explained in Halsbury's Laws, Volume 29, *Damages*: "…where damages are not taxable but go to replace income that would have been taxed, tax is deducted. So, for instance, in the case of damages for lost earnings in a personal injury claim, the would-be income tax payable on such earnings is subtracted from any award".

134. The principle that damages to reflect lost earnings should be awarded net of tax is derived from *BTC v Gourley* [1956] AC 185, HL. In that case, a plaintiff was injured by the negligence of the defendants. The trial judge awarded him £37,720 damages in respect of past and future loss of earnings without regard to the income tax and surtax he would have had to pay on the amount of such earnings had he not been injured. If taxation had been taken into account, the award would have been £6,695. It was agreed that the plaintiff would incur no future tax liability on the £37,720 or the £6,695. The House of Lords (Lord Keith dissenting) reversed the decision of the Court of Appeal, to hold that the judge ought to have taken the tax position into account. The plaintiff's award was reduced to £6,695.

135. The Claimant's 2019 Schedule of Loss was advanced on the conventional *Gourley* basis: he sought past and future losses on a net basis, with a 25% top rate of tax deduction on past losses and a 20% top rate of tax deduction on future losses.

136. However, the Claimant's February 2020 Schedule of Loss asserted that "The Claimant is resident in and pays income tax in Canada and will be subject to taxation upon damages received in accordance with Canadian and Quebecois tax laws. No credit is accordingly given for tax liability".

137. As to the role of Canadian or other foreign law on this issue, the parties agreed the following key principles summarised in *Bank Mellat v HM Treasury* [2019] EWCA Civ 449 at [53]: (i) in English private international law, foreign law is a question of fact, to be proved by a duly qualified expert in the law of that foreign country and the function of such an expert extends to both the interpretation and application of the foreign law; (ii) the burden of proof rests on the party seeking to establish the proposition of foreign law in question; and (iii) although the English court will scrutinise the evidence adduced, it will not undertake its own researches into questions of foreign law, any more than it will into other areas of evidence.

138. However, there was no evidence before the court as to how, and if so to what extent, any damages awarded to the Claimant in London would be taxed at a federal or local level in Canada. The parties had been unable to agree to instruct a single joint expert on the issue. Each side then took the view that the other bore the burden of proof on the point for the legal reasons discussed below and so declined to instruct their own expert. It is perhaps unfortunate that this issue was not resolved before the trial commenced, given the sums of money potentially involved.

5.2: The parties' submissions

139. Mr Huckle submitted that the first question was whether the damages will be taxable upon receipt by the Claimant. He argued that the answer to this question remained unclear: the Claimant could be liable to pay income and/or corporation and/or capital gains tax (or the Canadian/Quebecois equivalents if any) on damages received. The *Gourley* principle only applied if the court was satisfied that the Claimant would not be taxed. Therefore, if the Claimant's damages are or might be subject to tax, the court should not undertake a netting exercise and the damages should be awarded gross. It was for the Second Defendant to prove that the Claimant would not be taxed, and the Second Defendant had failed to do this.

140. Mr Huckle drew support for this approach from *Stoke-on-Trent City Council v Wood Mitchell* [1980] 1 WLR 254, CA. In that case the claimants' land had been subject to a compulsory purchase order. The claimants and the acquiring authority agreed a sum of compensation for certain losses between 1969 and 1971 while their business was being re-established. However, there was a dispute as to whether the gross sum should be adjusted to take into account corporation tax, in accordance with *West Suffolk County Council v. W. Rought Ltd.* [1957] AC 403 (in which the House of Lords had applied the *Gourley* principle to compensation payments for compulsory land acquisitions). The Lands Tribunal held that the compensation was in the nature of income and was to be treated as a trading receipt in the hands of the claimants. Therefore, as the claimants were liable to pay corporation tax on the sum received, they were entitled to compensation assessed without deduction of tax. The Court of Appeal dismissed the acquiring authority's appeal.

141. Roskill LJ giving the judgment of the Court of Appeal in *Wood Mitchell* noted at pp.258H-259A that there was an "important distinction" between the *Rought* case and the present case because in the former the Inland Revenue had made plain that in their view no income tax was chargeable on the compensation in question and the House of Lords proceeded on the assumption that that view was correct. However, in *Wood Mitchell*, the Inland Revenue had "written no such letter nor given any such assurance. On the contrary, an exchange of letters between the claimants and one department of the Inland Revenue suggested that capital gains tax would or might be payable". He then explained at p.259C-D that the position of the Inland Revenue was "of importance": if the Inland Revenue ultimately levied tax on the compensation which had been paid net in application of the *Rought* case, a "grave injustice would have been done to the claimants": this was because, in simple terms, there was a risk that they would be required to give credit for taxation twice (once in the initial calculation of the damages and then again in the future taxation of the award).

142. The key passage from *Wood Mitchell* on which Mr Huckle relied was at p.259E-H, where Roskill LJ said:

> "Since the purpose of decisions such as those in *British Transport Commission v. Gourley* [1956] AC 185 and *West Suffolk County Council v. W. Rought Ltd.* [1957] AC 403 was to secure that a successful plaintiff or claimant did not get more by way of damages or compensation than would have been received by him in the absence of his injuries or of the compulsory acquisition in question, as the case might be, it seems somewhat strange that the principle underlying those decisions should be able to be invoked by the acquiring authority in order to produce the result that the claimants, in the absence of any assurance from the Inland Revenue that no attempt would be made to levy tax upon this sum, stood in peril of receiving considerably less than that which they would have received had their capacity to earn continued unaffected by compulsory acquisition. In such circumstances the more natural course, which would avoid any risk of injustice, would be for the claimants to receive the full sum, leaving the question of liability to tax, if any, to be adjusted thereafter between the claimants and the Inland Revenue.
>
> We take the view that the principles laid down in *West Suffolk County Council v. W. Rought Ltd.* can only be applied if after examination of the relevant statutory provisions it is clear beyond peradventure that the sum in question would not be taxable in the hands of the claimants. If that is clear, then it would be wrong to require the acquiring authority to compensate the claimants beyond the amount of the loss which the claimants would in truth suffer. But if it is not, then it seems to us unjust that in a doubtful situation the acquiring authority can get the benefit of a reduced payment while leaving the claimants exposed to the risks we have mentioned. Considerations of abstract justice might be thought to suggest that the claimants should receive the full sum and then in due course account to the Inland Revenue for any tax properly chargeable upon that amount" [my emphasis].

143. On the facts of *Wood Mitchell*, the Court of Appeal held that it was "far...from…clear" that the compensation would not be taxable, and indeed it appeared that some part of the compensation may become taxable. This was clearly distinguishable from the *Rought* case such that the acquiring authority had to pay the full sum to the claimants, leaving the claimants to account to the Inland Revenue for the sum (p.263B-D).

144. Mr Dignum argued that the Claimant bore the burden of proof on the Canadian tax treatment of his damages because (i) he had pleaded a positive case as to taxation in his Schedule of Loss and thus the general principle that "he who asserts must prove" (Phipson on Evidence (20th Edition), paragraph 6.06) applied; and (ii) a party who wishes to rely on a point of foreign law must plead that law with particularity and prove it before the court as a matter of fact by means of expert evidence, and in the absence of any evidence of the precise law in question, or adequate proof as to its application, the court is bound to apply English law: see *Bank Mellat* at [53] and Dicey, Morris & Collins on the Conflict of Laws (15th Edition), Volume 11, paragraphs 9-001, 9-004 and 9-025.

145. However, the Claimant had not called any evidence of his actual intentions in respect of his damages (and he could decide to invest some or all of his damages in the UK, Europe, the US, Haiti or elsewhere), nor any expert evidence on the application of

Canadian and/or Quebecois tax law. The Schedules of Loss could not be relied on as such evidence at trial. Thus, he had failed to prove his pleaded case and the *Gourley* principle applied. There was no competing evidence as to taxation or uncertainty as to what might happen to the Claimant's damages if he took them to Canada: there was simply no evidence either way. Therefore, *Wood Mitchell* did not assist the Claimant.

146. Further, Mr Dignum referred to (i) section 1611 of the Civil Code of Quebec, which was said to codify the principle of *restitutio in integrum*, such that neither pecuniary nor non-pecuniary damages awarded by judgment as a result of personal injury are taxable; and (ii) *Montreal (City of) v Wilson Davies*, 2013, QCCA 34, a decision of the Court of Appeal in Quebec, which was said to be authority for the proposition that damages to compensate victims of personal injury are not subjected to taxation ([67] and [89]). Mr Huckle submitted that no regard should be had to this Canadian law material as this would be tantamount to the court carrying out its own investigation. In any event, *Wilson Davies* is difficult to understand, dates back to 2013 and does not give clarity as to what this Claimant's tax position would be in 2022.

5.3: Analysis and conclusion

147. In addressing this question, I have found it helpful to revert to the context of the *Gourley* decision. McGregor on Damages (21st Edition), paragraph 18-003 states that:

> "The presence of two factors was necessary to set the stage for the problem which was posed for their Lordships' decision in *Gourley's* case: (1) the sums for the loss of which the damages awarded constitute compensation would have been subject to tax; and (2) the damages awarded to the claimant would not themselves be subject to tax.
>
> For there cannot be any reason for taking tax into account in calculating damages given in compensation for a loss which would never itself have been taxed; this would let in a taxation where no taxation would have been, which would be unfair to the claimant. Equally there cannot be any reason for taking tax into account in calculating the damages if the damages themselves will then be taxed in the same manner as the loss compensated would have been taxed: this would result in a double taxation, equally unfair to the claimant".

148. *Gourley* factor (1) is present in this case: any damages awarded to the Claimant are to compensate him for income on which he would otherwise have been taxed. The precise level of that taxation remained a little unclear to me. The Second Defendant relied on a Combined Federal & Quebec Tax table to assert that the relevant rate would be 53.31%. At one point the Claimant argued for a broad-brush 50% rate but then appeared to accept the 53.31% rate. However, this table appears to reflect the marginal tax rate applicable to individual personal income (with potential variations for the calculation of tax on dividends on capital gains), whereas Mr Stanbury's report dated 4 October 2021, paragraph 3.05, suggested that the Claimant is liable to pay Corporation Tax on his pre-tax profits and Income Tax and Social Security deductions based on his post-tax profits. For me to seek to resolve this issue would also appear to fall foul of the *Bank Mellat* principle that an English court should not undertake its own research into questions of foreign law.

149. However, in respect of *Gourley* factor (2), there is simply no evidence as to whether or not the damages awarded to the Claimant will themselves be subject to tax.

150. In terms of what this lack of evidence means for the calculation of the Claimant's award, having considered the competing arguments, I prefer Mr Huckle's submissions. In my view, as a matter of English law, the *Wood Mitchell* principle applies. That principle is to the effect that the *Gourley* or *Rought* netting exercise is not undertaken unless it is "clear beyond peradventure" that the damages in question will not be taxed in future.

151. Whether or not this Claimant's damages will be taxed in future is far from clear, let alone "clear beyond peradventure". There is simply no evidence available as to the future tax treatment of the Claimant's damages in Canada or any other country. Applying the wording of *Wood Mitchell*, the situation remains a "doubtful" one, such that it would be "unjust" to permit the Second Defendant to "get the benefit of a reduced payment while leaving the [Claimant] exposed to the risks [of taxation]".

152. *Wood Mitchell* does not expressly refer to the burden of proof. Logically, the party which will incur the additional cost of a gross award where the tax position remains unclear has the incentive to obtain the necessary foreign law evidence to make the position clear for the court. I note that McGregor paragraph 18-056 interprets *Wood Mitchell* in the same way as Mr Huckle, i.e., that the effect of the judgment is that it shifts the burden of proof to a defendant: "After a period of uncertainty the Court of Appeal…in…*Wood Mitchell* held that it was the defendant's onus to show that factor (2) is satisfied, so that their failure to do so ousts the *Gourley* rule". The point is repeated at McGregor at paragraph 52-005.

153. After circulation of my draft judgment, Mr Dignum rightly drew my attention to p.413 of *Rought*, where Lord Morton held that it is for the party claiming losses "to prove the loss which they have suffered". In *Rought*, this required the company whose land had been acquired to prove their lost profits taking into account the incidence of taxation. The passage continued by indicating that the other party might then criticise the figures and the court would ultimately decide on the correct approach. However, I agree with Mr Huckle that this passage is directed at how the losses for which compensation is to be awarded would have been taxed, for the purposes of any netting exercise, and not who bears the burden of proof on the question of future taxation.

154. Here the Second Defendant has chosen to place no foreign law evidence before the court and so in my view the *Gourley* rule is ousted. However, in my view the fact remains that – whichever side bore the burden of proof – the taxation position remains unclear, such that *Wood Mitchell* applies.

155. Similarly, I consider that the fact that one of the reasons for the uncertainty in this case is the potential role of foreign law makes no difference. Indeed, even if one does approach this issue as a question of private international law, the result is the same: this court has an absence of any evidence of the Canadian or other tax law in question, such that the court is bound to apply English law. English law on this particular point is set out in *Wood Mitchell*, with the consequences set out above.

156. For the avoidance of doubt, I did not consider it appropriate to have regard to the Canadian law material provided by the Second Defendant, given the recognition that the court should not conduct its own investigation into a matter of foreign law.

157. I therefore conclude that the awards to the Claimant to reflect lost income should be made on a gross basis. I appreciate that the impact of this decision is that the Claimant may receive more by way of grossed up damages than he ultimately pays in tax. However, this seems to me the inevitable consequence of *Wood* Mitchell (which specifically recognised the injustice of the reverse scenario, namely a claimant being under-compensated through a net award on which they were later taxed) and the absence of tax law evidence before the court.

6: Past losses

6.1: Past lost income

(a): The legal principles relating to the lost income claims

158. The Claimant contended for a conventional, mathematical approach to calculating his past and future loss, using multiplicands and multipliers as appropriate. Mr Huckle argued that if I was not satisfied with any of the underlying assumptions used in Mr Stanbury's calculations, the methodology could be modified, but that it was appropriate to continue to use the conventional approach.

159. The Second Defendant's primary case was that the Claimant could prove no ongoing loss beyond the end of 2018. Alternatively, Mr Dignum submitted that if any loss was found, there were simply far too many uncertainties to use the conventional method, so that the approach taken in *Blamire v South Cumbria Health* Authority [1993] PIQR Q1 was appropriate.

160. In *Blamire* there were multiple uncertainties over what the plaintiff would have earned over the course of her working life had she not been injured and as to the likely future pattern of her earnings. The trial judge made a global award to reflect the risk of loss of future earnings and pension benefits and the plaintiff's future vulnerability in the market. The Court of Appeal upheld his approach on the basis that there had been "far too many imponderables" for him to have been bound to adopt the conventional multiplier/multiplicand approach; further he "had well in mind that it was his duty to look at the matter globally and to ask himself what was the present value of risk of future financial loss. He had in mind that there was no perfect arithmetical way of calculating compensation in such a case. Inevitably one is driven to the broad-brush approach. The law is concerned with practical matters…and very often one is driven to making a very rough estimate of the damages" (per Balcombe LJ at Q5-6, in part quoting Lord Reid in *Gourley*).

161. In *Bullock v Atlas Ward* [2008] EWCA Civ 194, the Court of Appeal made it clear that judges should not adopt the *Blamire* approach too easily. At [19]-[21] Keene LJ held that "[a]ll assessments of future loss of earnings…necessarily involve some degree of uncertainty…Merely because there are uncertainties about the future does not of itself justify a departure from [the conventional] method. Judges should therefore be slow to resort to the broad-brush *Blamire* approach, unless they really have no alternative". At [16]-[17] Ward LJ observed that the only uncertainty in *Bullock* related to whether the claimant would achieve a certain level of earnings. In those circumstances the court was "not only able…but bound" to use a conventional approach as "a much more appropriate method for fairly assessing damages".

162. In *Van Wees v Karkour* [2007] EWHC 165 at [134] Langstaff J adopted the global sum approach to assessing the Claimant's employment prospects, because he considered that there were "too many possibilities and too many uncertainties" about her likely career path. These related to multiple chances of her having reached various positions and uncertainties over accurate salary rates, rates of pay progression, dates of promotion and the likely influence of other possible factors such as working abroad, being paid in different currencies and being subject to different tax regimes. That said, the data available to the judge enabled him to perform a "more calculated" assessment than had been used in *Blamire*.

163. In *Irani v Duchon* [2020] PIQR P4, the Court of Appeal upheld a trial judge's use of the *Blamire* approach where that had been a "wholesale insufficiency" of evidence: the only evidence before the trial judge was "a letter from a friend, a snapshot of unsuitable jobs…from one…website, and various assertions from the Claimant, a number of which were specifically rejected". The Court noted that "if the only issue had been one of uncertainty" the conventional approach could have been used: [34] and [38].

164. The Claimant advanced his claim for past loss relating to early 2022 and his claim for future loss on the basis that he had a 70% prospect of achieving certain levels of sales. In "loss of a chance" cases involving the loss of earnings, the court has to assess the extent of the lost chance and reduce the damages accordingly: see, for example, *Anderson v Davis* [1993] PIQR Q87 (loss of a two-thirds chance of becoming a principal lecturer), *Doyle v Wallace* [1998] PIQR Q146 Q87 (loss of a 50% chance of becoming a teacher), *Langford v Hebran* [2001] PIQR Q13 (loss of various chances of escalating success as a kickboxer) and *Collett v Smith* [2008] EWHC 1962 (QB) (loss of a 60% chance of playing in the Premiership for a third of a footballer's career).

(b): General observations regarding the claim for past lost income

(i): The 'baseline'

165. This was not a case where there was an immediately discernible pre-accident income baseline from which to calculate the Claimant's lost income due to the accident. At the time of the accident, he was part-way through his studies for his Masters' degree and it was only after completion of that course that he returned to full-time work as an artist, subject to the limitation of his symptoms.

166. However, there was evidence of how the Claimant had worked before starting his Masters in 2013. He had produced paintings and begun to sell them in galleries in Haiti while studying for his undergraduate art degree, often travelling back to Haiti. On graduating in 2010, he continued to sell his art but took a job as a Hewlett Packard representative to support himself financially. He had a studio but had to give it up in mid-2013 to save money for the Goldsmiths course. When he had the studio, he estimated that he produced 40-50 pieces of art a year.

167. The Claimant had also continued to take part in group exhibitions while studying for his Masters. In 2014 he took a break from the course to return to work as an artist and produced 21 paintings and seven drawings. He returned to Goldsmiths in January 2015. Although he was focussed on his studies that year rather than producing work for commercial sale, he nevertheless produced 23 new pieces of art before his accident on 28 November 2015.

168. The Claimant explained he led a "busy and demanding life" before his accident, especially as he had no support from gallerists or agents. This meant that he had to do everything himself, including personally packing and shipping the art he produced, making contact with gallerists and buyers and setting up exhibitions. He now has "the best facilities and support". He did not agree that his life before the accident was less stressful or hectic than his life after it and I accept that evidence.

169. This evidence illustrates that prior to the accident the Claimant was a hard-working and committed artist, with a close eye on his business as well his art. Mr Huckle described him as a "hungry fighter" as he has come from a modest background, and at various points had to support himself with part-time work, which I consider fair. It is clear to me that he worked very hard and was willing to do so in pursuit of his art.

(ii): The shortfall

170. The Claimant graduated from Goldsmiths after his accident and gradually returned to full-time work, enjoying a much higher level of success than before. It is for this reason that his productivity and income have increased since the accident. However, this does not mean that he has not sustained losses. I accept the Claimant's overall contention that his productivity and income have increased since the accident, but that he would have produced more art, and thus earned more, but for the accident. This is because I accept the Claimant's evidence that while the impact of his symptoms has reduced over time, they have meant and continue to mean that he needs to take more regular breaks in the day than he would otherwise do, cannot work as late in the studio as he would like and needs to take regular rest days. This means he produces less art. I therefore do not accept the Second Defendant's submission that because of his increase in productivity since the accident the Claimant cannot show any losses: the two are not mutually inconsistent.

171. In my view, the Claimant has done his best to estimate what art he would have produced had the symptoms not inhibited him in the way they have done. The nature of his deficits is that they are largely hidden. Although the experts can provide scientific data about the Claimant's injuries, this does not extend to being able to provide an incontrovertible assessment of the lost productivity that they cause. In those circumstances, I accept Mr Huckle's submission that the Claimant is best placed to assess how much productivity he has lost. I did not understand any of the experts to be saying that his assessment was wholly unreasonable given his symptoms (subject to the evidence about mitigation of loss set out above).

172. The Second Defendant relied on the fact that in 2017 the Claimant completed a form for the Canadian compensation scheme indicating that he was working a 60-hour week. In evidence the Claimant said that this was "aspirational" and included all the time he was in the studio even if he was not actually working. Given that he would work seven days a week if his health permits it, 60 hours a week is not necessarily inconsistent with a shortfall in any event. It could be said, for example, that 60 hours was equivalent to five long (12 hour) days in the studio and two rest days. Mr Kiernander's evidence was that he himself worked 60 hours in the studio while also doing a teaching job. I do not therefore regard the evidence the Claimant provided to the Canadian compensation authorities as inconsistent with his evidence as to his ongoing symptoms and the shortfall at this time.

173. There was evidence that the Claimant always meets the specific demands of his gallerists for work, even if it is at the last minute according to Mr Gupta. The Second Defendant argued that this means that he cannot show evidence of a shortfall. Again, I disagree: the Claimant's evidence was clear that he always meets the demands of a particular engagement (such as a show or pre-ordered piece of art) but not the general demands of the market for his work.

(iii): Selling the shortfall and unsold or held back work

174. Once the shortfall is established for a particular year, it is then necessary to establish whether that shortfall leads to any financial loss to the Claimant. That requires an assessment of whether the "lost" art (i.e., the art the Claimant has not been able to produce) would be sold.

175. Mr Stanbury applied an assumption that all the works which the Claimant would have produced in a particular year would have been sold. This was based on the fact that the gallerists gave broadly consistent evidence to the effect that they cannot currently meet the demand for the Claimant's work from potential buyers. However, it is necessary to look at what was happening with the Claimant's sales in each of the years for which a shortfall is claimed to identify whether he would, in fact, have made more sales had he produced more work.

176. The Second Defendant relied on the fact that a certain percentage of the Claimant's work to date has not, in fact, sold. For example, a recent exhibition at the Matthew Brown Gallery in Los Angeles had not led to the sales hoped for. The Second Defendant therefore understandably argued that any unmet demand could be met from the Claimant's current stock of art, and that there was no ongoing shortfall.

177. However, when Mr Stanbury completed his final analysis of the unsold art in the Claimant's archive, he concluded that of the 287 pieces he has produced since 2016, only 27 are unsold. This is just under 10%. There was evidence to the effect that artists are advised to routinely hold back from sale around 25% of their art. Mr Gupta advises all his artists to this effect. The Claimant had also been given advised by the accountant for Robert Rauschenberg (a famous artist) to hold back four pieces from each series he produces. This is for several reasons. It is sensible for artists to retain some art for their own future financial benefit or that of their estates. Artists use paintings as gifts, often a little strategically. The Claimant had done this, by, for example, giving Ms Joyner a painting for her birthday in 2020. They may also keep paintings for their own personal use, including for future research.

178. I do not therefore consider that the Claimant should have been expected to use this unsold or held back work to service the unmet demand, not least as he is already retaining a lower percentage than is considered sensible. Further, it is clear that holding back work in this way benefits the artist financially, albeit in a less direct or immediate way than an immediate sale. It is therefore reasonable that the Claimant should have the benefit of any nominal held back work for the purposes of calculating his loss. I therefore do not consider it necessary to modify the assumption Mr Stanbury has applied to the calculation of loss that the Claimant would have sold all works represented by the lost production figures to reflect the fact that some would not, in fact, have been sold. The Claimant is nevertheless entitled to the value of them.

References below to paintings being "sold" should therefore be interpreted as referring to both sold, and held back, paintings.

(iv): Calculating the value to the Claimant of the shortfall

179. The Claimant generally receives 50% of the sale price for each painting that is sold.

180. Mr Stanbury's calculation of the Claimant's losses was commendably thorough. I found his 40-page initial report and 10 supporting evidentiary schedules, together with his supplementary report, further revised schedules and oral evidence very helpful. He had reviewed a large amount of material, including the Claimant's archive of work, his annual accounts, price lists, sales records and gallery artist reports as well as the key witness evidence. He described the case as "replete" with data for the purposes of calculating the Claimant's losses, compared to the 900 or so similar cases in which he has advised. Based on his analysis of the data, he was satisfied that the Claimant's documentation provided a "reliable record" of the work sold and that the invoices reconciled to the accounts satisfactorily: typically, there were only negligible discrepancies, which were often likely due to exchange rate differences.

181. Mr Stanbury reconciled the fact that the Claimant invoices in four different currencies (US dollars, Canadian dollars, British pounds and Euros) by using appropriate exchange rates to give consistent figures in CAD $ (either the actual exchange rate for the date in question or the average exchange rate for the relevant accounting period). He calculated average selling prices per year for large, medium and small paintings and a "blended" average selling price across all sizes. Having calculated the average number of years between production and sale (as 2.1 years in 2016, declining to 1.1 years in 2021, consistent with there being increased demand for the Claimant's work), he applied an assumption that work produced in one year would be sold the following year.

182. Mr Stanbury used the actual sales figures so as to incorporate the element of discounting which often occurs in the art market and which the Claimant's gallerists had actually applied to his sales. I do not therefore accept that any further reduction to reflect heavy discounting from the Claimant's sales prices is appropriate as the Second Defendant suggested (and in any event the evidence did not show that the discounting was consistently heavy or outside industry norms).

183. The Defendant's expert Mr Rabinowitz agreed the sales reconciliation by painting and the average actual sales prices from 2016-2021 with Mr Stanbury. He did not provide an alternative calculation for past loss, but I have taken his observations into account where appropriate. The same applies to the arguments advanced in the Second Defendant's Counter-Schedule of Loss and closing submissions.

(c): Past lost income per year, 2016-2022

(i): 2016

184. The Claimant's evidence was that he was only able to return to painting very slowly after his return to Goldsmiths in January 2016. He said that "[w]ith huge difficulty" he produced the "bare minimum" he needed for the Goldsmiths end of year show in July 2016, namely a "tryptic" (a large work, broadly equivalent to three separate paintings) and five further paintings. He then took the rest of the year off to recover from his

injuries. It was no part of the Second Defendant's case that he had failed to mitigate his loss in doing so.

185. The Claimant estimated that he would have produced at least another 15 paintings of various sizes before the July 2016 show. I consider this credible. This was the period when the Claimant's symptoms were at their worst and it is thus reasonable to infer that but for the symptoms, he would have been significantly more productive (around three times more so) than he actually was. Further, I accept the Claimant's evidence that it was clear to the students that their focus at this point in the course was to produce work for the show rather than engage in further study. I therefore do not accept the Second Defendant's suggestion that absent the accident the Claimant would have been studying in 2016 and so would not have been working at full capacity in any event.

186. The Claimant estimated that if he had not taken the latter part of 2016 off to recover, he would have produced at least 30 paintings. Again, I consider that this is credible. This figure is broadly consistent with the pattern he has estimated for the first part of the year, which was based partly on pieces he had actually produced. I also accept the Claimant's evidence that but for his accident he would have thrown himself into his work and "tried to ride the wave" of success after the Goldsmiths show. This is entirely consistent with his clear dedication to his art and good business sense.

187. I therefore accept the Claimant's case that but for his injuries he would have produced a total of 45 more pictures in 2016. I do not consider that the Second Defendant's suggestion that the proper shortfall figure for this year would be 5 lost paintings, or 10% lost productivity, fully reflects the continued impact of the Claimant's injuries on him at this time.

188. The Claimant's case was that he would have sold all 45 of these paintings. The Goldsmiths' show was noted by many of the witnesses as having been a huge success. The pieces he put in the show all sold and he was approached by various gallerists wanting to work with him. An article entitled "Why London artist Manuel Mathieu is on the way up" generated a lot of interest in him. The demand for his work continued into 2017 (see section 6.1(b)(ii) below).

189. However, he only sold four pieces from the Goldsmiths show, and a total of 11 pieces that year. He had not, by this point, been taken on by any gallerists who could assist in promoting his work. Unlike later periods, there is no evidence of unmet demand for his work for this period. I therefore consider that he would have been able to sell some, but not all, of the 45 lost paintings. Bearing in mind the other sales figures for the year and doing the best I can to make a broad-brush assessment on the evidence, I estimate that he would have sold 20 of these paintings in 2016. Given my findings in the following sections to the effect that the Claimant began to have unmet demand for his paintings in 2017, and given Mr Stanbury's evidence that the average number of years between production and sale was 2.1 years in 2016, I find that the Claimant would have sold the remaining 25 paintings produced in 2016 in 2018.

190. The Claimant did not specify what size the additional paintings for 2016 would have been. Accordingly, and applying the working assumption that work produced one year would be sold the next, Mr Stanbury used the blended figure for average sales in 2017 to generate an average figure of CAD $5,216 per painting. This was based on the Claimant's sales invoices and Canadian accounts for 2017, in which there were

negligible discrepancies. I accept this as a sound figure per lost painting. I consider this methodology more rigorous than the one advanced in the Second Defendant's closing submissions which applied a broad 10% reduction to the Claimant's gross profit for the year.

191. Throughout Mr Stanbury's calculations he applied an assumed deduction of 6.7% to reflect the Claimant's costs in producing his paintings. However, it became clear during the trial that some of the Claimant's costs, such as studio costs, would be incurred in any event. I accept his evidence that a large painting costs around CAD $2,000 in additional costs (for canvas, stretcher and paints). Given the absence of evidence about small painting costs Mr Huckle fairly invited me to apply the CAD $2,000 deduction to the sales figures for all lost paintings, of whatever size. I accept this. This gives a lost profit figure of CAD $3,216 per painting in 2016 for each of the 20 paintings that the Claimant would have produced and sold in 2016. The parties have agreed a lost profit figure of CAD $10,731.71 per painting for each of the 25 paintings the Claimant would have produced in 2016 but not sold until 2018.

192. I therefore calculate the Claimant's lost income for 2016 on the basis of (i) 20 lost paintings that would have been produced and sold in 2016 at CAD $3,216 profit per painting = CAD $64,320; plus (ii) 25 lost paintings that would have been produced in 2016 but sold in 2018, at CAD $10,731.71 per painting = CAD $268,292.86.

193. As the Second Defendant pointed out, Mr Stanbury's calculations resulted in a higher lost income figure for 2016 than the Claimant's total gross profit for the year (CAD $47,392). Even my more limited calculations also do so. However, this is the inevitable consequence of the very significant impact the accident had on the Claimant's productivity during 2016, the rising value of his art and the sensible assumptions and methodology used by Mr Stanbury. I do not accept, as the Second Defendant submitted, that such a large disparity between actual income and calculated lost income means that an award for the entirety of the latter is "wholly unreal".

(ii): 2017

194. The Claimant's recovery continued during 2017, albeit that he was still very hampered by his symptoms. His archive shows that he produced 39 paintings and 21 drawings that year. However, he was set back by the second road traffic accident which occurred on 27 March 2017. His evidence was that he lost four weeks' productivity as a result. Even allowing for that, his claim was that he could have produced a further 30 pieces of work in 2017 but for his symptoms from the 2015 accident. I accept the Claimant's case in this regard. It is a reasonable figure bearing in mind the ongoing impact of his symptoms, relative to what he was still able to produce. It is a lower shortfall figure than that adopted for 2016, recognising that the impact of his symptoms was reducing, and his productivity was increasing. Again, the Second Defendant's suggestion of a shortfall figure of five lost paintings / 10% lost productivity does not fully reflect the ongoing impact on the Claimant.

195. The Second Defendant seeks to attribute six months' lost productivity to the second accident in 2017. This is understandable as this appears to be the period of time for which the Claimant was paid statutory Canadian compensation for lost earnings, but his evidence, which I have accepted, is that he in fact only lost four weeks' productivity due to the second accident.

196. The Claimant's case is that if he had produced these 30 paintings in 2017, he would have sold them all. On balance, I accept this, because the Claimant's ability to sell his works had markedly improved from 2016, he had broad gallerist support and there is evidence of unmet demand for his work.

197. In 2017, the Claimant had been taken on by the Tiwani Gallery in London and had a critically acclaimed solo show there towards the end of the year. Celeste Ricci who had worked at Tiwani was clear in her evidence that there had been interest in the Claimant's work even before the show, largely due to his ICA and Goldsmiths successes, and she had arranged one sale before the show took place. Ms Ricci had "no difficulty" in selling all 14 works displayed in the show; "did not have enough work from Manuel to meet demand from collectors"; and had "no doubt at all that I would have been able to sell any additional work Manuel was able to provide…he was very much seen by the collectors as a talented artist whose career was rapidly ascending". By the time of the Tiwani show the Claimant had also started working with the Kavi Gupta Gallery in Chicago and the Maruani Mercier Gallery in Brussels and Ms Ricci explained that when enquiries were made of these two galleries, they also had no "spare" works by the Claimant which could be used to meet customer demand. Ms Ricci gave an account at trial that differed from her written evidence as to whether she, or others, had asked the Claimant to produce more work, but her inconsistency on this point of detail from events over four years ago did not in my assessment undermine the broad thrust of her evidence. Finally, the demand for the Claimant's work continued into 2018 (see section 6.1(b)(iii) below).

198. Mr Stanbury used the sales invoices and accounts for 2018 to generate a blended figure of CAD $6,220 per lost painting for 2017. Again, a costs deduction of CAD $2,000 per painting needs to be made, giving a lost profit figure of CAD $4,220 per painting for 2017.

199. I therefore calculate the Claimant's lost income for 2017 on the basis of 30 lost paintings at CAD $4,220 profit per painting, giving a total of CAD $126,600.

(iii): 2018

200. The Claimant's evidence was that his recovery continued month on month, but broadly stabilised at the end of 2017. In 2018 he produced around 71 paintings and 40 drawings. His final assessment was that but for the accident he would have been able to produce 10 more large paintings and the equivalent of 4 medium ones in 2018. I consider the Claimant is best placed to make this assessment and that it is reasonable. It is a further reduction in the shortfall claimed from the previous year, to mark his increased productivity generally. The Claimant provided a clear rationale for the estimate of 10 lost large paintings: this equates to one for each month of the year, save for two months when he would be on holiday or engaged in other activities. The evidence shows that even with his symptoms he can typically produce 25 large paintings a year, so it is reasonable to conclude that without the symptoms he could have produced a further 10. The overall shortfall estimate fits with the impact of his symptoms as set out in his later diaries.

201. I also consider that the Claimant is entitled, and best placed, to say how he would have used the productive time he has lost due to his injuries. He is clear that he would have used this time primarily to produce large artworks. They are what he is best known for

and what sell the best. His allowance for the equivalent of 4 medium paintings is, in my view, a sensible recognition of the fact that some of his lost productivity would have been directed to other, less lucrative, art forms. I do not therefore accept the Second Defendant's submission that the lost productivity must be equally allocated across all the art forms in which the Claimant works.

202. As his symptoms have stabilised, and as he has now reached what is likely to be the best accommodation of them that he can, it is logical that the shortfall will remain broadly consistent for the future, even if his actual productivity varies each year.

203. I am satisfied that if the Claimant had produced these 14 paintings in 2018, he would have sold them. Ms Ricci and the Claimant confirmed that all 14 of the pieces the Claimant put in Armory show in New York in March 2018 sold. Mr Gupta explained that the show at his gallery in Chicago in March 2018 was a "complete sell out". Mr de Montferrand started working with the Claimant in early 2018 and was able to sell the three paintings the Claimant gave him "rapidly". The demand for his work also continued into 2019 (see section 6.1(b)(iv) below).

204. Mr Stanbury used the sales invoices and accounts for 2019 to generate a lost sales figure of CAD $13,728 per lost large painting and CAD $10,241 per lost medium painting for 2018. Again, a costs deduction of CAD $2,000 per painting needs to be made, giving lost profit figures of CAD $11,728 per large painting and CAD $8,241 per medium painting for 2018.

205. I therefore calculate the Claimant's lost income for 2018 on the basis of (i) 10 lost large paintings at CAD $11,728 profit per painting = CAD $117,280; plus (ii) 4 lost medium paintings at CAD $8,241 profit per painting = CAD $32,964, giving a total of CAD $150,244.

(iv): 2019

206. In 2019 the Claimant produced around 70 paintings and 40 drawings. These figures are very similar to those for 2018 and illustrate that his symptoms were stabilising, as was his ability to cope with them. The Claimant again claimed a shortfall of 10 large plus four medium lost paintings for this period. Mr Rabinowitz questioned whether the fact that the Claimant spent the second half of 2019 in the Stuttgart residency should lead to a reduction in the shortfall. There is some force in this, given the Claimant's evidence that a residency generally involves an element of holiday time. However, the residency does not seem to have adversely impacted on his productivity for the year, as his figures are similar to those for 2018. The tone of the correspondence of the Stuttgart residency is also quite formal: it describes the residency as an academy fellowship and does not refer to any time off for travel. I therefore do not consider that this is a reason to reduce the shortfall claimed and so adopt the Claimant's figures of 10 large paintings and fourmedium ones.

207. I am satisfied that if the Claimant had produced these 14 paintings in 2019, he would have sold them. Mr de Montferrand had organised a solo show in Beijing in March/April 2019 and it had sold out. Mr Charbonneau had acquired several of the Claimant's pieces in mid-2019 to "test the market" and "sold all the pieces without difficulty". His witness statement, signed in November 2019, noted that the Claimant's work was "in constant demand" such that "I have no doubt that if Manuel were able to

provide me with more art these would sell". Mr Gupta's statement from the same month also said that "demand remains extremely high globally and waiting lists are forming for his works". The demand for his work also continued into 2020 (see section 6.1(b)(v) below).

208. Mr Stanbury used the sales invoices and accounts for 2020 to generate the lost sales figures for 2019. He generated a lost sales figure of CAD $23,403 per lost large painting and CAD $13,233 per lost medium painting for 2019. Again, a costs deduction of CAD $2,000 per painting needs to be made, giving lost profit figures of CAD $21,403 per large painting and CAD $11,233 per medium painting for 2018.

209. I therefore calculate the Claimant's lost income for 2019 on the basis of (i) 10 lost large paintings at CAD $21,403 profit per painting = CAD $214,030; plus (ii) four lost medium paintings at CAD $11,233 profit per painting = CAD $44,932, giving a total of CAD $258,962.

(v): 2020

210. In 2020 the Claimant produced around 44 paintings and 28 drawings. These figures are lower than those for 2019, partly due to his studio being closed due to the Covid-19 lockdown in April 2020. This would have happened in any event and so I consider it necessary to reduce the shortfall claimed (which was otherwise the same figure as was advanced for 2018 and 2019). Bearing in mind the Claimant's reduced productivity overall during this year, and the impact of the lockdown, and taking a broad-brush approach, I reduce the shortfall for this period to eight large paintings and three medium ones.

211. I am satisfied that if the Claimant had produced these 10 paintings in 2020, he would have sold them. Mr Gupta explained that he had included the Claimant in some virtual art fairs during the pandemic and that all the pieces the Claimant had placed with him during 2020 sold. Mr Charbonneau organised a sale of 10 small pieces in September/October 2020 and they all sold. Mr de Montferrand exhibited the Claimant's work at shows in China in June and November 2020 and all nine pieces sold. The Claimant also described selling three of the four pieces he exhibited at the PHI Foundation in Canada. The demand for his work also continued into 2021 (see section 6.1(b)(vi) below).

212. Mr Stanbury used the sales invoices and draft accounts for 2021 to generate the lost sales figures for 2020, at CAD $27,405 per lost large painting and CAD $12,602 per lost medium painting. Again, a costs deduction of CAD $2,000 per painting needs to be made, giving lost profit figures of CAD $25,405 per large painting and CAD $10,602 per medium painting for 2020.

213. I therefore calculate the Claimant's lost income for 2020 on the basis of (i) eight lost large paintings at CAD $25,405 profit per painting = CAD $203,240; plus (ii) three lost medium paintings at CAD $10,602 profit per painting = CAD $31,806, giving a total of CAD $235,046.

(vi): 2021

214. In 2021 the Claimant produced around 65 paintings. For this period, I accept the Claimant's case that but for his symptoms he would have produced 10 large plus the equivalent of four medium paintings.

215. I am satisfied that if the Claimant had produced these 14 paintings in 2021, he would have sold them. Mr Charbonneau and Mr Gupta both signed witness statements in March 2021, referring to an unmet need for the Claimant's work. Mr Charbonneau said that "for months" he had had a list of "billionaire collectors, museums and embassies waiting for large artworks from Manuel". At trial he said there were 72 of the 1,700 collectors he worked with on this list and he did not have enough "cards to play" (pieces of the Claimant's work) to meet their demand. Mr Gupta referred to being unable to meet the demand for the Claimant's work from collectors in the USA, Canada and Singapore. The Claimant explained that the Museum of Fine Arts purchased the largest painting he had created for the Survivance exhibition that had re-opened in early 2021. I note that this exhibition was described on the Frieze website from March 2021 as "one of the top 5 shows to see in the US and Canada". Ten of the paintings in the Power Plant exhibition in 2021 also sold.

216. Mr Stanbury calculated the lost sales figures for 2021 at CAD $36,695 per lost large painting and CAD $16,874 per lost medium painting by using the actual selling prices in 2021, increased by 33.9%, this being the average price increase across all currencies, obtained from review of the Claimant's price lists, as detailed in Schedule 8A to his report. I accept this methodology as sound. Again, a costs deduction of CAD $2,000 per painting needs to be made, giving lost profit figures of CAD $34,695 per large painting and CAD $14,874 per medium painting for 2021.

217. I therefore calculate the Claimant's lost income for 2021 on the basis of (i) 10 lost large paintings at CAD $34,695 profit per painting = CAD $346,950; plus (ii) four lost medium paintings at CAD $14,874 profit per painting = CAD $59,496, giving a total of CAD $406,446.

(vii): 1 January 2022-31 March 2022

218. For the final period of past loss relating to early 2022, I am again willing to accept the Claimant's model of 10 lost large paintings and four lost medium paintings. I also accept that if he had produced a pro rata share of these paintings during this part of 2022, he would have sold them, in light of the gallerists' evidence of ongoing unmet demand referred to under sub-paragraph (vi) above and the powerful evidence as to the Claimant's current trajectory described in section 7.1 below.

219. Mr Stanbury calculated lost sales figures for 2022 at CAD $60,374 per lost large painting and CAD $23,077 per lost medium painting. Consistent with the model used throughout, these were based on his predicted sales figures for 2023. To calculate these, Mr Stanbury relied on a key passage in Mr Francis' September 2021 report, which I set out in full, as this is also the basis of the Claimant's future lost income claim:

> "[The Claimant] has recently been advised to raise his sales prices and has done so to the level of [USD] $100,000 for a large painting…and I would expect his sales prices to increase over the next few years towards a level of [USD] $150-250,000 for large paintings and [USD] $50,000-70,000 for his medium paintings, and then perhaps to level off. I would

> put the chance of these price 'brackets' being achieved at 70% given the evidence of his career progression to date, indeed I would be very surprised if they were not reached. Going beyond 5 years or so is very speculative, because of market forces and interests…long term his prices are unlikely to reduce below the level reached in this initial period of rising prices and might well continue to rise if the market remains strong for his genre".

220. At trial Mr Francis was tested on his predicted sales prices because it was not clear that the Claimant had in fact already raised his prices to USD $100,000 for a large painting: the most recent price list available was from July 2021 and the highest price on that was USD $74,200. Moreover, Mr Gupta and Mr Moos had been less optimistic on the issue in their March 2021 statements. Mr Gupta had said that the price of the Claimant's larger-scale work should rise to "something in the region of USD $100,000 or more within the few years". Mr Moos said that "over the next three years" he could "confidently predict" that the Claimant would reach sales prices "in the region of USD $100,000".

221. Mr Francis readily accepted that these witnesses, especially Mr Gupta as one of the Claimant's long-standing gallerists, had a "good feel for [the Claimant's] values". I consider that as professional people "closer" to the Claimant and his position in the market, Mr Gupta and Mr Moos are better placed to estimate his likely sales prices in the immediate term than Mr Francis, who could only give quite general predictions. In this regard I take the same approach as the trial judge in *Collett v Smith* [2008] EWHC 1962 (QB) at [97], who had regard to the views of Sir Alex Ferguson, given his "a wealth of experience in the development of young [football] players": she considered that although his was not expert evidence, it "must inevitably carry great weight".

222. Further, the evidence relating to potential comparator artists for the Claimant summarised at section 7.1 below shows that they have all achieved sales prices in excess of the USD $100,000 figure given by Mr Gupta and Mr Moos. There is evidence that the Claimant's prices are rising and heading towards the USD $100,000 figure. Mr Sainty did not appear to consider the prediction unreasonable. These pieces of evidence reinforce my view that the prediction by Mr Gupta and Mr Moos is sound.

223. I therefore consider that calculation for this period of past loss should be based on a revised assumption of the Claimant achieving a sales price of USD $100,000 for a large painting by the end of March 2024 (that being three years from when Mr Gupta and Mr Moos signed their statements). Mr Francis' initial prediction in relation to the sales prices of a medium painting should also be reduced proportionately. This gives a figure of USD $30,000 for a medium painting.

224. As noted above Mr Francis had estimated that the Claimant had only a 70% prospect of achieving these prices. The use of this percentage figure recognised that however popular an artist is at any point in time, there are inherent uncertainties in the art market, not least due to changing fashions and tastes within the market. Given the current evidence of unmet demand for the Claimant's art (see section (vi) above) and the fact that he is clearly currently on a powerful upward trajectory (see section 7.1 below) I see no reason to reduce the 70% chance figure for this period of past loss.

225. For ease of calculation, this period of past loss should end with a nominal judgment date of 31 March 2022, that being shortly before the actual judgment date, and almost exactly one year from the estimates given by Mr Gupta and Mr Moos.

226. Accordingly, the principles applicable to this part of the past loss award are: (i) shortfall of 10 large paintings and four medium paintings; (ii) lost profit figures for those paintings to be calculated based on predicted sales prices for 2024; (iii) those predicted sales prices to be calculated by working out the intervening prices between the Claimant's 2021sales prices (see section 6.1(vi) above) and him achieving a sales price of USD $100,000 for a large painting and USD $30,000 for a medium painting by the end of March 2024; (iv) costs deduction of CAD $2,000 per painting to be applied; (v) reduction to reflect that the Claimant has only a 70% prospect of losing the value of the shortfall calculated in this way; and (vi) pro rata award to reflect period of past loss of 1 January 2022 to 31 March 2022.

6.2: Other past losses

227. The Second Defendant admitted the Claimant's claims for the cost of the therapy he undertook in Canada in full. This equates to £1,503.

228. The Claimant sought CAD $5,163 (£3,097) in relation to the fortnight immediately after the accident when his sister cared for him in England. This was calculated on the basis of her loss of earnings, flight costs, expenses in London and two counselling sessions that she had. He also sought CAD $3,600 (£2,160) for loss of earnings, food and other care costs for the month from 14 December 2015 to 15 January 2016 when his then partner Alexandra Melancon cared for him. The Second Defendant offered £2,500 on the combined care claim. I consider this a reasonable figure because (i) the invoice showed that her flight cost CAD $1,067.85 (£531); (ii) I accept the Second Defendant's submission that her counselling fees are irrecoverable; and (iii) there was no witness or documentary evidence to corroborate Ms Melancon's losses.

229. The Claimant also sought CAD $4,371 for his December 2015 flight costs from England to Canada. The Claimant had already booked to fly back to Canada on 22 December 2015 with Air Canada but needed to return earlier to recover from the accident. I accept the Second Defendant's submission that he failed to provide any evidence of losses caused by having to cancel the flight and re-book: my understanding of the email confirmation for the original flight is that for a fee of £120 it was capable of alteration until up to 2 hours before departure. It is not clear why this was not done and why a new flight with Finnair (which I note cost CAD $1,838.19) was purchased. In those circumstances, I award the Claimant £120 for the nominal loss of the alteration fee.

230. Accordingly, I award a total of £1,503 + £2,500 + £120 = £4,123 under this heading.

231. Interest on the Claimant's past losses is to be calculated at half the special account rate in the usual way.

7: Future losses

7.1: Future lost income

(a): The issues

232. Mr Francis and Mr Sainty broadly agreed that the potential scenarios for the Claimant's future income are that (1) his prices continue to rise; (2) his prices level out and "hold"; (3) his prices fall; or (4) some combination of these scenarios.

233. Predicting the future loss of income for any artist will be difficult. The Second Defendant accurately summarised the general uncertainties of the art market as "staying in vogue, market preferences, changes of gallerist, variation of discounts, economic calamities, geopolitical instabilities, sustainability of pricing, competition, physical health, other emotional demands, perhaps even another pandemic".

234. The Claimant's case was that for the rest of his life he will continue to suffer a shortfall of 14 paintings a year, demand for his work will remain as it is and he will continue to be unable to meet that demand. Mr Huckle submitted that the 70% chance figure given by Mr Francis and used throughout sufficiently reflected any risks that this would not occur. He invited me to modify any of the underlying assumptions in the calculations Mr Stanbury had used if I felt it appropriate to do so, in light of the evidence, but maintained that a conventional multiplicand/multiplier approach could still be used.

235. Mr Francis and Mr Sainty agreed that predicting the evolution of any artist's work, its value and pricing beyond the next two to three years involves speculation. Mr Francis volunteered that when he was working with Anthony Gormley and Jean-Michel Basquiat at the outset of their careers, he would not have been able to predict what they would be earning two to three years later.

236. The Second Defendant's primary position was that in light of this agreed evidence, no award to reflect the period beyond two to three years could be made, because all attempts at quantification would be too speculative. I do not agree. As Keene LJ observed in *Bullock* at [19]-[21], all assessments of future loss of earnings necessarily involve some degree of uncertainty. As Langstaff J said in *Van Wees* at [100], where there are "a number of uncertainties and imponderables which are not amenable to any precise answer", the court needs to perform "the best jury assessment [it can] in the light of all the material, having seen the witnesses and considered what [it thinks] to be the realities of the situation". Having conducted the assessment, the award may be very much smaller than that claimed, or may indeed be nil, but this does not mean the court should not carry out the process.

237. The Second Defendant's secondary position was that any award would need to reflect "the overwhelming probability" that the Claimant's prices would "go up and then come down, very likely at a significant rate, such that the multiplicands…are far too high. Moreover, the proportion of unsold works will likely go up and his lost profit become even smaller". For these reasons, even if some award could be quantified for the first two to three years, it was said that beyond that a *Blamire* award was appropriate. By way of illustration only an award based on two lost paintings a year was calculated.

(b): Duration of the Claimant's productivity and the impact of his symptoms on it

238. The Claimant's significant efforts to build and sustain a demanding career despite his symptoms illustrate his commitment to his work. I consider it likely that he will continue to paint and create art in other mediums as long as his health permits him to

do so. As Mr Francis noted, "[a]rtists tend not to retire as long as their ability to work continues, and there is now a more general expectation that long careers are normal". In my view the Claimant is likely to be akin to the two artists in their 80s described by Mr Francis at trial, who continue to work seven days a week and "almost certainly" produce over large numbers of pieces of art a year.

239. I have already found that the Claimant's symptoms are likely to be permanent. Thus, I accept that his symptoms will continue to adversely affect him for his lifetime. In light of my findings on mitigation of loss set out at section 4 above, I do not consider that this issue needs to be factored into the calculation of the Claimant's future loss.

240. The more difficult question is whether the ongoing impact of his symptoms and the ongoing shortfall will continue to cause a financial loss to him. This depends on an assessment of his likely ability to continue selling all his produced works, and to continue generating sufficient demand to sell his nominal "lost" works, and if so to what financial level. It was to this issue that Mr Francis and Mr Sainty's evidence was primarily addressed. I also took into account the evidence from the gallerists and Mr Moos, consistent with the approach taken in *Collett*, referred to in section 6.1(c)(vii) above. I address the Claimant's future loss claim in two distinct chronological phases to reflect the agreed expert evidence as to the two to three years point, and in light of my findings in section 6.1(c)(vii) above about the Claimant's prices in the immediate term.

(c): Future lost income from 1 April 2022-31 March 2024

241. The evidence makes clear that the Claimant is currently on a potentially powerful upward trajectory in his career:

(i) His sharply increasing sales demonstrate, as Mr Francis said, "sustained and rising interest in his work internationally".

(ii) There has been increasing awareness in the art world in recent years of the need to recognise artists from diverse backgrounds. The Claimant may well be benefitting from what several of the witnesses described as a long overdue historical correction. Although Mr Sainty had initially characterised the impact of the Black Lives Matter movement as a trend, he later accepted that it is more likely to lead to embedded change in the art world.

(iii) Displaying in art institutions or museums as opposed to galleries significantly assists in taking an artist's career to a higher level, and the Claimant has recently achieved this: in 2020 he exhibited in what Mr Moos described as "two significant art institutions" (the Museum of Fine Arts in Montreal and the Power Plant in Toronto). Although Mr Sainty was of the view that these are not among the most prestigious museums worldwide, there is evidence that the Claimant is moving into the international museum scene: the Miami Museum of Contemporary Art having committed to showing his works and the Claimant has been in some discussions with the Tate Museum in London.

(iv) The Claimant has the benefit of what Mr Francis described as "distinguished and well-connected collectors" such as Ms Joyner, and this "helps to sustain and

widen the collector base as it is competitive". Ms Joyner's role as a trustee and benefactor of major US museums was also likely to assist.

(v) In 2020 the Claimant was "long-listed" for the Sobey award, described by Mr Charbonneau as "the biggest award in Canada, attracting a lot of publicity", which "has been the springboard for the careers of many Canadian artists over the years". Due to Covid-19 the committee decided to share the award among all 25 long-listed artists.

(vi) In late 2021 two of the Claimant's large works featured in the 'Social Works II' exhibition at the London Gagosian, widely recognised by the witnesses as one of the world's leading galleries (variously described as the "Ferrari" or "Rolls Royce" of the art world). This was described by Mr Moos as a significant achievement for the Claimant. The two works sold, and he has since provided them with four more paintings. In early 2022 he arranged a video interview with Gagosian to go on their YouTube channel.

(vii) In 2021 he was working on a major catalogue of his work, to which a number of internationally respected authors had agreed to contribute, and the design concept for which was being created by Ima Boon, described by Mr Moos as the "greatest living book designer".

(viii) On 4 January 2022 the Artnet website included the Claimant as the only Canadian in its list of "12 artists poised to break out in 2022".

(ix) In early 2022, he was taken on by Pilar Corrias, London gallerist. A show was arranged for April 2022. Mr Moos noted her "outstanding profile as an early detector of talent" and ranked her "among very few London and Europe based galleries". He was clear that she "knows how to develop the careers of young artists in an expert fashion" and referred to "at least three artists in her stable I have watched rise". While Mr Sainty was more guarded in his recognition of her, he did accept that while thousands of students graduate from art school each year, a "small proportion" get taken on by dealers at different levels.

242. In my view Mr de Montferrand accurately summarised the position when noting that the Claimant "…is now entering a higher level in his career as an emergent international artist". Similarly, Mr Francis described the Claimant as being on a "steep trajectory" that was "rare but demonstrable" and showed "demonstrated skills, business and social as well as artistic, that point towards a drive for success"; "it is all going in a certain direction so far". He has recently had one less successful exhibition, at the Matthew Brown gallery in Los Angeles, but this appears out of kilter – at least for now – with the otherwise positive evidence.

243. In section 6.1(c)(vii) I explained that I accepted the evidence of Mr Gupta and Mr Moos to the effect that the Claimant is likely to achieve a sales price of USD $100,000 for a large painting and USD $30,000 for a medium painting by 31 March 2024.

244. In light of all this evidence, I am satisfied that if the Claimant were able to produce 14 paintings in each of the two years from 2022-2024, he would sell them, and that there is no basis to reduce the 70% chance figure. In my view, this continues to be an

appropriate figure to reflect both the Claimant's prospects of continued success at the same level as he is currently enjoying and the general uncertainties of the art market.

245. Accordingly, the principles to be used to calculate the annual multiplicand for the award of future loss to the Claimant for 1 April 2022 to 31 March 2024 are: (i) shortfall of 10 lost large paintings and four lost medium paintings; (ii) lost profit figures to be based on predicted sales prices; (iii) predicted sales prices to be calculated on the basis that by the end of March 2024 the Claimant would achieve a sales price of USD $100,000 for a large painting and USD $30,000 for a medium painting; (iv) costs deduction of CAD $2,000 per painting to be applied; and (v) reduction to reflect that the Claimant has only a 70% prospect of losing the total value of the shortfall calculated in this way.

246. The Defendant did not challenge the Claimant's selection of the multiplier of 2.005 for this period. The appropriate Table A adjustment to reflect the Claimant being Level 3 in terms of his education and employed had been applied.

(d): Future lost income beyond 1 April 2024

247. In light of the expert evidence, making predictions beyond two to three years is much more difficult.

248. At a general level, Mr Sainty identified the following as factors in an artist's success: artistic talent, ambition, commitment, hard work, a bit of luck, a prominent dealer, collectors who buy their art, a broad market for the artist's work and whether they are part of the "zeitgeist". All of these appear present for the Claimant.

249. In addition to this evidence, and the evidence of the Claimant's current trajectory referred to in section 7.1(c) above, there is evidence that he genuinely "stands out" among his peers:

(i) Mr Sainty observed that of his graduating class from Goldsmiths, he is in the minority group (one third) still working as a professional artist, and that his "star has risen faster and higher than many of his contemporaries".

(ii) Having tutored students for 23 years, Mr Mabb considered that the Claimant was "exceptional" and was notable for his drive, ambition to succeed and marketing skills. He also indicated that the Claimant was the only one of the students he had tutored who were at the level of success the Claimant was in their twenties, or who had gone on to enjoy the level of success he has.

(iii) Ms Joyner's own view is that the Claimant is one of "a small group of really promising abstract painters globally" and that his work is "at the highest level of global contemporary abstract artists."

(iv) Having worked in the art world for 25 years, Mr Charbonneau noted that his sales in Canada had been "unprecedented", as museums and private collectors had been prepared to pay around four times as much for his work than they have historically paid for other artists.

(v) The Claimant's art is being purchased by very wealthy private individuals, often referred to as "marque collectors", Mr Moos, having worked as a museum

curator for many years and written extensively on abstract art, now effectively acts as a private curator for eight such collectors. His two criteria for recommendations to his clients are that the work is of exceptionally high standard and capable of standing the test of time and that the piece represents a good financial investment. At his recommendation, five pieces of the Claimant's work have been purchased by his clients. He intends to continue to recommend the Claimant's work because "[m]ore than ever [his] work fulfils the stringent criteria that I apply".

(vi) Many of the witnesses identified the fact that the Claimant is supported by Mr Gupta as significant, as he has a proven track record of helping establish the careers of some of the world's leading artists. These include Theaster Gates and McArthur Binion, who have subsequently gone on to be represented by the world's leading galleries such as Gagosian or White Cube. He also represents Mickalene Thomas and Angel Otero.

(vii) In his March 2021 statement, Mr Gupta accepted that he has a long-standing reputation for developing the careers of young artists, so that they have risen to being internationally recognised, displaying in prestigious museums and art institutions and attracting significant sums for their work. He set out his plan for putting the resources of his gallery into "projecting" the Claimant into this level and said that the Claimant was at the top of his team's lists of artists who they consider for exhibitions, art fairs and group shows.

(viii) The fact that he has recently been taken on by Pilar Corrias in London is notable. She represents the very successful Christina Quarles

(ix) The fact that he is building a relationship with Gagosian is significant.

250. Mr Francis noted that the Claimant would benefit from "more critical support from museum and Biennale curators". It seems to me quite likely that he will develop this support over time. Having enjoyed success with the Canadian museum shows in 2020, and with the Miami museum show planned, it seems to me likely that he and his gallerists will work towards securing him a museum show in one of the more recognised centres of the art world in the short to medium term.

251. A further factor that the experts had identified as potentially militating against the Claimant's future success is that he is not based in one of the recognised centres of the art world, such as London or New York, nor established in these markets. I am not persuaded that this is a significant issue. In light of all the evidence I have heard, including of the Claimant's willingness to move to London to study for his Masters and undertake residencies in Aruba, the USA and Germany, it seems to me likely that if his gallerists advised that a move to London or New York was necessary for his career, he would follow that advice. I heard no evidence to suggest that any personal or family ties to Montreal would keep him there if his career required a move.

252. Based on all of this evidence, I am satisfied that there are signs that the Claimant will continue to sustain his current level of success, including unmet demand, beyond 1 April 2024. It is quite likely that by that point he will have been promoted more widely by Ms Joyner, continued to generate interest from the marque collectors and exhibited in more museums worldwide. He is quite likely to have benefitted from the continued

promotion by Pilar Corrias, who has achieved significant success for other similar artists. His relationship with Gagosian may have developed and strengthened further, perhaps with a view to them formally representing him, as has happened with other artists initially nurtured by Mr Gupta. This scenario is not, in my view, unrealistic.

253. There is also some, although I think a slim, prospect that his prices will continue to rise, and he will go on to achieve the sort of "stratospheric" levels of success enjoyed by a very small number of artists. One example that emerged in the evidence was Mickalene Thomas, age 51. From 2007-2012 her works sold for USD $20,000-50,000 and from 2013-2015 for USD $100,000-$175,000. In 2021 she achieved prices of USD $1,542,000 and USD $1,800,000 for works produced in 2011 and 2016 which had been brought to auction for the first time. In his report Mr Sainty referred to Sarah Lucas who achieved sales of USD $904,000 in 2014 and whose works regularly sell for £100,000-£250,000. At trial Mr Sainty mentioned to Cecily Brown, a British artist promoted by Gagosian, who has achieved what he described as "Olympian" or "stratospheric" success. He referred to a work she had sold for $7 million.

254. However, there are a number of very powerful areas of evidence that cut across this otherwise positive picture, and which create very significant difficulties for the Claimant's lifetime loss claim.

255. *First,* Mr Sainty was clear that very few artists maintain lifelong success to the level of financial remuneration sought by the Claimant. He provided numerous examples of artists who have achieved significant success in their early years, but whose fame and income have then reduced considerably, saying "[a] rapid rise and later fall in values is more common than contemporary dealers like to admit, while changing fashion and rapidly shifting taste along with the fickleness of buyers cannot be predicted". He referred to the Young British Artists (YBAs) promoted by British collector Charles Saatchi in the early 1990s, others who had achieved initial success having graduated from Goldsmiths or exhibited at the ICA, and further examples. He supported his evidence on each of these artists with data showing the prices they had achieved at auction.

256. The typical pattern provided by Mr Sainty was of these artists achieving very high sales prices at the start of their careers, but then their prices and the demand for their work reducing over time, even if their work remained critically acclaimed. For many of the artists, their work simply does not get brought to auction now. He noted that with one exception none of the YBAs are now currently selling their works through the main London and international galleries. Further, if the art is brought to auction, it often does not sell or it achieves relatively modest sums, often less than £10,000 per painting. Several of these artists have now taken up other professions such as teaching. Although the experts agreed that the YBAs were not direct comparators for the Claimant, I do not consider that this undermines the force of Mr Sainty's evidence. His research showed that artists going into "tailspin", as Mr Huckle described it, is a recognised pattern, not limited to the YBAs. Even artists who have achieved very substantial success in life can fall out of fashion in their final years: Mr Sainty cited Boticelli as an example of this.

257. *Second,* there was no clear, consistent and detailed body of evidence to counter this picture from Mr Sainty. Mr Francis agreed that "most" artists, even those such as the Claimant "with a good art school education and mentoring" do not "necessarily go on

to sustained and successful careers". However, he contended that changes in the art market over the last twenty years mean that the "extreme unpredictability" of earlier generations' reputations has been "replaced with more information, market analysis and critical attention which contributes to consensus as to the interest, and consequent success of artists". This led him to assert as a general proposition that "[t]hose artists who fly high and then crash are very few".

258. I struggled to understand how the changes in the art market over the last twenty years mean artists' careers are any more secure: as Mr Sainty said: "merely because [the contemporary art market now] is larger does not make it less volatile nor does it preclude changing fashions and demand for individual artists". I found force in Mr Sainty's arguments that there have been previous "booms" such as that which has occurred in the last twenty years and the art market has always been to some degree international. Further, his evidence that as opportunities expand so does the competition made sense to me.

259. Further, I was not provided with a persuasive series of examples of artists who have enjoyed comparable success to the Claimant and gone on to sustain it over a very lengthy period. The point was made that as Mr Sainty is not a dealer of contemporary art, he had no access to figures from the primary art market (when an artist first sells their painting, normally to a gallery or direct to a collector) and had to rely on auction prices. That was correct, but he presented the results of his analysis of the auction results in a comprehensive way, and they provided detailed evidence of the sales prices of a significant number of artists. There was no similarly referenced contradictory picture provided by Mr Francis based on primary art market data.

260. The experts agreed that selecting comparator artists was somewhat arbitrary, they eventually settled on three young, black artists for this purpose: Christina Quarles, Oscar Murillo and Angel Otero. These artists exhibit in the same galleries as the Claimant; Mr Gupta considers the Claimant to be similar to them; and Christina Quarles is represented by Pilar Corrias. However, they are not overly helpful for assessing the Claimant's likely future loss, as they are all of a similar age to him (35). Further, they have all already enjoyed a higher level of success than he has. Christina Quarles, age 36, sold works at auction for USD $169,000-$490,000 between 2019 and 2021. Oscar Murillo, age 35, has been even more successful with 15 paintings having sold at auction for over USD $300,000 since 2013. The third, Angel Otero, age 40, enjoyed significant success at auction from 2013-2018, achieving a sales price of USD $121,000 at one point (but there were already some concerning signs in that he had not succeeded in selling his work at a 2021 auction).

261. *Third*, the experts agreed that given the relatively short career the Claimant has had to date, he has not yet been able to demonstrate significant innovation in his art, which is important for continued artistic and commercial success. As Mr Sainty said "…[e]very artist must develop and innovate to sustain their careers. Most artists develop stylistically from their student years into their mid-30's, but it is about that age that artists may find it most challenging to advance and innovate". Further, "[o]nly a small handful of truly great artists have ever managed to sustain a lifelong career of constant innovation and creativity". At trial he confirmed that "most don't manage to do it [innovate]"; "many fail to innovate and achieve the same sense of novelty and excitement as they did when they were young". He gave Picasso as an example of

someone who had succeeded in this regard: he had totally re-thought his art every 10 years.

262. The Claimant has diversified into different mediums, but the experts had in mind a more fundamental sort of innovation, of which there is no evidence yet for him. Mr Francis' report had expressly said that "the evolution" of an artist's work beyond two to three years is also hard to predict, as well as its value and pricing. The Claimant is business savvy, and will no doubt have an eye on the need to innovate, but whether he is able to do so with financial success is uncertain. This obviously depends on whether or not any innovative work he is able to produce continues to find favour on the market to the same level as his current paintings. There is some evidence already that his ceramic works have not done so, which underscores the uncertainty.

263. *Fourth*, the stability of the Claimant's reputation and sales prices have not yet been tested in the secondary art market at auction. Mr Huckle was right to argue that an artist only benefits from the primary art market. This means that auction prices do not help in assessing the Claimant's own losses. I also accept Mr Francis' evidence that auction prices are less crucial in the contemporary art market, which is heavily controlled by gallerists. This means that some young artists are highly successful without selling at auction, such that an auction record is "not necessary or essential". However, he conceded that such a record "can be helpful as a measure of success". It is a fact that the Claimant cannot point to a proven track record of auction sales. If he could, this would provide greater reassurance about his likely future prospects. Accordingly, its absence adds a further element of uncertainty to the future projections.

264. I do not accept Mr Huckle's submission that there is no more uncertainty in this case than in any case involving a self-employed person. There is significant uncertainty caused by the fact that this particular self-employed person works in a notoriously volatile industry, where there is good evidence that initial success is not necessarily a predictor of long-term success at the same level.

265. However, I accept his argument that the uncertainty works both ways: it is possible that his prices will rise even further to the highest levels; it is also possible that his career will go into tailspin. He submitted that Mr Francis' 70% projection for life was "sensibly cautious", and it is my task to assess whether or not I agree.

266. In light of all the evidence summarised above, while I accept that the Claimant has a chance of sustaining his success beyond 1 April 2024, and a slim chance of improving on it, I do not consider that continuing to use a 70% chance figure for his lifetime sufficiently reflects the uncertainties in the art market, and particularly the uncertainties about whether the Claimant will continue to attract the interest and generate the success he currently has.

267. I was provided with no alternative percentage scenarios, nor chronologically graduated scenarios, by the Claimant. I therefore need to assess the loss of the chance to the Claimant as best I can in light of all the evidence.

268. While there is some evidence that artists' later works can be prized more highly, the more common pattern described by Mr Sainty is of initial success, waning over time, and then petering out. I therefore consider that the Claimant's future losses should be looked at in two broad phases: (i) a period in the medium term after 2024 when his

success is likely to be at its highest as he continues to enjoy the effects of the current powerful trajectory; and (ii) a longer term period when his success is likely to be less.

269. Doing the best I can in light of the evidence, I consider it appropriate to make the Claimant further awards to reflect loss of income (i) for five years from 1 April 2024; and (ii) for the rest of his life, after 1 April 2029.

(i): 1 April 2024-31 March 2029

270. I have selected the period of five years for this period because, allowing for his broadly five-year success to date, this would give a period of peak success for the Claimant of 10 years, taking him to his early 40's. This is broadly consistent with Mr Sainty's evidence that artists are often at their most creative in their 30's, and then face the challenge of the need to innovate. His report provided some examples of this: Sandro Chio, whose peak was when he was "in his 30s" and Alan Davie, whose work "from his early 30s to early 50s" is still sought after. A 10 year peak period (even if some of the work from the peak period sells much later) is also a very fluid average derived from several of the examples Mr Sainty provided: Abigail Lane (a participant in the 1988 YBA Freeze show, who achieved good sales prices including for early work until 1998); Gillian Wearing and Michael Landy (who graduated in 1990/1988 respectively, were elected to the Royal Academy in 2007 and 2008 and have enjoyed critical success and good prices for work done "in the 1990's"); David Salle (whose most valuable work was that done in "the 1980s [and] early 1990s"); and Julian Schnabel (who was highly sought after "in the 1980's" and whose works from this period continue to do well at auction).

271. In light of my findings above, the Claimant will still have an annual shortfall of 14 paintings as of 1 April 2024. His prices will have reached USD $100,000 for a large painting and USD $30,000 for a medium one. Considering all the evidence summarised above, and stepping back, I consider that the Claimant does have a reasonable chance of continued success during this five year period, by which I mean continuing to sell his produced art and being unable to meet demand due to his shortfall.

272. However, in light of the absence of evidence of him being able to innovate his work, or a track record at auction, and the other numerous uncertainties of the art market, doing the best I can, I assess his chance of this level of continued success at this level at 40%. In my view this figure recognises the chances that his prices will rise or hold and that there will be continued unmet demand for his work, but also acknowledges the very significant risks that his prices will fall and/or that the unmet demand will.

273. After circulation of my draft judgment Mr Huckle invited me to review this 40% figure, and the 70% figure used in sections 6.1(c)(vii) and 7.1(c), pursuant to the principles summarised by Fraser J in *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] Bus LR 1439. He argued that due to the polarised positions of the parties at trial there was no opportunity to canvass the broad loss of a chance approach I have taken to quantifying the Claimant's loss. The Defendant argued in response that the Claimant's case was predicated on a percentage chance recovery and any submissions relevant to the formulation of the loss on that basis could and should have been made at trial. I accepted those submissions, and on that basis concluded a review was not appropriate: *Gosvenor* at p.1462F-G, paragraph 52 makes clear that the discretion to alter a judgment before it is handed down should not be exercised so as to provide litigants with a

"second bite at the cherry", to remedy lacunae in their own evidence or raise further arguments.

274. Accordingly the principles applicable to the award of future loss to the Claimant for 1 April 2024 to 31 March 2029 are: (i) shortfall of 10 lost large paintings and four lost medium paintings; (ii) lost profit figures to be based on predicted sales prices for 1 April 2024 of USD $100,000 for a large painting and USD $30,000 for a medium painting; (iii) costs deduction of CAD $2,000 per painting to be applied; and (iv) reduction to reflect that the Claimant has only a 40% prospect of losing the total value of the shortfall calculated in this way. This will generate the annual multiplicand. I address the multiplier below.

(ii): From 1 April 2029, for the rest of the Claimant's lifetime

275. As set out above, I am satisfied that the Claimant's symptoms will continue to affect him, and his artistic activities, for the rest of his life.

276. However, based on the evidence I have heard, what those artistic activities will be, and how he will support himself financially, beyond 1 April 2029 remain uncertain.

277. The Claimant's case was advanced solely on the basis that he will continue to paint and create art to sell professionally for the rest of his life. There is a chance that he will do so, and that that will provide sufficient income for him. The level of such income remains very difficult to predict in light of the agreed expert evidence.

278. However, I am satisfied that a working assumption of the Claimant achieving sales prices of USD $100,000 for a large painting and USD $30,000 for a medium one beyond 1 April 2029, and having unmet demand at that level, for the rest of his life is not realistic. Rather, I consider that it is more likely, consistent with the broad pattern described by Mr Sainty, that the Claimant's sales prices will drop significantly and then peter out and/or that the unmet demand for his work will cease during this period.

279. If his income drops very significantly, he may decide to take up a teaching position as Mr Sainty explained other artists have done. The Claimant has shown himself willing to supplement his income when needed before (as he did before the Goldsmiths period, when working at Hewlett Packard). He already mentor's student artists and his friend Mr Kiernander has already taken up a teaching position. Although the Claimant did not advance a scenario of this kind, it is my task to assess what is likely to happen in the future as best I can, based on all the evidence I have heard. Having done so, the Claimant eventually taking up a teaching post at some point seems a realistic possibility. However, there was no evidence before me as to the likely salary for an art teacher, the ability of the Claimant to secure that kind of work, how he would manage his symptoms while doing that kind of work and whether his symptoms would lead to any financial loss in this scenario.

280. In light of all these uncertainties and doing the best I can in what is a particularly difficult exercise, I assess the annual loss to the Claimant for this period as CAD $32,850. I have reached this figure by two different routes.

281. *First*, my expectation is that the re-worked annual multiplicand for the period at section 7.2(c) will be in the region of CAD $500,000 (on a 70% chance basis), equivalent to

CAD $714,285 (on a 100% basis). This is because Mr Stanbury's multiplicand for this period was initially CAD $1,048,580 (on a 70% chance basis), but this figure will reduce by about a half to reflect Mr Moos and Mr Gupta's evidence as to the Claimant's likely sales prices by the end of March 2014. Doing the best I can in light of all the evidence, I assess the chance the Claimant has lost of lifelong success at his current level, including with continuing unmet demand, at only 5%. This figure reflects all the uncertainties above. 5% of CAD $714,285 is CAD $35,714.

282. *Second*, although it was offered for the purposes of illustration only, the Second Defendant's model based on the loss of two paintings a year is another way of constructing a more realistic, broad-brush approach to this part of the future loss claim. When Mr Stanbury's calculations are re-worked the lost profit for a medium picture is likely to be around CAD $15,000. Two such lost pictures therefore equates to CAD $30,000.

283. The rounded down mid-point of these figures is CAD $32,850.

284. I consider that this very substantial reduction to the multiplicand figure advanced by the Claimant for this part of his future loss claim is necessary to reflect the significant risks that he will not sustain his current success, especially given the absence of evidence of innovation or auction history. In my assessment, the above awards afford him compensation for the chances he has lost as accurately as possible, given what is inevitably an uncertain exercise.

285. I have therefore found myself able to continue to use the conventional multiplicand/multiplier approach advanced by the Claimant for this period of loss, albeit with very substantial modifications and assessing the multiplicand in a broad-brush way. That is consistent with the authorities indicating that judges should not resort to the *Blamire* approach unless essential.

286. Accordingly, the award of future loss to the Claimant from 1 April 2029 for the remainder of his lifetime should be calculated on the basis of an annual multiplicand of CAD $32,850.

287. The unchallenged multiplier advanced by the Claimant for the balance of the Claimant's working life after the first two years was 44.82. I adopt this. It should be split proportionately between the two periods at sections 7.2(d)(i) and (ii) above.

7.2: Other future losses

288. Dr Bach and Dr Nathaniel-James agreed that provision should be made for three courses of six CBT/ACT sessions over the course of the Claimant's lifetime. Dr Bach estimated the cost of each session at £200-250. Dr Nathaniel-James used the lower of these two figures. Using the mid-point of £225 per session, for 18 sessions, gives an award of £4,050.

8: Provisional damages

8.1: The legal framework

(a): The statutory criteria and the *Willson* test

289. The Senior Courts Act 1981, section 32A makes provision for the court to order provisional damages to be paid in the future where "there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition". Under CPR 41.2(1) the court may make such an award if (a) the particulars of claim include a claim for provisional damages; and (b) the court is satisfied that the criteria in section 32A or the comparable provision in or the County Courts Act 1984, section 51 are met.

290. The power to award provisional damages was considered by Scott Baker J (as he then was) in *Willson v Ministry of Defence* [1991] ICR 595. At pp.598H-599A, he identified three questions he had to decide, namely (1) is there a chance of the claimant developing the disease or deterioration in question? (2) is the disease or deterioration serious? and (3) if so, should the court exercise its discretion to make an award of provisional damages? This approach was approved by the Court of Appeal in *Curi v Colina*, The Times, 14 October 1998: see the judgment of Roch LJ, with whom Ward, and Potter LJ agreed (transcript, p.9).

(b): The 'chance' and the 'seriousness' questions

291. In *Willson,* Scott Baker J considered that the chance must be "measurable rather than fanciful…[h]owever slim" (p.599B-C). The Court of Appeal in *Curi* held that this was a "sensible and proper approach" and agreed that the chance "must be more than fanciful" (transcript, p.9). Mr Huckle urged some caution about the use of the word "measurable" as this is not in the statute, albeit that it has been used in some of the cases. It appears to mean no more than that the chance is capable of being measured so as to ensure it meets the "more than fanciful" test. Provided it does so, precise quantification is not necessary: as Simon Brown J (as he then was) explained in *Patterson v Ministry of Defence* [1987] C.L.Y. 1194 "…one great advantage of a provisional damages award is that it is unnecessary to resolve differences…between the specialists…as to the precise extent of the risk to which the plaintiff is now exposed" (transcript, p.9).

292. Provisional damages can be awarded even where there is a relatively small chance of developing the serious condition in question: for example, in *Mitchell v Royal Liverpool and Broadgreen UH NHS Trust* (unreported, 17 July 2006) Beatson J held that the claimant should have been permitted to amend his claim to plead provisional damages in respect of the 0.15% risk of serious consequences of syringomyelia (a potentially serious cyst or syrinx within the spinal cord) (transcript, paragraph 11); and in *Kotula* Irwin J at [43]-[46] concluded that a 0.1% risk of serious consequences of syringomyelia (1 in a 1,000 patients) was sufficient for these purposes.

293. In *Willson,* Scott Baker J considered that whether deterioration is serious in any particular case is "a question of fact depending on the circumstances of [the] case including the effect of the deterioration on the plaintiff". He gave the example of a hand injury having a particularly serious impact on a pianist (p.599E). In *Curi,* the Court of Appeal confirmed this approach, indicating that a disease or deterioration could be serious because of the effect on the activities, capabilities, life expectancy or financial position of the claimant. Further, the Court held that the disease or deterioration must be "such that an award of damages which included a sum for the 'chance' will be wholly

inadequate to compensate the plaintiff for the position in which he would find himself once the chance had materialised" (transcript, p.9).

(c): The discretion

294. In *Willson* at p.600G-H and p.601E Scott Baker J noted that in *Patterson* Simon Brown J had made a provisional damages award in respect of mesothelioma but had declined to do so for the risk of further pleural thickening. This was in part because he:

> "…would not regard it as appropriate to leave this matter over for future legal proceedings. Even assuming [the claimant's asthmatic condition] were to become aggravated by the worsening of pleural changes, it would be very difficult to assess the level of that aggravation, or its impact upon the plaintiffs day-to-day existence…generally speaking, it appears to me desirable to limit the employment of this valuable new statutory power to cases where the adverse prospect is reasonably clear-cut and where there would be little room for later dispute whether or not the contemplated deterioration had actually occurred" (transcript, p.6).

295. Similarly, in *Allott v Central Electricity Generating Board* (unreported, 19 December 1988) Michael Davies J had indicated that he would not be enthusiastic about awarding provisional damages save "in the clearest case" (*Willson*, p.601E-F).

296. Scott Baker J continued:

> "The general rule in English law is that damages are assessed on a once-and-for-all basis. Section 32A of the Supreme Court Act 1981 creates a valuable statutory exception. In my judgment, the section envisages a clear and severable risk rather than a continuing deterioration, as is the typical osteoarthritic picture…many disabilities follow a developing pattern in which the precise results cannot be foreseen. Within a general band this or that may or may not occur. Such are not the cases for provisional damages. The courts have to do their best to make an award in the light of a broad medical prognosis. In my judgment, there should be some clear-cut event which, if it occurs, triggers an entitlement to further compensation" (*Willson*, p.602A-B).

297. He considered that the factors relevant to the exercise of the discretion were:

> "…first…whether, in respect of any of the three events…there can truly be said to be a clear-cut identifiable threshold…[second] the degree of risk and the consequences of the risk…third…weighing up the possibilities of doing justice by a once-and-for-all assessment against the possibility of doing better justice by reserving the plaintiff's right to return" (*Willson*, p.602C-E).

298. The Court of Appeal in *Curi* indicated that judges should bear in mind that the power to award provisional damages is an exception to the general rule that damages are assessed on a once and for all basis, with the practical advantages that brings. The observations from *Patterson* and *Allott* quoted above which emphasise the need for clarity were reiterated (transcript, pp.9-10).

299. In *Mitchell*, Beatson J observed that "…where a risk is small that in itself may be the justification for an award of provisional damages. This is because, if the Claimant is to be restricted to a lump sum once and for all award, the smallness of the chance may leave that Claimant significantly under-compensated if the risk transpires" (transcript, paragraphs 11-12).

300. In *Kotula v EDF Energy Networks (EDN) PLC* [2011] EWHC 1546 (QB) in which Irwin J (as he then was) reviewed all the key authorities and said the following about the discretion:

> "[47] I bear in mind all of the dicta in *Willson* and elsewhere in favour of the need for clarity. We are not here dealing with the development of osteoarthritis, or even of a psychiatric condition…Those are very general conditions which are Protean [ie. variable] in their form and effects. It will often be difficult to establish the cause of osteoarthritis particularly later in life. It may often be difficult to establish the origins of a psychiatric condition. It seems to me to be relatively easy to establish what has flowed from the development of a syrinx in a given patient, and having identified the effects, to decide whether or not they were serious. Imaging will provide a picture of the location and size of the cyst or cysts. It will readily be apparent which part or parts of the nerve supply will be affected. By definition, in a case as such as this, there will be a fully developed picture of the neurological condition of the patient before the syrinx develops. His or her condition will have been fully analysed and reported. Of course, the impact of the development of syringomyelia may often be compounded by other disorders or indeed by progressive deterioration which is not the result of a syrinx. Sometimes the effects on functioning or the need for care will indeed be difficult to tease out, and it is likely in such cases that the wise Claimant will not risk costs in making a claim. If a Claimant does seek further damages or variations on an indistinct factual ground, he may rapidly be placed on a significant costs risk by the astute use of CPR Part 36. It is relevant to bear in mind in the context of syringomyelia that such claims will be extremely rare. By contrast to potential claims arising from osteoarthritis or psychiatric condition, one truly is contemplating a trickle not a flood.
>
> [48] I bear fully in mind the desirability of finality of awards. Finality brings great benefit not merely to insurers and to the court system, but also to Claimants. However in this context that must be set against the potentially enormous inadequacy of an award, in that very small but measurable group of patients who go on to develop really significant incremental spinal compromise as a consequence of syringomyelia. It does seem to me that this is precisely the kind of rare but highly damaging contingency which Parliament must be taken to have in mind, when permitting damages awards to be provisional, and permitting the variation of periodical payment".

301. In *Yale-Helms v Countess of Chester Hospital NHS Foundation Trust* (unreported, 13 February 2015) at [13], Blake J held that "…where the future risk cannot really be separated from the existing medical condition, then that is a reason to make the

judgment at the time of trial rather than at some distant point in the future because that is really already insufficiently disconnected with the overall assessment for the trial judge".

302. In *XX v Whittington Hospital NHS Trust* [2017] EWHC 2318 (QB) at [30], Nelson J declined to award provisional damages in relation to a possible deterioration in a claimant's psychological condition, in part because he was concerned about the difficulty, in future, of "establishing the origins of a particular psychological condition or its exacerbation".

(d): Causation

303. The Court of Appeal in *Curi* held if the serious disease or deterioration occurs "the fact that…there may be an issue on causation should not prevent the court from exercising its power [to award provisional damages], provided that it has been proved on the balance of probabilities that there is a measurable chance of the disease or deterioration materialising" (transcript, p.9).

304. In *Fairchild v Glenhaven Funeral Services Ltd* and others [2002] ICR 412 at [163]-[166], the Court of Appeal held that while the power to award provisional damages required the court to decide whether there was a proven or admitted chance that at some definite or indefinite time the claimant would develop mesothelioma as a result of exposure to asbestos while employed by the defendants, the question of which, if any, of the defendants was liable for mesothelioma which might result from that exposure should be decided if the disease developed, on the basis of the evidence then available and on the law as then established.

305. In *Chewings v Williams* [2010] PIQR Q1, Slade J considered an application for provisional damages by a claimant who had sustained serious injuries to his right lower leg in a road traffic accident. The application was put on the basis that there was a chance that he would suffer a below knee amputation as a result of fusion surgery. One of the issues was whether the claimant first had to prove on a balance of probabilities that he would undergo the operation which could lead to the need for an amputation. Slade J held that he did not:

> "It is for the applicant for a provisional award of damages to establish on a balance of probabilities that there is a chance that at some time in the future he will suffer some serious deterioration in his physical condition. The chance is established by less than a balance of probabilities standard. If that standard were satisfied, the event would not be a chance but a certainty not warranting provisional damages but the award of an ascertained sum. There is no warrant for imposing a preliminary hurdle to overcome to a balance of probabilities standard of proof that an event which may lead to deterioration in the applicant's physical condition will occur…the appropriate test to be applied in deciding whether Section 32A is satisfied is whether the claimant has established on a balance of probabilities that as a result of the act or omission which gave rise to the cause of action there is a chance of serious deterioration in his physical condition in the future" (paragraphs 12 and 14).

8.2: The Claimant's provisional damages claim: epilepsy

306. Dr Orrell and Dr Foster agreed in their joint statement that the Claimant had an increased risk of developing epilepsy related to his traumatic brain injury (TBI). Dr Foster's view was that there is a current residual lifetime epilepsy risk of 5-7%; Dr Orrell put the figure at 8%. This is to be compared to a background risk of epilepsy at 0.1-1% as described by Dr Orrell in his report dated 27 August 2016. Dr Orrell's written evidence was if the Claimant did experience seizures in the future, there was around a 64% probability that these would be controlled by medication.

307. The experts therefore agreed that there is a chance that the Claimant will develop epilepsy as a result of his TBI. This is measurable: it is somewhere between 5 and 8%. This cannot be said to be fanciful.

308. There has been no suggestion by the Second Defendant that epilepsy is not a readily diagnosable, serious condition for the purposes of this claim. In *Sarwar v Ali* [2007] EWHC 1255 (QB) at [10], Lloyd-Jones J (as he then was) described epilepsy as "clearly sufficiently serious for a once and for all damages award to be inadequate to compensate the Claimant should it occur". In *Loughlin v Singh* [2013] EWHC 1641 (QB) at [98], Kenneth Parker J recognised that there was a good prospect that any epilepsy that developed could be controlled with medication, but that there was still a non-negligible risk that uncontrolled epilepsy would develop, and in that scenario the Claimant would be seriously under-compensated by a conventional award. The same position applies here: although on Dr Orrell's evidence the Claimant has a 64% prospect that epilepsy would be controlled by medication, this still leaves a 36% prospect that it will not be, in which case it would be a serious condition for which he would be seriously under-compensated.

309. For these reasons, I consider that *Willson* questions (1) and (2) should be answered positively in respect of the Claimant's claim for provisional damages relating to epilepsy.

310. In terms of the discretion in *Willson* question (3), I am satisfied that epilepsy is a condition which is "clear-cut", "identifiable" and "severable" from the Claimant's current conditions, and that if the Claimant developed it there would be little room for dispute as to whether or not that had occurred. The concerns mitigating against the exercise of the discretion expressed at first instance in *Patterson*, *Allott* and *Willson* and approved by the Court of Appeal in *Curi* do not therefore apply to this claim. Overall, I am satisfied that leaving the Claimant without the opportunity to ask for further compensation should the epilepsy materialise would be unfair.

311. I therefore make a provisional damages award to the Claimant in respect of the chance of him developing epilepsy. I make this for his lifetime to reflect the contents of the joint statement by the neurologists.

8.3: The Claimant's provisional damages claim: dementia

(a): The chance of the Claimant developing dementia due to his brain injury

(i): The evidence

312. The issue of any link between TBI and dementia has been the subject of extensive neurological research and debate in recent years. Dr Orrell and Dr Foster placed before

the court a large volume of medical literature. Neither had been involved in the underlying research but both expressed their opinions on it, and how it applied to the Claimant.

313. In summary, Dr Orrell's view was that there is accumulating evidence of a generalised increased risk of developing dementia, Alzheimer's or a similar condition following a TBI. This risk is considerably stronger for the Claimant given his severe TBI, and the absence of independent factors in his case predicting for early onset of dementia. The only such factor which might be relevant to the Claimant was his ethnicity and this was likely to be of limited significance. However, he accepted that the Claimant is probably in the top 10-20% of people with his level of brain injury in terms of his recovery so far. Dr Foster took a different view to Dr Orrell. He considered that there is insufficient evidence that there is a generalised increased risk of dementia due to TBI. Further, any general risk is likely to be even lower in the Claimant's case because he has had an exceptional outcome so far and is in the top 1% of patients with his level of brain injury in this regard.

314. Dr Orrell's evidence as to the level of the increased risk was initially based on papers by Agrawal and Ford (July 2018)[2] and Barnes et al (May 2018).[3] The Agrawal and Ford paper summarised previous research findings. The Barnes research was a cohort study of more than 350,000 veterans. Its conclusion was that "...even mild TBI without [loss of consciousness] is associated with more than a 2-fold increase in the risk of dementia diagnosis". Applying the Barnes research and bearing in mind that the Claimant was then 34 and had not yet developed dementia, Dr Orrell estimated that the cumulative incidence of dementia for the Claimant would be around 20% at age 60 and around 55% at age 80, against background incidences of around 5% and 25% at those ages respectively. These percentages broadly equated to the risk of two to four times normal background risk which had been given by Agrawal and Ford. In his 31 January 2022 report, Dr Orrell provided a graph from the Barnes paper which illustrated a dose-response relationship (i.e. the more severe the head injury, the higher the risk) and which he had used to calculate his cumulative risk figures. Dr Orrell accepted from the outset that there is a wide range of opinion and uncertainty at the present time. He had suggested that a neuropsychiatrist and statistician might be able to assist further.

315. In cross-examination it was put to Dr Orrell that the Barnes research was a "gross outlier" indicating the most extreme view on the issue. It was suggested that the veterans' cohort used in the Barnes research was not typical of the general population, and that its results were far removed from other data with respect to the background risk in the uninjured population and the increased risk following TBI. Dr Orrell accepted that the Barnes research was controversial but pointed to other research showing the TBI/dementia association, primarily larger population-based studies. Of these, in his May 2021 report he referenced further 2018 papers by Fann et al[4] (which had found that the risk of dementia was highest in the first six months post-TBI, dropping towards around 1.4 hazard ratio (ie. how often a particular event happens in one group compared to how often it happens in another group) by six years post-TBI)

[2] Agrawal and Ford, *Trouble Ahead*, PI Focus, July 2018, pp.10-14
[3] Barnes et al, *Association of Mild Traumatic Brain Injury With and Without Loss of Consciousness With Dementia in US Military Veterans*, JAMA Neurol 2018: 75(9): 1055-1061
[4] Fann et al, *Long-term risk of dementia among people with traumatic brain injury in Denmark: a population-based observational cohort study*, Lancet Psychiatry 2018; 5: 424-31

and Nordstrom and Nordstrom[5] (which suggested that the risk was increased by four to six times in the first year post-TBI and then decreased rapidly but was still significant for more than 30 years post-TBI). The Fann and Nordstrom studies had also been cited in the Agrawal and Ford paper.

316. In his 31 January 2022 report, Dr Orrell had also referred to a 2019 paper by Graham and Sharp.[6] Professor Sharp is a leading neurology professor at Imperial College. The paper stated at p.1221 that "Previously, TBI has generally been viewed as producing a static neurological insult. However, it is now clear that it can trigger progressive neurodegeneration and dementia" [my emphasis]. Dr Orrell considered that this was an overstatement as there is a range of opinion on this issue. At p.1222, Box 1, Graham and Sharp estimated that the "all-cause dementia risk is increased by around 1.5 times" in cases of TBI.

317. Dr Orrell explained that the pathological mechanism linking a TBI with dementia is not known but there are some reasonable explanations: reduced cognitive reserve as a result of the accident, the additional inevitable age-related deterioration and other possible neurodegenerative processes including Alzheimer's disease.

318. Dr Foster accepted that there is a large body of evidence suggesting an association between TBI and dementia. Although at one point he appeared to agree with Mr Huckle who asserted that association essentially means the same as risk or chance, he had earlier said that an 'association' between two things is merely an observation but does not imply causation. Overall, he described the literature as "a mess". He suggested that the research was flawed by issues such as retrospective analysis, observer bias and problems with the basis on which dementia is diagnosed in such individuals. Although the Fann/Nordstrom papers were considered to be the best, they appeared to have conflated the effects of the TBI itself with dementia, given their findings that the incidence of diagnosed dementia is highest within the first few months or year following the TBI rather than it being a delayed consequence.

319. Dr Orrell accepted many of the criticisms of the research, including the particular issue with the Fann/Nordstrom papers. In his 31 January 2022 report he had also referred to concerns about the definitions of TBI used in the research and self-reporting by older participants in the studies of reduced levels of neuro-functioning.

320. The experts agreed that confounding factors are also an issue in the research. These are potentially inter-relating factors in individual cases which are independent of brain injury yet predict for the onset of (or are themselves functions of) dementia. They include the potential effects of advanced age, sex, deafness, obesity, diabetes, hypertension, the level of physical and mental activity, the level of education, alcohol, depression, sleep deprivation/fatigue, social isolation, nutritional factors and other lifestyle factors. It is very difficult to control for these factors in the research.

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[5] Nordstrom and Nordstrom, *Traumatic brain injury and the risk of dementia diagnosis: A nationwide cohort study*, PLoS Med 15(1): e1002496

[6] Graham and Sharp, *Understanding neurodegeneration after traumatic brain injury: from mechanisms to clinical trials in dementia*, Journal of Neurology, Neurosurgery and Psychiatry 2019; 90: 1221-1233

321. Dr Foster referred to one study which positively denied the link between TBI and dementia. A post-mortem study of clergymen looked at patients with a brain injury but found no evidence of dementia changes in them.[7]

322. Given the difficulties with much of the primary research, a series of meta-analyses (i.e., statistical analyses that combine the results of multiple scientific studies) have been caried out. These have had mixed results. Julien et al[8] concluded that whether TBI is a risk factor for Alzheimer's disease remains elusive. Li et al[9] showed around 1.6 times the risk of dementia after head injury. Huang et al[10] noted difficulties in the literature and did not find an increased risk of Alzheimer's disease from TBI. Most recently, the Hicks et al[11] meta-analysis (published in December 2019) analysed 68 research papers. It was "the first comprehensive and detailed evaluation of the methodologies of studies examining TBI as a risk factor for dementia and [Alzheimer disease]" (p.3216). It found common methodological weaknesses in the research, reflecting the issues described by Dr Orrell and Dr Foster. The Hicks review identified only one in which stronger methodological rigour had been applied. This was a study by Plassman et al.[12] Dr Foster accepted that this study was well designed but said that it had also been based on veterans and had not been able to exclude the role of confounding factors.

(ii): The parties' submissions

323. In his opening submissions, Mr Huckle put the provisional damages claim on the basis of the original risk figures which Dr Orrell had derived from the Barnes paper. In closing, he revised the way the claim was put and relied instead on the figures from Fann/Nordstrom, Graham and Sharp and Plassman et al. These suggested, respectively, elevations of risk to a factor of 1.2, 1.5-3 and 4. Applied to a background risk of 1%, these figures equate to enhancements of, respectively, 20%, 50-300% and 400%. Mr Huckle also indicated that the claim was revised so that it was pursued on a lifetime basis, rather than limited to the development of dementia prior to age 80.

324. Mr Huckle urged me to accept Dr Orrell's evidence. He is a well-recognised scientist with permanent and high-level academic and clinical posts at the UK's premier centre for neurology, Queen Square, and his views should be preferred to the "nihilistic" approach of Dr Foster. Dr Foster had retired from clinical NHS practice in 2018; his review of the research was quite limited compared to the work done by Dr Orrell; and he was vulnerable to criticism for not having identified the Graham and Sharp paper. He submitted that based on Dr Orrell's evidence, the Claimant can prove a more than

[7] Crane et al, *Association of TBI and Late-Life Neurodegenerative Conditions*, JAMA Neurol 2016: 73(9): 1063-1069
[8] Julien et al, *Association of traumatic brain injury and Alzheimer disease onset: A systemic review*, Annals of Physical and Rehabilitation Medicine 60 (2017) 347-356
[9] Li et al, *Head injury as a risk factor for dementia and Alzheimer's disease: a systematic review and meta-analysis of 32 observational studies*, PLoS One (2017); 12:e0169650
[10] Huang et al, *Is traumatic brain injury a risk factor for neurodegeneration? A meta-analysis of population-based studies*, BMC Neurology 55 (2018) 18:184
[11] Hicks et al, *Traumatic Brain Injury as a Risk Factor for Dementia and Alzheimer Disease: Critical Review of Study Methodologies*, Journal of Neurotrauma 36: 3191-3219 (December 1, 2019)
[12] Plassman et al, *Documented head injury in early adulthood and risk of Alzheimer's disease and other dementias*, Neurology 55 (2000); 55; 1158-1166

fanciful chance of the TBI causing future dementia, at between 1.2 and 4%, although the court need not assess the exact percentage.

325. Mr Dignum pressed me to accept Dr Foster's view that science has simply not provided the evidence to demonstrate a causal link. He argued that Dr Orrell had presented the Barnes research as the centre of his argument when it was the most extreme, flawed and controversial of all the available literature, in breach of his duties as an expert. In contrast, Dr Foster had approached the issue in a fair and balanced manner and his evidence should therefore be preferred. Dr Orrell's evidence was also inherently unreliable because of his volte face on the issue of the treatability of the Claimant's headaches. In any event, Dr Orrell had largely accepted the criticisms of the research advanced by Dr Foster. The Claimant's excellent recovery compared to most other patients who had sustained a severe TBI meant that the generalised risk may well not materialise in his case. Dr Orrell was unable to identify what the adjustment factor ought to be to any risk due to lifestyle factors specific to the Claimant.

(iii): Analysis and conclusion

326. The wording of section 32A makes clear that a claimant can succeed in a claim for provisional damages if it is admitted by the defendant that the statutory criteria are met, or by the claimant proving that they are. In the vast majority of cases of this nature, where the entitlement to provisional damages is not admitted by the defendant, the claimant proves their case based on agreed expert evidence about the existence of the chance (even if the experts disagree about the precise extent of it).

327. It cannot be the case that provisional damages are only available in situations where the experts are agreed as to the existence of the chance, because the reference to "proving" in CPR 41.2 clearly leaves open the possibility that a claimant can prove their claim based on entirely contested expert evidence and persuade the court to prefer their expert, as here. However, the repeated dicta in the case law emphasising the need for clarity may explain why provisional damages awards are generally made on the basis of agreed expert evidence.

328. The Claimant needs to prove, on the balance of probabilities, that there is a more than fanciful chance that the TBI will cause him dementia in the future. This requires him to prove that as a matter of generality a single TBI can cause dementia, and that this risk applies to him.

329. In my view the answer to this first, general question remains doubtful as a matter of science.

330. Dr Orrell and Dr Foster plainly fall into different "camps" on this issue. I was not particularly persuaded by each party's attempts to undermine the credibility of the other's expert. To the extent that Dr Orrell could be criticised for unduly relying on the Barnes research, he had never shied away from the fact that there are differences of medical opinion on the central issue. Dr Foster was also vulnerable to some criticism for not having identified the recent Graham and Sharp paper himself. It is a fact that he is retired from NHS clinical practice.

331. In my view, both Dr Orrell and Dr Foster were trying to assist the court in interpreting a complex body of research in which neither of them had been directly involved.

Neither are expert epidemiologists. In a sense, the research speaks for itself. Indeed, this was a point put by Mr Huckle to Dr Foster in cross-examination.

332. The individual research studies have reached different conclusions as to whether there is an association between a single TBI and dementia. The Hicks meta-analysis published in December 2019 concluded that the results of the individual studies were "mixed", "difficult to synthesize and interpret" and "provided no clear support either in favor or against the hypothesis that TBI is a risk factor for…dementia" (pp.3215-6).

333. However, more significant, in my view, is the Hicks team's conclusion as to the common methodology issues in the individual research studies. One of the recommendations for the future made by the Hicks team to address the methodological "weaknesses" they had identified was that researchers should focus on outcome variables that move beyond what was described as the "catchall" definition of dementia. They hoped that studies incorporating the more rigorous methodological elements they had identified would "help the research community in finally answering the question as to whether a TBI does indeed increase the risk of [Alzheimer disease]" (p.3126) [my emphasis].

334. The Hicks team's conclusions surely cast significant doubt on those previous studies which found an association between a single TBI and dementia. This is not to resort to "nihilism" as Mr Huckle said Dr Foster was doing, but to recognise that the most recent meta-analysis is itself leaving open the question of whether there is a sound scientific basis for the assertion that a single TBI can cause dementia.

335. The Huang et al meta-analysis published the year before the Hicks paper reached similar conclusions.

336. Only one study was found by Hicks et al to have "stronger" methodological rigour (p.3215). This was the Plassman paper, but that is vulnerable to the criticisms levelled at it by Dr Foster. In the circumstances, this paper alone is not a sufficiently sound basis for the Claimant's claim as to the chance element.

337. The Graham and Sharp paper did not provide any fresh data on whether a causative link between a TBI and dementia was made out. The paper's assertion of the clarity of the link was considered by Dr Orrell to be an overstatement. The Hicks meta-analysis was published after the Graham and Sharp paper. I do not know how the writers of the Graham and Sharp paper would respond to the findings of the Hicks team. They may well disagree with them, or they may modify the views expressed in their 2019 article. However, neither was an expert called in the trial.

338. Moreover, I agree with Dr Foster that an association between two things does not necessarily mean that one thing has caused the other, especially, as here, where there is no clear understanding of what the causative "route" may actually be.

339. I therefore prefer Dr Foster's interpretation of the research.

340. Even if the existence of a generalised enhanced risk was clearer on the evidence, given the Claimant's unusually good recovery from the TBI so far and the other apparently protective factors he has in place, how any such risk would apply to him remains unclear.

341. Accordingly, I do not consider, on the current state of the science, that the Claimant can show, to the balance of probabilities standard, the existence of a more than fanciful chance that the TBI will lead to him developing dementia. The Claimant cannot therefore meet the requirements of *Willson* question (1).

342. I therefore accept the Second Defendant's submission that the claim for provisional damages fails at the first stage. I do not therefore need to address the second limb of the Second Defendant's argument on this issue, to the effect that the Claimant also had to prove that the TBI will be the cause of any dementia that developed. If it had proved necessary for me to resolve it, I would have had difficulty accepting the Second Defendant's argument on this issue. I prefer Mr Huckle's submission to the effect that all the Claimant would have had to prove at trial was a more than fanciful chance of the TBI causing dementia and that causation would be addressed on any restored hearing should the condition develop. Support for this analysis can be drawn from the extracts from *Curi*, *Fairchild* and *Chewings* noted above. That said, the difficulty the court would face in future in addressing the causation question bears directly on the discretion which, as set out below, is a further reason why I decline to make this award.

(b): The seriousness of dementia if the Claimant develops it

343. The Second Defendant conceded that if the Claimant does develop dementia, it would meet the seriousness threshold of *Willson* question (2). This was a fair concession. In his 15 February 2020 and May 2021 reports, Dr Orrell had opined that if the Claimant developed dementia at age 60 he would need care and likely be unable to continue to work as an artist. His life expectancy would be reduced, and he would probably die within 6.7 years, being fully dependent on care in the final three years of his life.

(c): The discretion to award provisional damages due to dementia

(i): The evidence

344. Dr Orrell accepted that there are perhaps 100 different types of dementia and modern science continues to find more sub-types. There is not yet a specific sub-type of post-traumatic dementia. Dementias progress at different rates. Some types of dementia, including their causes, are understood better than others. There is a great deal still not understood about how dementias develop. It is increasingly recognised that there can be a genetic basis to dementia.

345. Dr Orrell agreed that if the Claimant develops TBI in the future, he cannot say now that the TBI will have caused it: he would need to have a 'time machine' to do so. However future clinicians would be in a better position to determine whether the TBI had caused the dementia: if the Claimant's brain showed differential loss in the front part, where he has already suffered deficits, this would be a strong indication that the TBI had caused that damage; 'PET' scanning could look for chemical changes; and there is likely to be more experience in interpreting scans, new methods of scanning and better epidemiological data.

346. Graham and Sharp referred to the current "diagnostic uncertainty" of patients with chronic problems after a TBI. They indicated that part of the difficulty of the diagnosis of post-traumatic neurodegenerative conditions was that "…the clinical features of CTE [chronic traumatic encephalopathy] (for instance, memory, behavioural and

neuropsychiatric problems) and other post-traumatic dementias overlap with the direct cognitive and psychiatric effects of brain injury…it is not usually possible to disentangle the direct effects of TBI from those due to neurodegenerative processes on the grounds of clinical features alone". However, they, like Dr Orrell, appeared optimistic about improvements over time in this regard. They expressed the view that in future "systemic use of clinical assessments in combination with multimodal biomarkers and postmortem validation will allow the development of accurate diagnostic criteria for post-traumatic dementias, as well as facilitate the measurement of disease progression and prognostification" (pp.1221 and 1226) [my emphasis].

(ii): The parties' submissions

347. Mr Huckle argued that dementia is a readily diagnosable condition which would have serious and potentially catastrophic effects on the Claimant. The discretion should be exercised in favour of a provisional damages award as to do otherwise would leave the Claimant seriously under-compensated should he develop dementia. If this was not the sort of case where such an award was appropriate, it was hard to see what was.

348. Mr Dignum submitted that dementia is so multi-faceted a condition that it cannot properly satisfy the clarity required by the court to exercise its discretion: an award of provisional damages is not appropriate for an organic, progressive neurogenerative disease such as dementia which is Protean in nature and presents in multiple manifestations. It is akin to arthritis of the brain and *Kotula* [47] reiterated that such a condition would not attract provisional damages.

(iii): Analysis and conclusion

349. The case law summarised above suggests that the factors to be considered in exercising the discretion to award provisional damages include (i) the clarity of the development of the condition relied upon, the extent to which the developing condition can be "severed" or separated from the original condition and the ability to identify the cause or origin of the developing condition; (ii) the degree of the risk and the consequences of it; and (iii) the extent to which the claimant will be under-compensated without a provisional damages award if the risk eventuates, balanced against the lack of finality such an award creates for the defendant.

350. Of these factors, if the element of chance was made out, (ii) and (iii) would support an award of provisional damages in this case. It is agreed that there would be serious consequences for the Claimant if he developed dementia. I also appreciate that a once and for all award of damages including a sum for the chance of developing dementia may prove to be inadequate to compensate the Claimant for the position he would find himself in if the chance materialised.

351. However, the various elements of factor (i) militate, strongly in my view, against exercising the discretion.

352. *First*, I do not accept Mr Huckle's submission that post-TBI dementia is clearly diagnosable. There is no specific sub-type of post-traumatic dementia. Graham and Sharp specifically refer to the "diagnostic uncertainty" in this area.

353. While the optimism expressed by Dr Foster and in the Graham and Sharp paper about future diagnostic developments may prove merited, I need to decide whether to exercise the discretion now. In my view, therefore, the various elements of factor (i) need to be present now.

354. *Second*, on the basis of the current scientific evidence, any post-TBI dementia that develops would not be "reasonably clear-cut" and there may well be "room for…dispute whether or not the contemplated deterioration had actually occurred": these were the factors which led Simon Brown J to consider the risk of further pleural thickening unsuitable for a provisional damages award in *Patterson*.

355. On the current state of scientific knowledge, a post-TBI dementia is often not severable from the consequences of the initial TBI. As Graham and Sharp said, "it is not usually possible to disentangle the direct effects of TBI from those due to neurodegenerative processes on the grounds of clinical features alone" and I do not understand there to be any other basis for doing so at present. This is apposite to this Claimant, whose consequences of the TBI include matters such as memory and concentration issues that in future are likely to be similar to those which could suggest dementia. This overlap in symptoms means that, like the worsening of pleural changes considered in *Patterson*, it would be "very difficult to assess the level of the aggravation, or its impact upon the [Claimant's] day-to-day existence" if he developed post-TBI dementia.

356. *Third*, the experts agreed that dementias have many causes and effects. I accept Mr Dignum's submission that post-TBI dementia is akin to osteoarthritis or certain psychiatric conditions, which were considered by Irwin J in *Kotula* to be unsuitable for provisional damages because they are "very general conditions which are Protean in their form and effects" and where the cause is often difficult to establish.

357. For these reasons the development of post-TBI dementia cannot be said to be an example of "the clearest case" envisaged in *Allott*; a "clear and severable risk", "clear-cut event" or "clear-cut identifiable threshold" as described by Scott Baker J in *Willson*; or one where, with ease, it could be separated from the existing medical condition", per *Yale-Helms* and *XX*.

358. I therefore consider that it would not be appropriate to exercise the discretion to award provisional damages in respect of dementia, even if I had considered the first *Willson* question could be answered positively.

9: Conclusion

359. The accident on 28 November 2015 for which the Second Defendant accepted liability has had a life-changing impact on the Claimant and his career. I have set out my findings on general damages at section 3 above. For the reasons I have set out at sections 4 and 5, I do not accept that he has failed to mitigate his loss or that the damages should be reduced to reflect taxation. I have set out my findings as to the past and future loss of income and other heads of damage at sections 6 and 7 above. I am grateful to the parties for their assistance throughout this complex case and in agreeing the final calculations as set out in the Appendices to this judgment. On that basis there shall be judgment for the Claimant in the sum of £3,178,741.64.

360. I also make a provisional damages award in respect of the risk of epilepsy for the Claimant's lifetime. I decline to make a provisional damages award in respect of the risk of dementia for the reasons explained at section 8 of this judgment.

Appendix 1: Summary of the basis of calculation of past lost income

CAD$ / £ = 0.61 US$ - CAD$ = 1.26 (7/4/22)

1.	2016: 20 lost paintings, sold in 2016: CAD $64,320, converted to GBP £ 25 lost paintings, sold in 2018: CAD $268,292.86, converted to GBP £	 £39,235.20 £163,658.64
2.	2017: CAD$126,600, converted to GBP £	£77,226.00
3.	2018: CAD $150,244, converted to GBP £	£91,648.84
4.	2019: CAD $258,962, converted to GBP £	£157,966.82
5.	2020: CAD $235,046, converted to GBP £	£143,378.06
6.	2021: CAD $406,446, converted to GBP £	£247,932.06
7.	1 January 2022-31 March 2022: principles set out at section 6.1(b)(vii) of the judgment	£57,860.96
	Total	**£978,906.58**

Appendix 2: Summary of the basis of calculation of future lost income

1.	1 April 2022-31 March 2024: principles set out at section 7.1(c) of the judgment CAD$426,868.05 k x 2.005 = CAD$855,870.44	£522,080.97
2.	1 April 2024-31 March 2029: principles set out at section 7.1(d)(i) of the judgment CAD$271,040 x 4.74 = CAD$1,284,729.60	£783,685.05
3.	1 April 2029 for remainder of the Claimant's life: principles set out at section 7.1(d)(ii) of the judgment CAD$32,850 x 40.08 = CAD$1,316,628	£803,143.08
	Total	**£2,108,909.10**

C's Life Expct April 2024 – Table A.3 - Age 37.5 = 47.3 years (Age 84.8 years)
No.2 - 2024 – 2029 - Period 5 years - Multiplier = 4.74
(5/47.3 x 44.82 = 4.74)
No.3 2029 for life – Period 42.3 years - Multiplier = 40.08
(42.3/47.3 x 44.82 = 40.08)

Interest

General Damages – 2% pa. since service

Claim Form Served – 29th January 2019
Period to 13/4/2022 – 3 years 74 days = 3.202 years
Interest 6.41 % - £66,580 = £4,267.78

Special Damages

Total Sum - £983,029.58

i)£5,000 – (28/11/15 - 10/8/17) – Period 1 year 237 days
SAR 0.005% x ½ x (1yr 237/365) x £5,000 = £20.62

ii)£45,000 – (28/11/15 - 31/5/20) – Period 4 years 184 days
SAR 0.005% x ½ x (4ys 184/365) x £45,000 = £506.71

iii) £983,029.58 - (28/11/15–13/4/22) – Period 6 years 136 days
SAR 0.005% x ½ x (4ys 184/365) x £933,029.58 = £10,506.17
SAR 1/6/20 ff - 0.001% x ½ x (1yr 317/365) x £933,029.58 = £871.68

Total Interest = £11,905.18

Appendix 3: Total breakdown of the award

1.	General damages for pain, suffering, injury and loss of amenity	£66,580
2.	Interest on general damages	£4,267.78
3.	Past lost income	£978,906.58
4.	Other past losses	£4,123
5.	Interest on special damages adjusted for Interim Payments of £5,000 (10/8/17) + £ £45,000 (31/5/20)	£11,905.18
6.	Future lost income	£2,108,909.10
7.	Other future losses	£4,050
	Total	**£3,178,741.64**