[2016] JMSC CIV 163

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010HCV02045

BETWEEN	**CHRISTOPHER WATSON**	**CLAIMANT**
AND	**TANKWELD LIMITED**	**DEFENDANT**

Ms Christine Mae Hudson and Ms Ishia Robinson instructed by K. Churchill Neita & Co for the Claimant

Mr Maurice Manning, Ms Camille Wignall and Ms K. Michelle Reid instructed by Nunes Scholefield DeLeon & Co for the Defendant

Negligence-Causation- Defence as to quantum- Assessment of damages – Claimant survives an aeroplane accident – Injuries to his face, arms, legs and back – Post traumatic stress disorder – Permanent pain – Whether pain attributable to physical injury or psychogenic

Heard: 11th, 12th and 13th May, 2016, 25th and 28th July, 2016 and 7th October, 2016.

CORAM: BATTS J,

[1] On the 8th day of August, 2008 the 35 year old Claimant, Christopher Watson, was injured after the aeroplane in which he was a passenger crashed into the Blue Mountains. This judgment concerns the assessment of damages for his injuries as liability was conceded by the Defendant. The Claimant initially sought relief from three Defendants but the 2nd Defendant was never served with the claim and it was discontinued against the 3rd Defendant on the 28th April, 2016.

[2] It is agreed by the parties that the Claimant was injured during the course of his employment. The events surrounding this injury were recounted by the Claimant

in his witness statement filed on the 9th day of March, 2016. The Claimant was the only witness to give evidence of the ordeal. This is because the pilot who was the only other person present did not participate in these proceedings.

[3] The Defendant has admitted that the accident which occurred on the 8th day of August, 2008 has caused the Claimant to suffer injuries. There is however a dispute concerning what injuries were caused by the accident and whether the Claimant contributed to his own injuries by failing to wear a harness. By way of its Defence filed on the 5th day of April, 2011 the Defendant puts the Claimant to strict proof of injuries, loss and damage claimed. This position is maintained in the amended and further amended Defences filed on the 12th day of December, 2014 and 19th day of April, 2016 respectively.

[4] The Claimant was employed to the Defendant as a driver. On the 8th day of August, 2008 Mr John Ralston the managing director of the Defendant instructed the Claimant to drive his Prado motor vehicle to the Ken Jones Aerodrome in Portland. The Claimant left the motor vehicle there with Mr Ralston and boarded a small aeroplane in order to return to Kingston. The aeroplane is a Cessna U206F aircraft registration N1161Q. The estimated travel time by direct route to Kingston was 18 minutes.

[5] I believe it is useful to recall the Claimant's evidence in order to give a background to the claim. He depicted a very traumatic experience in vivid language. He said that upon boarding the aircraft he buckled his seatbelt and the plane took off. The aircraft went through a dark patch of clouds and turbulence. It then swerved and crashed downwards at rocket speed. The Claimant's head hit against the dashboard as the aircraft crashed. The pilot and himself survived the collision. I accept his account as stated in his witness statement thus:

> *"13. A great deal of fear came over me, the fear of death came over me. My heart racing, I screamed and bawled out, all I could do was to brace myself for what I thought was the end of me. The plane violently hit the hill side, my whole body jerked and shaked from*

going forward and backward and my head smashed into the dash board.

14. I became disoriented for a few seconds, shortly after I heard Gavin voice saying "Chris, Chris come out, the plane is on fire". I saw smoke all around me, confused, shaken and frightened, I looked and saw Gavin outside of the plane. I pulled the seat belt and Gavin pulled me out of the plane. I was in shock my heart still racing, not able to see from my left eye, blood was all over my face, my whole body in pain. Gavin told me something about his (2) feet, I looked and it was a horrific sight.

15. Where the plane crashed the vegetation was so thick, not even the sky I could see. Fearing the plane would explode, Gavin and I crawled about thirty (30) feet, from the burning plane. Crawling away took a long time because i had to carefully work my way through the thick vegetation. All this time I was feeling pain all over my body, my whole body shake up, pain in my neck, back, both feet and face. I was bleeding from my mouth and nose, and felt a broken tooth in my mouth.

16. Away from civilization, no shoes on, shirt ripped apart, no phone as it was left on the plane, I was terrified and crippled by the fear of death. Feeling lost, abandoned, my whole life flashed in front of me. It was a very frightening and terrifying event, my wife was eight (8) months two (2) weeks pregnant and was due to give birth, and my daughter Abbygail was only four (4) years old. Am I going to die? What is going to happen to my family if I died? Would I be found? Were the questions I asked myself.

17. The hopelessness was made worse as I had no phone, I felt cut off from the world, and Gavin phone after some time went dead. Before Gavin phone went dead, he was talking on the phone but nothing he said gave any hope of being found".

[6] The Claimant says that at this point he feared death. He was stranded for two days with no food or water. In fact, he was so thirsty that on two occasions he drank his own urine. For food, he ate fungus and rotten leaves. Fortunately both the Claimant and the 2nd Defendant were rescued by personnel from the Jamaica Defence Force on the 10th August, 2008.

[7] Following the Claimant's rescue he was seen by several doctors. He spent five days in hospital and was sent home on crutches. He has submitted medical

evidence to prove that he suffered numerous injuries inclusive of a mental condition resulting in a phobia. The Claimant continues to be under medical care mainly for pain. He says that he is in constant pain and is still haunted by the trauma of the crash. Much of the dispute in this case concerns the matter of phobia and pain and whether the pain is real and/or whether it was caused by the accident or by a pre-existing condition.

[8] After the accident the Claimant was given the opportunity to continue working for the Defendant and his new role was in purchasing. The Claimant says however that he experienced pain when sitting for long periods of time and when walking up stairs. He had head-aches and nose bleeds. His health caused him to be absent from work on occasions. This caused the Defendant to write to his medical doctors expressing concern about the sick leave that was recommended. The Claimant continued to be remunerated until December 2009. Thereafter payments from the Defendant ceased. The Defendant contends that the Claimant failed without explanation to return to work. The Claimant says he was unable to work because of his injuries.

[9] The injuries alleged by the Claimant are particularised in the Fifth Amended Particulars of Claim filed on May 13, 2016. These include orthopaedic injuries to the arms, knees and ankle as well as injuries to the neck and back, dental injuries, facio-maxial injuries, ophthalmologic, and psychiatric and psychological complaints.

[10] The Claimant withdrew his claim in relation to the following injuries:

a) Diastenma between teeth #8 and #9

b) Carious teeth #17 , 18, 31 and 32

c) Periodontal disease and trauma to the periodontal ligament and costochontal tenderness

Claims in relation to injury to the Claimant's neck and cervical spine were also withdrawn as well as various ophthalmologic complaints. These ophthalmologic complaints included left retinal anterior occlusion, reduced visual acuity and permanent visual impairment and disability. The Claimant also withdrew his claim for the cost of surgical procedures which had been recommended by Dr. Webster in respect of the lumbar spine.

[11] There were a number of documents tendered in evidence as exhibits throughout the course of the trial. The following were agreed and tendered in a bundle as **exhibit 1**;

1. Letter from Dr Kelvin Metalor to Tank-Weld Equipment Limited dated August 26, 2009
2. Letter from Tank-Weld Equipment Limited to Kelvin Metalor dated August 28, 2009
3. Letter from Tank-Weld Equipment Limited to Christopher Watson dated July 20, 2009
4. Letter from Tank-Weld Equipment Limited to Christopher Watson dated September 2, 2009
5. Letter from Dr Tamika Haynes-Robinson to Tank-Weld Equipment Limited dated September 4, 2009
6. Invoice from Dr Tamika Haynes-Robinson dated September 4, 2009
7. Invoice from Dr Tamika Haynes-Robinson dated September 4, 2009
8. Receipt from D Tamika Hayne-Robinson dated November 23, 2009
9. Schedule of earnings for Christopher Watson from 2005-2009

A number of medical doctors provided reports in relation to this matter. Seven medical reports were agreed and marked as **exhibit 2**. These included;

1. Medical Report of Dr. Mohamed Basir dated July 23rd , 2009

2. Medical Report of Dr. Guyan Arscott dated February 7th, 2011

3. Medical Report of Dr. Dennis Jones dated November 12th, 2008

4. Medical Report of Dr. Hilary Ann Brown dated August 20th, 2009

5. Medical Report of Dr. Hilary Ann Brown dated November 11th, 2015

6. Medical Report of Dr. Emerson P. Henry dated June 15th , 2011

7. Medical Report of Dr. K. White dated June 21st, 2013

[12] Numerous other documents were marked as exhibits. They formed part of the evidence before me. They are listed below;

(a) Road Traffic Act Licence to operate stage carriage service (rural) as **Exhibit 3**

(b) Application for employment, Tank-Weld Limited and Subsidiary or Associated firms as **Exhibit 4**

(c) Medical Report of Dr Samantha Longman-Mills, Clinical Psychologist as **Exhibit 5**

(d) Questions posed to Dr Longman Mills by Ms. K. Michelle Reid of Nunes, Scholefield, DeLeon & Co as **Exhibit 6A**

(e) Response to Questions as **Exhibit 6B**

(f) Medical Report of Dr Michele Lee Lambert**,** Consultant Neurologist as **Exhibit 7**

(g) Questions posed to Dr Michele Lee Lambert by 1st Defendant's attorneys as **Exhibit 8A**.

(h) Responses to questions posed as **Exhibit 8B**.

(i) Medical Report of Dr Mark Minott, Consultant Orthopaedic Surgeon as **Exhibit 9A**

(j) Medical Report of Dr Mark Minott , Orthopaedic Surgeon as **Exhibit 9B**

(k) Medical Report of Dr Mark Minott, Orthopaedic Surgeon as **exhibit 9C**

(l) Joint Medical Report of Dr Grantel Dundas, and Dr. Mark Minott Consultant Orthopaedic Surgeons as **exhibit 10**

(m) Medical Report of Dr Grantel Dundas as **exhibit 11**

(n) Fees of Dr Mark Minott addressed to K. Churchill Neita & Co as **exhibit 12**

(o) Neurological Report of Dr Tamika Haynes- Robinson as **exhibit 13A**

(p) Neuropsychology consultation by Dr Tamika- Haynes, Neuropsychologist as **exhibit 13B**

(q) Neuropsychological report of Dr Tameka Haynes as **exhibit 14**

(r) Medical report of Dr Randolph Cheeks as **exhibit 15 A**

(s) Follow up Medical Report of Dr Randolph Cheeks as **exhibit 15B**

(t) Electro diagnostic Results from Dr Amza Ali of Andrews Memorial Hospital as **exhibit 16**

(u) Classification of age related changes in lumbar intervertebral discs – 2002 Volvo Award in Basic Science as **exhibit 17**

(v) Report of Dr Corey Golding, Consultant Neuroradiologist as **exhibit 18A**

(w) Report of Dr Corey Golding, Consultant Neuroradiologist as **exhibit 18B**

(x) UWI Department of Radiology Report prepared by Dr Didier and Soares as **exhibit 18C**

(y) Psychiatric evaluation by Dr Wendel Abel, Consultant Psychiatrist as **exhibit 19A**

(z) Psychiatric evaluation by Dr Wendel Abel, Consultant Psychiatrist **exhibit 19B**

(aa) Psychiatric evaluation by Dr Wendel Abel, Consultant Psychiatrist **exhibit 19C**

(bb) Report of Dr Kevin Ehikhametalor, Consultant Anaesthesiologist, Pain Management Specialist as **exhibit 20A**

(cc) Report of Dr Kevin Ehikhametalor, Consultant Anaesthesiologist, Pain Management Specialist as **exhibit 20B**

(dd) Report of Dr Kevin Ehikhametalor, Consultant Anaesthesiologist, Pain Management Specialist as **Exhibit 20C.**

[13] Some of the medical experts also gave oral evidence and were cross-examined. I do not intend to repeat the evidence of each witness or the submissions of the parties. I will reference only so much of the evidence or submissions, as I consider necessary to explain the reasons for my decision. Counsel should rest assured that their written and oral submissions were of great assistance.

[14] Dr Hillary Ann Brown consultant general surgeon at the University Hospital of the West Indies treated and managed the Claimant during the period of the 10th of August, 2008 to the 14th of August, 2008. She prepared two medical reports; one dated the 11th of November 2015 and the other the 20th of August, 2009 (exhibit 2). Both medical reports are to the same effect. They detailed the Claimant's complaint as right shoulder and arm pain and pain to left ankle and knee. Her examination revealed tachycardia (an abnormally fast heart beat rate) and dehydration and tenderness in the areas mentioned above. He had facial abrasions and a swollen inferior orbital ridge. A radiographic examination disclosed;

- Left nasal bone fracture
- Left maxillary sinus fracture
- Unicorticate fracture of the right humerus

- Talar fracture of the left ankle

The doctor stated that the CT scan of the brain revealed no intracranial injury, chest x-ray and pelvic x-rays were unremarkable. Laboratory evaluation was normal. There was she said no need for surgical intervention for his orthopaedic injuries or in respect of his frontal bones.

[15] Dr. Mohamed H. Basir a general practitioner saw the Claimant 26 times. His first visit was on 21st July, 2009. Findings were noted in his medical report (exhibit 2).

When examined the following significant signs were elicited:

- He had difficulty flexing the right arm and left arm with pain and swelling in both shoulders
- There was marked swelling and pain in the right and left side of the face
- Multiple wails and bruises to his right and left chest and right hip with pain and swelling. Right and left knee difficulty weight bearing and walks with the support of crutches.
- Laceration to forehead, slurred speech, bloodshot to right eye, laceration to left eye.

Under the subheading “Impression” the doctor listed:

- Severe pain and swelling in right and left shoulders and arms
- Multiple contusions to the right shoulder and left arm, right and left side of right and left hip, right knee, and left foot. Blunt trauma to the abdomen
- Right eye swelling with haematoma
- Head trauma with severe headaches and insomnia

- Blurred vision with reduced visual activity in his left eye
- Speech defect due to oral trauma
- Anxiety and depression
- Post-traumatic stress disorder

Dr. Basir listed the complaints of the Claimant as:

> *"Pain in right knee and left knee pains in his right side of chest and pains in his upper back and lower, numbness in his left side of his face, poor eye sight with blurred vision, loss of a few teeth (3) and above all headaches with insomnia"*

The doctor's follow up and prognosis was:

- Severe back pains with muscle spasms
- Visual impairment in left eye
- Chronic right and left knee bursitis
- Left ankle pain and swelling
- Difficulty standing for long periods
- Fair improvement was noted over care although there was still multiple pain flares.

[16] Dr Dennis Jones a dental surgeon gave a medical report dated November 12, 2008 having first seen the Claimant on September 5, 2008 (exhibit 2). He detailed his findings on examination thus:

- Fractures of teeth #9, #14 and #15
- Mobility of teeth #24 and #25 which had to be extracted and replaced

- #15 to be crowned

[17] Dr Emerson Henry a Dental Surgeon of E.P.H. Limited examined the Claimant between the 11th of October 2010 and the 31st of January, 2011. He detailed his examination and observations in his report dated 15th June, 2011 and diagnosed the Claimant as having the following;

- Trauma to teeth mainly on left side and centre of mouth
- Trauma to face resulting in pain on pressure to left zygomatic bone and right TMJ
- Trauma to eyes resulting in faulty vision and sensitivity to light in left eye
- Trauma to teeth in upper left quadrant, these teeth sensitive to percussion
- The trauma could be contributing to frequent headaches

[18] Dr Mark Minott gave medical reports dated January 16, 2010 and February 24, 2013(exhibits 9(a) and 9(b)). Dr Minott also gave a short report dated the 1st of July 2015 (exhibit 9c) .This latter report references a left shoulder injury to the Claimant four years prior to the accident. Dr Minott explains that he has lost his contemporaneous notes with respect to that injury. He stated "*I can state with utmost confidence, here, that the shoulder injury of 2004 has no nexus with the injuries of 2008*."

Dr Grandel Dundas Consultant Orthopaedic Surgeon examined the Claimant on the 27th of September, 2010. His report dated the 13th of October 2010 made reference to Dr Minott's report of the 16th of January 2010. Having detailed his own examination and findings Dr Dundas concluded that the following Orthopaedic impairments existed;

- Cervical sprain :Cervical Spine Regional Grid(page 564 Table 17-2)Class 1; Sprain (with reported fracture of osteophyte): 2

percent(2%) whole person.Grade modifier based on range of motion deficits- Moderate problem (page 559,Table17-1)Median twenty percent (20%)whole person.This incorporates the two percent (2%) above.

- Lumbar double level disc protrusion L3/L4,L4/L5 :Lumbar Spine Regional grid (page 570,Table 17-4) .Class 3: Multilevel disc disease with radiculopathy :nineteen percent (19%) whole person.

- Partial menisectomy left knee : Knee Regional Grid (page 510, Table 16-3) – right anterior cruciate injury without instability :zero percent (0%)

- Anterior cruciate ligament injury right knee : Knee Regional Grid (page 509,Table 16.3). Partial lateral menisectomy left knee- two percent (2%) lower extremity impairment.Grade modifier +2 for muscle atrophy: sum+1 = three percent(3%) lower extremity impairment.

- Arthrosis left ankle : Ankle arthrosis based on range of motion impairment left ankle (page 549,Table 16-22) fifteen percent (15%) lower extremity impairment.

- Sum left lower extremity impairments eighteen percent (18%) or 7% whole person impairment.

- Sum whole person orthopaedic impairments forty percent (40%) .

[19] On the 12th of December, 2014 Drs. Dundas and Minott, Consultant Orthopaedic Surgeons jointly re-evaluated the Claimant. Their findings were contained in a

joint medical report dated 26th March, 2015 and admitted into evidence as exhibit 10. They made the following observations;

- Marked spasm in the sacrospinalis muscles, especially on the right with restriction on side bending, flexion and extension
- Subtle differences in sensation in L4, L5, and S1 dermatomes, the right being slightly diminished
- Deep tendon reflexes were normal except for plantar responses
- Muscle power was marginally impaired on the right being 5 on a scale of 0-5.
- Propioception was intact.

The Claimant was diagnosed with myofacial pain syndrome and lumbar disc protrusion. Investigations, by way of nerve conduction studies, were carried out which confirmed bilateral mid chronic radiculopaties, L4 and L5 on right, L5 on left. MRI scans done at the University Hospital of the West Indies on 9th July 2012 confirmed left sided root infringement at L4/5 and L5/S1.

The doctors' impairment assessment was as follows:

a. Cervical spine: Joint agreement on a final rating of 2 %. The 20% mentioned in Dr Dundas' report of 13 November 2001 was a typographical error and lead to miscalculation.

b. Left lower extremity impairment for knee assessed at 4%. Ankle range of motion deficit at 7%. The sum lower extremity impairment was deemed to be 11% lower extremity or 4% whole person.

c. Lumbar spine impairments, single level confirmed and verified disc protrusion with neuropathy:

Class 1: Median 7% whole person

Grade modifier physical examination + 1

Total 8% whole person

d. Sum impairments: 14% whole person

[20] Dr Kelvin Ehikhametalor (Dr Metalor) consultant anaesthesiologist and pain management specialist, provided three medical reports dated 26th May, 2010, 25th July, 2011 and 11th April, 2013 (exhibits 20(a), (b) and (c)) documenting his treatment of the Claimant since January 2009.

He said the Claimant suffered from severe post traumatic stress disorder and severe chronic debilitating pain involving the back and legs. The doctor also stated,

> *"His recent magnetic resonance imaging (MRI) revealed that he has severe degenerative disease of the left lateral meniscuses as well as severe post traumatic disc disease of the lumbar spine, both conditions will require surgical intervention"*

Dr Ehikametalor also stated that the Claimant will require physical therapy as well as neuropsychological support.

[21] One of the medical reports which forms part of exhibit 1 is from the Kingston Public Hospital. It is date stamped 21st June 2013 and references Dr K White. That report is dated 20th January 2011 but says the Claimant's date of presentation was the "3/4/10". The findings on examination were lumbar bony spinal tenderness and grade 4/5 power in upper limbs, grade 5/5 power in lower limbs. He was diagnosed as having neurogenic pain, prolapsed lumbar and intervertebral disc. The Claimant was admitted to the hospital, given parenteral analgesia and referred to physiotherapy and anaesthesia departments. He was discharged on the "9/4/10".

[22] The Claimant was seen by four practitioners for psychological and psychiatric evaluation and treatment. They also gave oral evidence.

[23] Dr Michelle Lee Lambert MD Consultant neurologist with a diploma from the American Board of Psychiatry and Neurology gave a report dated January 14, 2013. She detailed her examination and findings and concluded thus;

- Significant headaches due to trauma which lead to post concussion headaches
- Major depression and post-traumatic stress disorder has developed and are additional contributing factors to his headache.

Dr Lee Lambert suggested that the Claimant will need long term medical care including medication. She first saw the Claimant in April 2009.

[24] Dr Tameka Haynes-Robinson a neuropsychologist gave 3 reports, one dated 26th September, 2014, the other dated 2nd December 2015 and the third was undated (exhibits 13(a), 13(b) and 14). She summarised her findings after her last examination on the 11th November 2015 thus;

> *"Mr Watson is a 41 year old right-handed male with a history of a moderate Traumatic Brain Injury with subsequent effects of migraine and cognitive dysfunction. He also has a history of cerebrovascular accident (CVA/ stroke). The results of his current neuropsychological evaluation suggest global cognitive functioning deficits, in particular he is currently experiencing impairment in language, problem solving, executive functioning, memory and psychomotor speed. These deficits remain unchanged from the previous testing except for a decrease in his executive functioning and psychomotor speed.*
>
> *In addition Mr Watson is experiencing severe symptoms of Major Depressive Disorder alongside Post Traumatic Stress Disorder which can also negatively affect his cognitive functioning. These findings are most likely consistent with the residual effects of the Traumatic Brain Injury made worse by the CVA and severe major depressive disorder with PTSD".*

[25] Dr Samantha Longman Mills a clinical psychologist gave a report dated 27th March 2016 (exhibit 5). In it she detailed her findings based on examinations done on the 3rd May and 14th June 2012. She diagnosed the Claimant as having ;

- Major depressive disorder, and

- Severe post-traumatic stress disorder

The treatment recommended was that the Claimant participates in cognitive behavioural therapy to help him acquire motivation for living. Cognitive therapy was also recommended to eliminate depression and post-traumatic stress symptoms.

[26] Dr Wendel D. Abel gave 3 reports (exhibits 19(a), 19(b) and 19(c).In his first report dated 27th June 2011 he summarized the claimant's condition thus:

> *"In summary, this man presents to me as a frustrated and broken individual who has been experiencing severe pain and is suffering from post traumatic stress disorder and major depression. The effect of the accident has resulted in emotional distress, gross impairment in physical function and impairment in his work activities. It has also had a negative impact on his role function as a spouse, father and provider for his family.*
>
> *I have come to this opinion based on the history reported by Mr Watson, the nature of the accident and his current mental state. Early resolution of this matter is of utmost importance to facilitate healing and a return to his usual level of functioning."*

Dr Wendel D. Abel gave two later medical reports dated 25th August, 2014 and 9th October, 2014 respectively. These reports contained findings and observations made on the 17th day of June, 2014 and the 9th day of October, 2014. The prognosis in his report of the 9th of October 2014 is stated thus:

> *"The prognosis at this time is guarded. It must be noted there are a number of factors impacting negatively against his recovery.*
>
> *The Claimant was referred for psychological care nine months after the accident. Research evidence has shown that earlier intervention increases the likelihood of recovery.*
>
> *Secondly the prolonged period to settlement of the matter the multiple physical and psychological symptoms and his functional impairment have proven to be traumatizing for him and this is likely to impact on his chances of recovery.*

Thirdly his future ability to re-enter the job market appears significantly compromised at this time.

Fourthly there are significant areas of continuing physical disability which are likely to impact on his daily living and psychological state."

[27] Dr Guyan Arscott, Consultant Plastic and Reconstructive Surgeon prepared a medical report dated 7th February, 2011 (exhibit 1) having examined the Claimant on the 27th January, 2011.He describes the scarring as follows:

- 2 cm raised hypertrophic hyper pigmented scar over the medial aspect of his left eyebrow(hypersensitive to touch)
- 1.5 x 1.5 cm hypertrophic scar in the region of the left nasalabial groove (hypersensitive to touch)
- Surgical 2.5 cm hypertrophic hyper pigmented scar over the left knee
- Surgical 2.5 cm raised hypertrophic hyper pigmented pinned site scar over the left ankle, anterior aspect
- Surgical 2.5 cm raised hypertrophic pigmented scar over right knee
- Smaller scars over the right leg

The following was noted:

- Corrective surgery will benefit only the facial scars, revised to provide improvement of fifty to sixty percent
- Approximate cost of surgical management for revision of the facial scars will be $120,000.

[28] The Claimant was examined by Dr Randolph Cheeks, Senior Neurological Surgeon, on the 17th day of September 2009. He was referred to Dr Cheeks by his previous attorneys-at-law. Dr Cheeks' examination revealed that there was no spasm or scoliosis in the lumbar spine, the range of motion was within normal limits and there were no myofascial trigger points. His neurological examination revealed normal power, muscle tone, sensation and deep tendon reflexes. Dr Cheeks reviewed an MRI scan conducted on the Claimant in March 2009 (exhibit 18B) and reported that it showed no evidence of spinal injury. He reported that it showed minor age related degenerative changes. In his opinion the headaches and back aches which the Claimant complained of were likely to be psychogenic symptoms of his depressed state. Dr. Cheeks stated that trauma could neither cause nor accelerate degenerative changes in the lumbar disc.

[29] The Claimant was again examined by Dr Cheeks on the 4th October, 2013. He detailed his examination and findings and concluded that the Claimant's lumbar back pains were largely due to age related degenerative changes in the lumbar spine.

[30] Relying on Dr. Cheek's opinion the Defendant's counsel submitted that in relation to the back, the sole injury proved to be attributable to the accident is a lumbar strain. Any continuing back pain is due either to degenerative changes present before the accident, or is as a result of the Claimant's depressed state, and is psychogenic. The claim as it relates to a cervical injury having, as stated above, been abandoned.

[31] The complaints which the Defendant says are not attributable to the crash include hypertension, high blood pressure, back pain and complaints in relation to the lumbar spine. Evidence that the Claimant had hypertension before the accident is contained in the psychology report of Dr Haynes Robinson. Dr Cheek's evidence is that the Claimant had high blood pressure before the accident. This evidence was based on his notes from the Claimant's first visit to

him in September 2009. I accept that the Claimant was hypertensive prior to the accident.

[32] I do not agree with the Defendant in its submission that the Claimant had back pain prior to the accident. This submission was supported by evidence of Mr Ralston. He said that the Claimant complained that he was unable to lift objects due to "back issues". If a job was assigned to the Claimant that required lifting a weight the Claimant asked some other person to accompany him to do the lifting. The evidence of the Claimant was that he could not lift as much weight with his left hand as with his right hand and that this was due to a pre-accident injury to his shoulder when he fell from a truck. The Defendant relied also on the employment form submitted by the Claimant to it prior to the Claimant being employed. On that form, the Claimant was less than truthful when answering in the negative that he had not lost time from work in the past two years because of an illness. In fact the Claimant admitted in cross-examination that while working for a previous employer he fell from a truck and hurt his shoulder. There was however no medical evidence that the Claimant was having back pain prior to the aeroplane accident. Indeed, as we have seen, Dr Minott stated that the fall from the truck had not affected the Claimant's back.

[33] I am satisfied and accept on a balance of probabilities that at his age and weight some age related degeneration had commenced prior to the accident. I find that prior to the accident it had no significant impact on his daily life or ability to perform his job.

[34] The Defendant's counsel submits further or in the alternative that the pain that the Claimant currently experiences in his back is psychogenic and not related to trauma. Counsel buttresses this submission with the findings of Dr Cheeks who found no evidence of structural damage to the Claimant's back. Dr Cheeks found mildly reduced lordosis, restriction in forward flexion by approximately 30 degrees and an abnormal lasegue's test at 60 degrees bilaterally. Dr Cheeks (whose credentials were impressive) downplayed the significance of these

findings when he opined that weight was responsible for the loss of lordosis and the abnormal lasegue's test and that it means nothing when a patient experiencing lumbar pains has restricted range of motion.

[35] Dr Cheek's evidence is that the findings on the MRI (exhibits 18B and 18C) were solely caused by age. His opinion is that trauma cannot make an asymptomatic disc become symptomatic and that injury is not a factor in the progression of lumbar disc degeneration. He opined that being overweight increases the axial load on the spine which over time results in degenerative changes in the weight bearing "shock absorbers". He denies that acute excessive mechanical loading or trauma can contribute to degeneration and pain. The medical experts are agreed that the Claimant was overweight or "slightly obese" prior to the accident. Dr Cheeks' words when giving evidence are worthy of quotation:

> *"Q: Would you say that the thickening of liberum flavum and hypertrophy of facial joints observed on March 2009 MRI was the result of high energy trauma caused by plane crash.*
>
> *A: No, that is not possible*
>
> *Q: Why*
>
> *A: Because these changes were well recognised in main stream medical literature as being classical representation of the effects of age on the human spine. Vancouver Research Institute states this clearly and AMA edition 6 specifies that degenerative changes are not diagnostic of injury. All this corresponds with my 37 years altogether in treatment of disorders of the spine in UK and here in Jamaica embracing military and crash injuries. I am quite certain these changes are age related."*

When cross-examined he said,

> *"Q: Do you agree acute mechanical load or acute trauma to an inter vertebral disc can contribute to degeneration and pain.*
>
> *A: Degeneration of the disc is not caused by injury. It is caused by age."*

And later,

"Q: Trauma can cause an asymptomatic degenerative disc to become symptomatic.

A: No it cannot. There is an article published in National Institute of Health "Risk factors for prognosis" published by Clinford - Dr Hessett. It was looking for factors which caused prognosis of lumbar spine disc degeneration. Three factors listed a) age b) back pain c) evidence of hip or knee osteoarthritis. That article confirms what I often read and come to believe in my years of practice. Injury is not a factor in the progress of lumbar disc degeneration.

J: Can't expedite it.

A: Correct. The disc degeneration will proceed at its own pace. The injury to the muscle or ligament will have its own dynamic.

Q: Fallacy that trauma cannot accelerate pre-existing degenerative [condition].

A: It cannot accelerate degenerative process. It can make patients situation worse, if he gets another separate injury say a ruptured ligament."

[36] The evidence of Dr Cheeks differs from that of Drs Minott, Dundas and Metalor. They each attributed numerous possible causes to the MRI results which included but were not limited to: age, trauma, weight and repetitive injury. Dr Dundas concluded that the condition observed was caused by trauma sustained in the accident. He thought it relevant that the Claimant gave no history of previous back pain. There was no MRI done on the Claimant's back prior to the accident. Dr Cheeks in contrast under re-examination stated that pain attributed immediately after trauma to a person with a normal MRI would disappear within three months. He opined that if it persists it would be psychogenic pain. He recommended that the Claimant be treated by a psychiatrist.

[37] Dr Kelvin Ehikhametalor (Dr Metalor) a consultant anaesthetist intensivist and pain management specialist with a post doctoral fellowship in neuro- trauma and neuro-intensive care at the University of Toronto opined that the Claimant suffers

from chronic pain. He differed in almost every respect with the conclusions of Dr Cheeks. Dr Metalor opined that the trauma caused the Claimant's condition. In his evidence in chief he answered thus:

> *"Q: What is specific abnormality you saw on MRI*
>
> *A: In MRI referred to showed facet joints were diseased inflamed.*
>
> *Q: What caused it in Mr Watson*
>
> *A: That is a difficult question. I can speak to which are known recognisable causes and to what I understand of the status of the patient prior to my seeing him from history. But I don't think I can or anybody can say what caused it.*
>
> *Facet arthropathy which covers disease condition of facet joint can be caused by a number of things. By trauma/ inflammation, by disease conditions such as osteoarthritis or rheumatoid arthritis, part of the ageing process and alot of other disease conditions.*
>
> *In this patient what I had in front of me was a history of no painful back disorder. He gave no history of back pain.*
>
> *From a clinical point of view I can only deduce that his pain as a result could perhaps be due to the insult he has suffered. In medicine it is called a diagnosis of exclusion."*

Later he said,

> *"Q: Evidence that Mr Watson's facet joint hypotrophy seen on the MRI could not be caused by injury you agree.*
>
> *A: If somebody had an MRI before injury and had evidence that back pain maybe yes. But if not such privilege you would have to be God to have such knowledge. Or some clinical symptoms of persons condition. Unquestionable that trauma is a recognised cause of facet joint atrophy including hypertrophy."*

In answers to the Court Dr Metalor said;

> *"[I am] not saying that pain which is not attributable to a physical injury does not exist. In clarifying I would refer to international definition of pain. Pain is defined in IASP as a sensory or emotional experience associated with actual or potential tissue damage, or may be described in such terms.*

So there are conditions in which pain can be described in terms similar to how some with actual or potential tissue damage describe it.

Where there is actual or potential tissue damage pain is described in these terms as a combination of nociception and psychological effect of that:

Pain for a period of time and psychological and usually a combination of depression anxiety or both, pain anxiety depression. Where you have pain without an identifiable cause in pain medicine that is usually referred to as a psychiatric disorder. It is somatoform disorder with a pain component.

As part of chronic pain management you usually involve a neuropsychiatrist as part of assessment and pain management.

Example: It used to refer to as irritable bowel disease. Used to be called psychogenic pain. When patient complain of abdominal pain and could find no physical cause at that time. Came into terminology in 1959 [ENSEL]. But modern medicine shows trauma is a cause for irritable bowel disease."

[38] The Claimant has been under the care of a psychiatrist Dr Abel , who opines that the cause of the Claimant's pain is 90% real (or physical) pain and 10% psychological pain. Dr Abel stated, and the other experts including Dr Cheeks accepted, that the fact that the pain is psychological does not diminish the experience of pain. I accept and find on a balance of probabilities that the cause of the Claimant's pain is partly physical and partly psychogenic. However for the reasons stated below I do not accept Dr Abel's estimate of a 90% to 10 % split between the two causes. As regards the physical cause I prefer the evidence of Dr Cheeks that trauma has not been the cause of the degenerative changes to the Claimant's back. It seems to me, that the early examination and diagnosis at the University Hospital, exhibit 2(4), supports this finding. This is because complaints related to the back appear to emerge later on. One would have thought that a physical injury to the spine would have resulted in an immediate complaint and investigation. Dr Hilary Ann Brown's report from the University Hospital does not reflect this .If there was no such physical injury then the

changes observed later on would in all probability be due to degeneration. Dr Cheeks was the only neurosurgeon to give evidence. I accept that degenerative changes could not be caused or expedited by the Claimant's lumbar muscle strain , which it is said he suffered at the time of collision. The fact, as I find, that the degenerative changes existed prior to the accident but caused no significant discomfort supports a conclusion that the cause of the pain was mostly mental and not physical.

[39] However, and insofar as the cause of pain does not diminish the reality of the experience of pain, I am not sure that the distinction between physical and psychogenic pain will impact too much my award for pain suffering and loss of amenities. Even if the cause is 90% physical and 10% mental, as stated by Dr Abel, the Claimant feels the same amount of pain. It matters not to him, in that regard, whether it is caused by a physical or an emotional "injury". The pain he feels is the same. Therefore, and as all the doctors agree that his mental condition is partly responsible for the pain he feels, since that mental condition is entirely caused by the accident he is entitled to compensation for the pain. No medical expert has said that the pain caused by physical trauma is greater or less than the pain due to his mental state. The pain experience is the same whatever the cause or however the cause is divided.

[40] Evidence was given of the Claimant's psychological state by Drs Abel, Haynes-Robinson and Dr Longman-Mills. The degree and gravity of impairment in their opinion varied. Dr Abel was unaware that the Claimant participated in activities including walking for exercise, driving his children to school and taking care of his finances. He deponed that had he had this information his prognosis might have been more promising. According to Dr Abel the Claimant's impaired vision has had a negative effect on his mood, feelings of independence and self worth and that this can have a high correlation with mental disorders such as depression and anxiety. The Defendant's counsel submitted that the Court should note that the Claimant's loss of vision contributed to his depressed state and this injury cannot be attributable to the accident. Whereas this may be true the evidence

reveals that loss of vision was not the sole contributor to the Claimant's depressed state. The medical evidence reveals multiple causes.

[41] The Defendant's counsel also expressed concern with the report of Dr Abel. Specifically his categorisation of the Claimant's post-traumatic stress disorder as severe. In Dr Abel's first report completed in August of 2014 he considered the Claimant to be depressed. However, in his October 2014 report the Claimant was categorised as severely depressed. This was in circumstances where Dr Abel testified that he had observed improvements in relation to the Claimant's depression and post-traumatic stress disorder. Dr Abel utilised a check list in moving his diagnosis to the severe category and there was no change in the Claimant's prognosis. I accept Dr. Abel's categorization of the Claimant's mental condition as severe.

[42] The Defendant's counsel submitted further that the Claimant was on numerous potent medications that had the potential of altering his emotional state. The medications taken by the Claimant were prescribed. This was as a result of the injuries he sustained. If it is that the medication taken has contributed to the Claimant being depressed this may be categorised as reasonably foreseeable. Depression is an illness that is a reasonably foreseeable consequence of the Claimant's traumatic experience. This was clearly stated by the doctors who gave evidence. I do not find that any contributory factor by the medication prescribed constituted a break in causation or an independent cause of the Claimant's mental state or condition.

[43] It was also submitted that the Claimant has recovered from the effects of the mild head injury that he suffered. Dr Lee Lambert diagnosed the Claimant as having post-concussion headaches. She stated that it was not rare for post-concussion headaches to last as long as five years. Her evidence was buttressed by medical publications. I accept her evidence in this regard. I accept that the Claimant is suffering from headaches caused by his injury and the traumatic experience.

[44] The Defendant's counsel submitted that the Claimant suffers no more than a 1% whole person disability in respect of the knees and 3% whole person disability in respect of the ankle. Although admitting that there was a lumbar strain to the Claimant's back, the Defendant's counsel submitted that the Claimant should be placed in either Class 0 or Class 1 of the soft tissue and non-specific conditions category in the American Medical Association Guides 6th Edition Lumbar Spine Regional Grid. That, as Dr. Cheeks stated, has an impairment rating range of 0% -3% whole person. Complaints which may be age related or the product of obesity or occupation should be discounted to arrive at this categorisation. The Defendant does not believe that the Claimant should be placed in class 1 of the motion segment lesions category of the grid. This latter was Drs Minott and Dundas' categorization. They assessed the Claimant's total permanent partial disability at 12% of the whole person. Defendant's counsel submitted that a 4% permanent partial impairment of the whole person was correct.

[45] In addressing damages for pain, suffering and loss of amenities the Defendant's counsel submitted that notwithstanding the multiplicity of issues pleaded a review of the medical evidence confirms that the Claimant's main complaints revolve around pain to the knee, ankle and back as well as emotional suffering which has been diagnosed as depression and post-traumatic stress disorder. He says that the Claimant's witness statement dated March 9, 2016, includes references to disputed injuries to the cervical spine and eyes which have now been abandoned by him. In the circumstances his evidence pertaining to the neck, cervical spine and loss of vision and any activities of daily living that were affected by these injuries as well as all emotional and psychological feelings associated with these injuries must be disregarded. I agree.

[46] I find that the injuries which remain as properly part of the claim have significantly affected the Claimant's daily lifestyle and his ability to work. These injuries include not only his lumbar strain, injured arm, knee, ankle, face and head but also the post traumatic stress disorder. This latter resulted in among other things his feeling continuous and acute pain to his head and to his back. He has not

been formally employed since December 2009 but has made attempts to earn a living. He raised chickens but that was not profitable. He purchased a public passenger vehicle however his projected earnings did not materialize. In addition that venture drove fear into him as money was often times demanded from him by persons at the bus park. The Claimant experienced a stroke in 2011 for which he was hospitalized. After recovering, he baked and sold items at his church. This was not profitable. Between the years 2013 – 2015 the Claimant sold car accessories and his evidence in cross examination is that he still does so. Prior to the accident the Claimant demonstrated himself to be hard working. His first job, at age 17, was as a relief worker at Desnoes & Geddes Ltd. While working as a driver for the Defendant he had done overtime and, on weekends and after work in the days, commenced training in the operation of a crane to earn more income. The Claimant's wife Mrs Leisa Watson in her witness statement dated 9th March, 2016 has said that the Claimant has since the accident become withdrawn and easily irritable with herself and the children. I accept her evidence that she could not recall a time when the Claimant had not been gainfully employed. She says that the Claimant was not comfortable with being at home and not working. She says that after he went back to work with the Defendant and had to return home because of illness he was tormented and upset because he wanted to be the person he was before the accident.

[47] On the totality of the evidence, I find that the Claimant has a whole person disability in consequence of all his injuries and their sequelae of 10% (4 % for the left lower extremity and 6% for the pain he experiences). The 0% rating suggested by Dr. Cheeks in relation to the lumbar region fails to take into account the reality of the psychogenic pain and its effects on his daily life. The rating of 14% by doctors Minott and Dundas take into account the abandoned cervical injury as well as the physical lumbar injury which I rejected. Reliance on the AMA Guide , and it is just a guide, on the facts of this case is misplaced. The guide, as the doctors stated, categorizes the percent disability based on cause of

lumbar injury i.e. soft tissue, age related or trauma. There seems to be no rating for pain that is psychogenic.

[48] The Defendant relied on the following authorities for my consideration in making an award for damages for pain, suffering and loss of amenities:

> **Irene Byfield v Ralf Anderson et al** reported in Khan's Vol 5
>
> **Veronica Irving v Brian Rowe** Claim No 2006 HCV 03177
>
> **Deyannis v Half Moon Bay Limited** Claim No. 2007 HCV 01001
>
> **Barbara Rowe-Anderson v Mohini Enterprises Ltd** Claim No. 2007 HCV 00802
>
> **Marlene Brown v Lema Malcolm and Derrick Gray** reported in Khan's vol 6 at page 8
>
> **Wilbert Honeywell v Jannette Roach** reported in Khan's vol. 4 at page 54
>
> **Nelson Walters Engineers Ltd & others v David Noel** reported in Harrisons (Revised Edition of Case note No. 2) at page 63
>
> **Pamela Thompson et al v Devon Barrows et al** CL T143 of 2001 unreported judgment delivered December 22, 2006
>
> **Angeleta Brown v Petroleum Company of Jamaica Limited and Juici Beef Limited** Claim No HCV 1061 of 2004 unreported Judgment delivered on April 27, 2007

[49] The Claimant asked the Court to consider the following in awarding general damages;

> **Phillip Granston v The Attorney General of Jamaica** Claim No HCV 1680 of 2003, unreported Judgment delivered August 2009 upheld on Appeal [2011] JMCA Civ 1 20th January 2011
>
> **Ann Marie Dietrich v Godfrey Chen**, (1984) 21 J.L.R 323
>
> **Charmaine Powell v Milton O'Meally & Anor**, Khan Volume 4, page 56

[50] I find the authority of **Phillip Granston v The Attorney General of Jamaica (above)** to be the most useful in the computation. The most dominant injury in that instance was to the back and this resulted in permanent and continuous pain. The sum awarded was $8 million. Using the Consumer Price Index of 134 that updates today to $ 13,916,417.91. The Claimant's complaint of pain is similar to those suffered in **Phillip Granston** and the medical evidence suggests it may last a life time. The circumstances of the Claimant's accident are far more traumatic than that in the **Granston** case. The Claimant also had injuries to his knee and ankle, face, teeth and arms which Mr. Granston did not.

[51] Counsel for the Claimant cited the case of **Evangelia Deyannis v Half Moon Bay Limited** where Straw J increased the base award for pain and suffering and loss of amenities to compensate the Claimant for psychogenic pain. The Defendant cited the authority of **Pamela Thompson et al v Devon Barrows et al** CL T143 of 2001 where Campbell J refused to make a separate award for post-traumatic stress disorder. The principle enunciated is that a Claimant should be compensated for the consequence of his disability. The granting of a separate award may amount to duplication. I agree that there should be no separate award. However in arriving at an appropriate award for pain suffering and loss of amenities it is necessary to consider what amount is appropriate for the Claimant's mental state. The Claimant's pain is psychogenic but that pain is real to him. It is caused by disorders which are a consequence of the accident. One can only imagine the horror and fear he felt as the aeroplane descended and crashed. The incredible fact that he emerged alive and with relatively minor injuries does not diminish, and indeed might just have enhanced, his post traumatic stress disorder. He still has nightmares. I believe that a reasonable award would be $20,000,000 for his mental condition, and chronic, permanent but psychogenic headaches and back pains. Upon considering the authorities of **Charmaine Powell v Milton O'Meally** & **Anor (above)** and **Merlene Brown** v **Lema Malcolm and Derrick Gray (above)** the sum of $5,000,000 is fair compensation for the injuries to the teeth, face, arm, knee and ankle. Therefore I

am satisfied having considered the authorities that a fair award for pain suffering and loss of amenities is $25,000,000.

[52] In respect of loss of earning capacity/ handicap on the labour market the Defendant relied on the authority of **Andrew Ebanks v Jephter McClymont** reported in Khan's vol 6 at page 76. The Claimant submitted the cases of

Moeliker v Royelle and Company Limited (1976) ICR 253

Cooke v Consolidated Fisheries Ltd (1976) ICR 253 and

Godfery Dyer v Stone, SCCA 7 of 1988

[53] These authorities establish that handicap on the labour market compensates for the Claimant's difficulty to compete on the job market. If he is employed at the time of assessment the court assesses the risk of losing that job and the difficulty consequent on the injury of finding something gainful to do. In this case the Claimant is self employed and sells car accessories. I find he has tried but was unable to find other gainful endeavours. The failure in that regard had more to do with the economic environment than his being physically or mentally unable to manage. He is now, and will for the foreseeable future, be unable to compete equally on the job market whether as a self employed person or an employee. He is now 43 years of age. I therefore assess a lump sum award for handicap on the labour market at $2,000,000. [I accept and adopt in this regard the reasoning of Sykes J in Granton's case (above), at Para 101 – 103 of his judgment].

[54] The Claimant has claimed damages for future medical care. Included in this is the cost of psychotherapy and psychiatric treatment. Dr Abel's evidence is that the Claimant will require psychotherapy twice per month for approximately 3-4 years at a cost of $10,000-12,000 per session. Dr Abel stated that psychiatric care would be required for an extended period of time, perhaps the Claimant's lifetime. This would be at a cost of $8,000 per session and one session per month. I accept the evidence of Dr Abel and will award the sum of $924,000 for

psychotherapy for three and a half years at $11,000 per session twice per month. As regards psychiatric care Dr. Abel was not certain that it would be required for the rest of his life. I therefore award this for 10 years. The cost of therapy is calculated as follows $8,000 .00 x 12 months x 10 years = $ 960,000.00.The total is therefore $1,884,000.00.

[55] The Claimant has claimed the amount of US $80,000 for the cost of two neural stimulators. This includes the cost of trial implantation, and follow up. Dr Metalor stated that the stimulator would have to be changed after 15 years. Dr Metalor in his medical report (admitted as exhibit 20A) stated under the heading impairment:

> *"Mr Watson has not yet reached maximal medical improvement. I have recommended a neural stimulator implant and he will be assessed as to the degree of relief he has with the implant. He will continue to require physical therapy and neuropsycological intervention. It is unlikely that he will ever be completely pain free and will not return to the quality of life enjoyed prior to his accident".*

[56] Having found that the cause of the back pain being experienced is psychogenic I am not satisfied on the evidence that the pain stimulator is either reasonable or necessary. On a balance of probabilities it is unlikely to have any impact. I accept the evidence of Dr Cheeks in that regard. I therefore decline to make an award for a neurostimulator.

[57] The Claimant seeks lost earnings from January 2010 to July 2016 in the sum of $ 6,632,328.53. The Defendant says that the Claimant is not entitled to an award for loss of earnings because he abandoned his job. On the 4th of September, 2009 Dr Tamika Haynes-Robinson in a letter to the 1st Defendant addressed to its Managing Director Mr John Ralston stated the following

> *"Finally, it is unlikely that Mr Watson will be able to return to work until he has successfully transitioned to more appropriate coping and reduced the depressive symptoms he is experiencing; at this point four months sick leave from occupational duties is recommended. When he returns to work he should be assigned a*

supervisor and start part-time until his efficiency in carrying out his duties return to baseline".

[58] This sick leave would have ended on the 4th of January 2010. The Claimant failed to report to work or submit any future medical reports. His evidence when cross-examined on this aspect is instructive:

Q: Mr Ralston says you stopped working and continued to be paid until 2009 when you abandoned your job.

Did you?

A: I did not abandon no job. Mr Ralston know it was because of medical issues why I had to stop from work. He assigned a driver to take me to the doctor when I have appointments.

I am committed to my job and Mr Ralston family. The only reason I stop was because I was sick. I work day and night every day if Mr Ralston ask. It don't matter what time I work."

In cross-examination the following:

"Q: Position purchasing manager your rate of pay for 80 hours fortnight was higher than what you were earning before

A: Yes sir

Q: Company set up an office for you

A: Yes sir

And later:

Q: You told Dr Abel that " I don't enjoy my work anymore as I have been reassigned to a desk job"

A: Yes

Q: You were unhappy to being confined to an office

A: Not the case

Q: "desk job" mean confined to office

A: No because of pain"

And a few questions later

> *"Q: You said in witness statement para 130, your job as purchasing manager could you perform it today.*
>
> *A: No*
>
> *Q: You prefer to be self-employed.*
>
> *A: Yes considering my limitations.*
>
> *Q: You are working for yourself now selling car accessories*
>
> *A: Yes. Sell car bulbs and so forth."*

Having considered the totality of the evidence I accept that the Claimant was no longer able to perform his job as a driver. His continuous pain affected his ability to remain seated and maintain the concentration necessary for such an occupation. On the other hand, the alternative offered by his employer at a higher salary was within his physical (and mental) capability. There was some medical opinion that it was within his capacity albeit that he should commence on a part time basis until his condition was sufficiently improved (exhibit 1 page 6).

[59] The Claimant did not return to work in January 2010 although the medical excuse had expired. I am satisfied that he was unhappy with his new job. He, and his previous work experience confirms this, had a predeliction to non-office type employment. His reason for not returning to the new job had more to do with this personal preference than with his medical complaints. The fact that all his subsequent economic ventures were of that nature also supports my conclusion. The Claimant's failure to return to work in January 2010 was therefore unreasonable , and is to be distinguished from the situation in **Fitzgibbons v Westpress Publications Ltd** 1983 645 (BS SC) Supreme Court of British Columbia (judgment delivered 2nd November 1983, relied on by the Claimant. In that case the employer dismissed the employee alleging abandonment .In this case the Claimant was not dismissed ,he just never returned to work. Not having done so,he cannot claim lost income in consequence of any wrong done by his

employer. Any loss of earning was self induced . The new job offered after the accident was at an increased salary. There is no medical evidence to support the Claimant's assertion that he could not return to work because of his injuries. Indeed the evidence of his other economic ventures suggests that he was capable of working and Dr. Haynes Robinson has said as much. The sum awarded for special damages will therefore not include lost earnings.

[60] It is my understanding from the written and oral submissions that Special damages were agreed. However the amount agreed differs in the defendant's written submission from the amount stated orally and as noted by me. I will therefore invite the parties to indicate the quantum agreed and to be awarded.

[61] The Defendant says that the Claimant contributed to his injuries in failing to wear a harness. The Defendant says that once the Claimant accepted the pilot's invitation to sit at the front of the aircraft he ought to have put on the shoulder harness in addition to the seatbelt. I do not accept this submission. The evidence of the Claimant is that he was not told that there was a shoulder harness on the plane, nor was he instructed to use one. I accept that evidence. There was no contribution by the Claimant to his injuries.

[62] I therefore make the following award;

a. General damages:

i.	For his pain, suffering and loss of amenities	$25,000,000.00
ii.	For Loss of Earning Capacity	$2,000,000.00
iii.	Future medical care	$1,884,000.00

b. Special Damages as agreed by the parties: $ (to be advised)

c. Interest on special damages at 3% per annum from the date of the accident.

d. Interest on General Damages at 3% from the date of the service of the claim form.

e. Interest on General Damages at 3% from the date of the service of the claim form

David Batts
Puisne Judge