[2014] JMSC Civ 124

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005HCV02260

BETWEEN	**RICARDO WILKINS**	**CLAIMANT**
A N D	**POWTRONICS ELECTRICAL INTEGRATED TECHNOLOGY LIMITED**	**1ST DEFENDANT**
AND	**DONALD FERGUSON**	**2ND DEFENDANT**
AND	**JAMAICA PUBLIC SERVICE CO. LIMITED**	**3RD DEFENDANT**

Mr. Ainsworth Campbell from May 19, 2011 and Mr. Andrew Campbell joining from July 9, 2013 for the Claimant

Mr. Conrad George instructed by Hart Muirhead Fatta on May 19, and June 6, 2011 and Mr. Patrick W. Foster Q.C. and Ms. Ayana L. Thomas instructed by Nunes Scholefield DeLeon & Co. from June 6, 2011 for the 1st Defendant.

May 19, 2011; June 6, 8, 2011; July 15, 2011; October 20, 2011; November 25, 2011; January 9 & 13, 2012; February 17, 2012; June 1 & 7, 2012; September 25, 2012; November 30, 2012; December 10, 2012; June 17, 2013; July 9, 2013; October 28-29, 2013; December 9-11, 2013; February 11 & 18, 2014; August 5, 2014.

Assessment of Damages – Causation – Apportionment of damages where injuries suffered in separate incidents and defendants sued only liable for one incident – Effect of non-disclosure by claimant of involvement and injury in other incidents

D. FRASER J

THE CLAIM

[1] On September 15, 2004, the date of the accident which spawned this claim, the claimant Ricardo Wilkins a string pole erector was in the employ of the 1st defendant, Powtronics Electrical Integrated Technology Limited.

The 2nd defendant Donald Farquharson was then the major shareholder and managing director of the 1st defendant.

[2] The accident occurred in this way. Personnel employed to the 1st defendant, including the claimant, were installing pole lines on the Port Royal Main Road in the vicinity of the roundabout. This activity was being carried out on behalf of the 3rd defendant, the Jamaica Public Service Company. At the direction of the 2nd defendant the claimant climbed a pole. The pole fell to the ground with the claimant on it. The claimant alleged that he suffered injuries, pain and suffering occasioned by the fall, which he maintained was caused as a result of the negligence of the defendants.

[3] The claim was filed against the 1st and 2nd defendants on August 5, 2005. It was served on the 1st defendant by registered post mailed on the date of filing. On November 18, 2005 the claimant obtained an interlocutory judgment in default of acknowledgment of service against the 1st defendant, which was entered at Judgment Binder Volume 737 Folio 446. The 3rd defendant was subsequently added. The claim was however not pursued against the 2nd and 3rd defendants. By Amended Claim Form filed June 19, 2007 the claimant sought damages for negligence and breach of statutory duty arising out of that accident.

[4] The Particulars of Negligence alleged by the claimant were:

a) Failure to properly secure the pole

b) Requiring the claimant to climb a pole that was not safely erected to facilitate the claimant climbing same.

c) Failing to have any or any sufficient regard for the safety of the claimant

d) Failure to properly supervise the works at all material times

e) Res Ipsa Loquitur.

[5] During the course of the hearing, in circumstances which will be outlined later in the judgment, it was revealed that the claimant had suffered a previous accident in 1997 and a subsequent accident in 2009, both of which may have contributed to the injuries and damage complained of by the claimant.

[6] In an Amended Defence Limited to Quantum filed by the 1st and 2nd defendants on December 17, 2012, the 1st defendant in its Defence admitted that the pole fell with the claimant to the ground. However the claimant's loss, injury, damage, disability and impairment as pleaded were denied and the claimant required to strictly prove them. At paragraph 9 of its Amended Defence, the 1st defendant further contended that the injuries as pleaded were not supported by the medical evidence and were not attributable to the accident on September 15, 2004. Rather the 1st defendant's case is that the injuries and disabilities complained of were attributable wholly or substantially in part, to the prior and subsequent accidents suffered by the claimant in 1997 and in 2009.

THE ISSUES

[7] The broad issues affect both the general and the special damages claimed. I adopt with some adaptation the issues for resolution as identified by counsel for the 1st defendant. These are:

a) Did the claimant sustain head injuries in the 1997 incident which caused him to develop epilepsy?

b) What is the nature of the injuries sustained by the claimant in 2004?

c) Did the claimant sustain head injuries in an accident in 2009 and if so what was their effect?

d) What injuries and effects can the court attribute to the accident in 2004?

e) What is the quantum of damages to be awarded to the claimant in respect of pain and suffering and loss of amenities for injuries sustained by him in the 2004 accident?

f) Is the claimant entitled to damages for handicap on the labour market?

g) Have the items and amounts claimed for special damages been specifically proven?

h) For what period and in what weekly amount should damages be awarded to the claimant for loss of earnings?

THE LAW RELATIVE TO CAUSATION AND DAMAGES

[8] I accept the outline of the law in this area by counsel for the 1st defendant as representing the appropriate background against which the facts of and major issues in this case are to be analysed.

[9] In ***The Attorney General v Phillip Granston*** [2011] JMCA Civ 1 the respondent was injured in a motor vehicle accident in 1997 in respect of which he claimed for damages. One main question for the court's determination was whether the respondent's disability originated from more than one cause, namely the 1997 accident, a fall in 2001 and another motor vehicle accident in 2004.

[10] Harris JA in delivering the judgment of the Court of Appeal, had this to say starting at paragraph 33:

> [33] It is trite law that the burden of proof of negligence is on a Claimant and also, as a matter of law, the onus of proof of causation is on the Claimant. That is the Claimant must establish

on the balance of probabilities, a casual connection between his injury and the defendant's negligence. For him to succeed he must show that the tortious act materially contributed to his injury – See **Alphacell Limited v Woodward** [1972] 2 All ER 475; **McGee v National Coal Board** [1972] 3 All ER 1008, [1973] 1 WLR 1, **Holtby v Brigham & Cowan and Allen v. British Engineering** [[2000] 3 All ER 421].

[34] Lord Salmon in ***Aphacell Ltd v. Woodward*** speaking to the nature of causation, said at 489 – 490:

> *"The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory."*

[35] …As shown in the cases where a supervening event contributes to a claimant's injuries, the claimant can recover no more than such contribution made by the defendant to his disability. The consideration therefore, must be, whether on the totality of the evidence, a Claimant has shown that a defendant bears the responsibility for all or for a quantifiable part of his injury.

[11] In ***Holtby v. Brigham & Cowan*** [2000] 3 All ER 421***,*** for several years the claimant was exposed to asbestos dust while working for a number of different employers. He developed asbestosis and instituted proceedings against one employer B Ltd. The trial judge held that B Ltd was only liable for a portion of his disability. On appeal it was held, among other things, that where a claimant suffered injury as a result of exposure to a noxious substance caused by two or more persons, but claimed against one person only, that person would be liable only to the extent that he contributed towards the disability.

[12] In ***Allen & Ors v. British Rail Engineering Ltd. & Anr.*** [2001] EWCA Civ 242 the plaintiff developed "vibratory white finger" caused by the use of percussive tools, over a number of years while employed to the defendant. He ceased working with the defendant but continued to use vibratory tools which resulted in his sustaining further damage. The judge having assessed compensation for the full extent of the claimant's injury, apportioned liability and the sum awarded was reduced by one half. On appeal, it was held, among other things, that, as apportionment was a question of fact and the amount at stake was fairly small, it was proper for the judge to have adopted a broad brush approach and on the evidence an attribution of 50% was not inappropriate for the defendant's liability.

[13] In ***Joblin v. Associated Diaries Limited*** [1982] A.C 794, the plaintiff an employee of the defendants, suffered an accident in the course of his work. He was left with somewhat disabling continuing back pain. In 1976 before the trial took place, the plaintiff was found to be suffering from spondylotic myelopathy which was in no way connected with the accident. The myelopathy would in any event, have proved totally disabling from about the middle or end of 1976. The joint medical report disclosed that at the date of the accident, *"there was no discernible signs or symptoms of myelopathy."* The trial judge having found that the defendants were in breach of duty, held that in assessing the damages payable in respect of the accident there should be no account taken of the disability caused by the supervening condition. The Court of Appeal allowed the defendant's appeal on the quantum of damages holding that the damages fell to be reduced to the extent that the further disability was a cause of the plaintiff's loss.

[14] On further appeal to the House of Lords it was held that in the assessment of damages, the myelopathy could not be disregarded since the court must provide just and sufficient but not excessive compensation, taking all factors into account and in comparing the situation resulting from the

accident with the situation had there been no accident, it must recognise that the supervening illness would have overtaken the plaintiff in any event.

[15] At page 814 paragraphs E-H Lord Keith of Kinkel had this to say:

> The assessment of damages for personal injuries involves a process of restitution in integrum. The object is to place the injured plaintiff in as good a position as he would have been in but for the accident. He is not to be placed in a better position. The process involves a comparison between the plaintiff's circumstances as regards capacity to enjoy the amenities of life and to earn a living as they would have been if the accident had not occurred and his actual circumstances in those respects following the accident. In considering how matters might have been expected to turn out if there had been no accident, the "vicissitudes" principle says that it is right to take into account events such as illness, which not uncommonly occur in the ordinary course of human life. If such events are not taken into account, the damages may be greater than are required to compensate the plaintiff for the effects of the accident, and that result would be unfair to the defendant.

[16] Further at page 815 paragraphs F – H in addressing cases where the plaintiff has suffered injuries from two or more successive independent tortious acts Lord Keith of Kinkel stated:

> In the event that damages against two successive tortfeasors fall to be assessed at the same time, it would be highly unreasonable if the aggregate of both awards were less than the total loss suffered by the plaintiff. The computation should start from an assessment of that total loss. The award against the second tortfeasor cannot in fairness to him fail to recognize that the plaintiff whom he injured was already to some extent incapacitated.

[17] Counsel for the claimant relied on the case of ***Baker v Willoughby*** [1970] AC 467 as supporting his submission that the 1st defendant was responsible for the full disability that the claimant now suffers. In this case the plaintiff was crossing a main highway when he was struck by the defendant's car, as a result of which he sustained injuries to his left leg. Both the plaintiff and the defendant had a full view of each other for at least 200 yards prior to the collision and yet neither took any evasive action. The plaintiff sued the defendant for damages in respect of his injuries, but shortly before the hearing of his action he was shot in the left leg during an armed robbery, and his left leg had to be amputated immediately. The judge found that the plaintiff was 25 per centum and the defendant 75 per centum to blame for the accident. He held that the appropriate measure of damages for the pain, discomfort, loss of amenities, and loss of earning power resulting from the injuries to the left leg was £1,600, and that he should not take into account the amputation, since the plaintiff's actual and prospective loss flowing from the defendant's negligent act had not been reduced by the subsequent loss of the leg. Accordingly, he held that the plaintiff's damages did not fall to be reduced because of the subsequent loss of the leg, and awarded him £1,200 general damages. On appeal by the defendant, the Court of Appeal held, (i) that the parties were equally to blame for the accident; and (ii) that the judge had erred in his assessment of the damages by failing to take into account the subsequent loss of the leg, and in the result the general damages were reduced to £350. On appeal it was held allowing the appeal that (i) there was no presumption that the parties were equally to blame for the accident and that in the circumstances there was no reason to disagree with the trial judge's assessment of liability and ii) That the plaintiff's disability could be regarded as having two causes and where, as here, the later injuries merely became a concurrent cause of the disabilities caused by the injury inflicted by the defendant they could not diminish the amount of damages payable by him, and that, accordingly,

the plaintiff was entitled to the sum of £1,200 originally awarded by way of general damages.

[18] The critical issue in any case is the issue of causation. ***Baker's*** case can only assist the claimant in vesting the 1st defendant with full responsibility for the injuries he now suffers if the later injuries in 2009 are proven to be a concurrent cause, or in the submission of counsel for the claimant a continuing cause of the injury of 2004.

[19] Based on the authorities, counsel for the 1st defendant stressed, and the court agrees, that both the claimant and the 1st defendant must be fairly and justly treated. The claimant is therefore only due compensation from the 1st defendant and the 1st defendant is only liable to compensate the claimant for, the loss and damage attributable to the tortious actions of the 1st defendant and of the 1st defendant alone.

THE EVIDENCE, SUBMISSIONS AND ANALYSIS CONCERNING THE ISSUES

Issue 1: Did the claimant sustain head injuries in the 1997 incident which caused him to develop epilepsy?

[20] The claimant filed three (3) witness statements in this claim which were together received as his evidence in chief. In none of those statements was there any mention of the claimant sustaining head injuries prior to 2004. Investigations conducted by counsel for the 1st defendant however revealed otherwise.

[21] Pursuant to an order for specific disclosure made on December 10, 2012 on an application by the 1st defendant, the claimant's attorneys-at-law disclosed both pleadings and medical records relied on in Suit No. C.L.W. 429 of 1998 ***Ricardo Wilkins v Cecil Jackson and Cecil Jackson Electric Company Limited***. The pleadings were together tendered into evidence as (**Exhibit B(1),(2) & (3)**) namely:

a) Writ of Summons filed on the 27th of November 1998;
b) Statement of Claim filed on the 27th of November 1998
c) Affidavit of Ricardo Wilkins sworn on the 29th of December 1999

[22] In the Statement of Claim in Suit No. C.L.W 429 of 1998 the claimant pleaded at paragraph 5 that "On *or about the 19th day of January 1997 at West Indies College in the parish of Manchester the plaintiff at the direction and for the Defendants was carrying tackles (pole bands) from an old light pole to a new one and while in the performance of his duty a pole band hit the plaintiff causing the plaintiff to sustain bodily injuries and to suffer pain, damage and loss and to be put to expense*."

[23] The Particulars of Injuries also pleaded at paragraph 5 of the Statement of Claim in Suit No. C.L. W. 429 of 1998 were:

i) Laceration to the forehead
ii) Laceration to the chin
iii) Fracture of the skull
iv) By reason of his injuries the Plaintiff began having dizzy spells
v) Because of his injuries the Plaintiff is unable to stand up to exposure to the sun
vi) By reason of his injuries the Plaintiff has developed memory problems
vii) By reason of his injuries the Plaintiff is unable to work in a meaningful way
viii) By reason of his injuries the Plaintiff has been injured in his brain, and consequently could develop any of the several sequelae to head injury in Epilepsy, Alzheimer disease, Parkinson Disease and Fat embolism.
(emphasis added by counsel for the 1st defendant)

[24] The Claimant further pleaded in that Suit loss of earnings occasioned by the injury at $2,500.00 per week from January 19, 1997 to November 27, 1998 (96 weeks) – almost two years.

[25] At paragraph 21 of his Affidavit in support sworn to on the 29th of December 29, 1999 the claimant stated:

> "That the injuries I received on the 19th day of January 1997 are serious and set out in the Statement of Claim filed in this Honourable Court the 17th day of November 1998 where the injuries are set out as:
>
> i) Laceration of the forehead
> ii) Laceration of the chin
> iii) Fracture of the skull
> iv) Inability to stand up to exposure to the sun
> v) Inability to work in any meaningful way
> vi) Brain injury from which the following sequelae may ensue epilepsy. Alzheimer disease, Parkinson disease and fat embolism.
>
> (emphasis added by counsel for the 1st defendant).

[26] The claimant in cross-examination was shown a copy of his Affidavit sworn on December 29, 1997 which was disclosed by his attorney pursuant to the order for specific disclosure made on December 10, 2012. The claimant disavowed the affidavit attributed to him. He denied signing the affidavit, denied suffering a serious injury in 1997 and denied reporting at the Medical Associates that he had experienced a loss of consciousness for 7 minutes or that he had experienced frequent dizziness and blurred vision. He did however in testimony agree that a pole band fell and hit him on his helmet and the helmet burst his head.

[27] It is true as submitted by counsel for the 1st defendant that the claimant was extremely evasive, argumentative and combative when cross-examined about the injuries he sustained in 1997. Counsel for the 1st defendant submitted that this denial was consistent with the claimant's general lack of candor with the court. The court was invited not to see the claimant as a credible witness as the document had been disclosed by his own attorney who was also his attorney in the 1998 suit.

[28] The medical reports disclosed pursuant to the order of December 10, 2012 were as follows:

a) Medical report from Medical Associates Limited dated 11/10/97 prepared by Dr. Geralo Graham. (Part of Exhibit 14A)
b) Medical report from Medical Associates Limited dated 3/4/98 prepared by Dr. Geralo Graham (Part of Exhibit 13A)

[29] Counsel for the claimant took no issue with the reception in evidence of the pleadings in Suit No. C.L. W. 429 of 1998. There could hardly have been a viable objection, they having been relevant to the issues the court has to decide, produced pursuant to the aforementioned order for specific disclosure and being public documents whose reception in evidence was facilitated by section 22 of the Evidence Act.

[30] In final submissions however counsel for the claimant maintained that the reports purportedly prepared by Dr. Graham were improperly adduced in evidence being hearsay and not received with the consent of the parties. On October 30, 2013 counsel for the 1st defendant filed A Notice of Intention to Tender into Evidence the two medical reports from Medical Associates prepared by Dr. Graham pursuant to section 31 E (4) of the Evidence Act. All five pre-conditions for the entry of the documents into evidence, based on the unavailability of the person (s) who made the

statements on the document, were listed in the notice without an indication of which would have been relied on.

[31] On November 8, 2013 counsel for the claimant filed a Notice of Objection to the documents being received pursuant to the Evidence Act and requiring the maker (s) of the documents to be called[1]. Further counsel maintained that the documents were never put in evidence by the claimant and that in fact the claimant denied having made any statement to the doctor as was recorded in the reports. He submitted that all the claimant testified to was being treated at the Medical Associates Hospital and having his sutures removed there. Counsel maintained that Dr Graham not having been called as a witness Dr. Morgan's assessment of his report was speculative and the court should not come to any finding adverse to the claimant based upon it. It was also highlighted on behalf of the claimant that the claim of 1998 was never adjudicated upon and hence the purported report of Dr. Graham was never adjudicated upon. Counsel submitted that all the evidence produced to the court and which supported the claim of the claimant was that he was, and all along from before 1997 with a break of two weeks when he sustained lacerations, on the job with Cecil Jackson where he had been a linesman.

[32] Counsel for the 1st defendant never pursued the Notice of Intention to admit the documents under section 31E (4). Instead the document dated Tuesday April 3, 1998 was sent by counsel to Professor Morgan for him to comment on and provide a further report to those he had previously prepared in relation to the claimant. The two reports of Dr. Graham were tendered in evidence while Professor Morgan was testifying as part of the correspondence between counsel for the 1st defendant and Professor Morgan and as part of Professor Morgan's final report (Exhibits 13A and

[1] Actually the Notice of Objection states, "…the maker(s) of the said documents should not be called…", but it is clear from the context that the "not" was included in error, as the purpose of the Notice was to object to the evidence being received without the calling of the maker(s) of the documents.

14B). Despite the earlier Notice and Counter Notice[2], no objection was taken to their reception at the time these exhibits were tendered for admission in evidence. Based on the fact that the documents were disclosed by the claimant after court order and their clear relevance to the case, they were accordingly received in evidence and counsel for the claimant proceeded to cross-examine fully in relation to them.

[33] In the medical report from Medical Associates Limited dated the 3/4/98, part of Exhibit 13A Dr. Geralo Graham stated as follows:

> *"I hereby certify that the above patient presented on the 20th of January 1997 with a history of laceration to the forehead (1.5 x 1.0cm) and mandible (1.0 x 0.2 cm).*
> *Treatment involved the following*
> - *Clean and suture lacerations & dressings*
> - *Tetamus toxoid & analgesics & antibiotics*
> - *Skull x-ray which revealed no fracture*
>
> ***Subsequent visits to the casualty department involved complaints of frequent dizziness and <u>"loss of consciousness for 7 minutes" with associated blurred vision and headaches</u>.***
> *Investigations done included a complete blood count (normal), random glucose (normal) and electrolytes (normal)*
>
> ***<u>Further investigations presently requires a CT Scan of the brain to ascertain a diagnosis for his syncopal episodes."</u>***
>
> (emphasis added by counsel for the 1st defendant)

[34] Professor Owen Morgan's evidence is that he reviewed Dr. Graham's 1998 report. On cross-examination by counsel for the claimant his view was that, putting the whole together — the loss of consciousness for 7 minutes associated with blurred vision and headaches — his concern was that the claimant would have had epilepsy. This in the context of the recurring nature of the problem indicated by the fact that the claimant

[2] The court recognises that under section 31E(4) the issue of reception of a document in evidence is not dependent on whether or not a counter notice has been served but on whether one or more of the pre-conditions for admissibility has been met on a balance of probabilities.

made subsequent visits. He also highlighted when pressed, that these episodes were not transitory as they lasted up to 7 minutes. He further noted that tests such as MRI and EEG might come back negative even if done, but that a finding of epilepsy was a clinical diagnosis. His view therefore was that the claimant was diagnosed with a seizure disorder from 1997 and not first in 2005.

[35] Counsel for the 1st defendant submitted that the claimant's own affidavit supported that he suffered a head injury in 1997 from which, based on the medical report of Dr. Graham and the unchallenged evidence of Professor Morgan he developed epilepsy. Further that he experienced frequent dizziness, loss of consciousness, blurred vision and headaches, and the inability to stand up to the sun and to work in any meaningful way from as early as 1998.

[36] I have carefully examined the evidence. I have found that the affidavit received in evidence as Exhibit B (3), contrary to the evidence of the claimant, was his affidavit signed by him December 29, 1999. However I have also borne in mind the fact that, the claimant's affidavit contained at least one inaccurate statement. The claimant indicated he had a fracture to the skull, however the 1998 medical report of Dr. Graham indicated that a skull x-ray showed no fracture. I am however satisfied that the evidence in the 1998 medical report disclosed by his present counsel who was also his counsel in the 1998 suit, was based on his complaints and the medical examination and treatment he received on visits to Medical Associates. Those records show that the claimant suffered some injury to the head though no fracture of the skull which he alleged. I accept the evidence of Professor Morgan's review of Dr. Graham's report, and his conclusion unchallenged by any other medical expert, that the claimant suffered from epilepsy from as far back as 1997. The impact of this finding on the overall liability of the 1st defendant will be addressed in my final analysis. The

court will in that analysis bear in mind that the claimant was in fact working after the 1997 incident when the 2004 accident occurred. The 1997 incident therefore affected but did not incapacitate the claimant.

Issue 2: What is the nature of the injuries sustained by the claimant in 2004?

[37] The claimant relied on an exhaustive list of injuries in his Second Further Amended Particulars of Claim filed on the 1st of December 2010 as follows:

i. Trauma to the face and back
ii. Fracture of the bones of the neck (cervical fracture)
iii. Fracture of the ribs
iv. Lacerations of both arms
v. Concussion with loss of consciousness
vi. Temporary loss of hearing
vii. Epilepsy
viii. Temporary loss of speech
ix. Inability to eat for several days
x. Headaches and recurring fainting spells, neck pains and difficulty with cognitive and behavioural function
xi. Impairment and great concentration
xii. Difficulty in coping psycho-socially with his condition
xiii. Mild restriction of neck movement as recently as the 13/11/09 and continuing
xiv. Laceration of the chin that left a 3cm scar
xv. The final clinical assessment on the 13/11/09 was :
    a. Mild head injury with persistent headaches and probable seizure disorder
    b. Soft tissue cervical injury
    c. Psycho-social disorder – possibly post traumatic

xvi. Low density focus in the periphery of the left temporal lobe which is likely to be an area of gliosis or old contusion.

xvii. Chronic adjustment disorder with anxiety and depressed mood, the stressor being accident in September 2004

xviii. Mental Impairment on the Global Assessment of Functioning Scale at 65

xix. Recurrent syncopal attacks that are seizure related

xx. Disability due to psychosocial problems is 12% of the whole person

xxi. Post traumatic headaches have resulted in a 2% disability of the whole person

xxii. Cervical pathology resulted in 2% permanent disability of the whole person

xxiii. The combined permanent partial disability is 22-25% of the whole person

xxiv. Inability to sleep or sleep well

xxv. Poor appetite and loss of weight

xxvi. The Claimant is unable to tolerate light and when walking would often fall to the ground

xxvii. Because of his injuries the Claimant is unable to climb poles as he usually did to earn a living so that up to the 17/3/10 he has not worked and or earned and this condition will probably be permanent

xxviii. By reason of all his limitations and disabilities the Claimant is often suicidal in his thought.

xxix. By reason of his injuries and disabilities the Claimant has become cruel and emotionally unstable; this is demonstrated by his flogging his children and beating and fighting his common law wife for which he was shielded from criminal proceedings by the intervention of his common law wife as to the probable cause of his antisocial behaviour.

[38] In his witness statement filed on December 1, 2010, the claimant accounts for the incident on September 15, 2004 and the treatment he received thereafter at paragraphs 2, 3, 15, 16 and 17.

[39] At paragraph 2 the claimant stated that on September 15, 2004 at about 4pm he fell 45 feet while belted on a pole at Harbour View, Kingston. He indicated at paragraph 2 – 3 that:

> I did not lose consciousness immediately. I was driven to the St. Joseph's Hospital, where a female doctor examined me and ordered that I should be transferred to the Kingston Public Hospital. I could not talk but I could hear. I could not turn my neck or move my feet or my hands. I lost consciousness about 7pm. I did not eat for 3 days and when I was fed it was by drip. **I was in hospital for 2 weeks**. I went home by taxi and paid $700.00.
>
> 3. While in the hospital doctors saw me 3 times per day and x-rayed me three times in the neck, chest and back. I felt great pain in the right side of my face, head, back and legs. Doctor gave me collar. They also gave me a neck support for sleeping, a waist band and a back support. I returned to the Kingston Public Hospital the 2/10/04. Doctors looked at me. I was in great pain. Doctors said I needed the help of a specialist doctor at the University Hospital of the West Indies i.e. the A & E Department.

[40] At paragraph 15 the claimant stated:

> When I fell 15/9/2004 I hit my chin and it was busted and bled. **My right knee was badly cut and my trousers had to be cut off to release me.** When I was taken by ambulance from the St. Joseph's Hospital to Kingston Public Hospital I was carried into an x-ray room and my hands, back, neck and feet were x-rayed. **My chin was cleaned and stitched up about 3 days after I had gone there. Doctor said I got 80 stitches. Doctor said my chin was fractured.** Put in Livingston Ward. Both my arms legs and

around my waist were strapped down on the bed. I was shaking and bawling for pain which was very severe. As I was strapped I fell asleep. My head was also tied up." (emphasis added by counsel for the 1st defendant).

[41] At paragraph 16 of his witness statement he stated that the following morning he was seen by a doctor. Dr. Lee gave him 2 injections and he was put on a drip for 4 days and told he should not eat. He was feeling a sticking pain in his neck.

[42] At paragraph 17 of his witness statement, the claimant stated that he was readmitted to hospital a week later and put back on drip.

[43] The witness Derrick Wright called on behalf of the claimant in his witness statement indicated that on September 15, 2004 he saw the claimant strapped to a pole and falling. He saw him bleed with a busted chin looking like dead after the accident. He pulled off his strap away from the fallen pole and he, along with others, took the claimant to St. Joseph's Hospital. He saw him transferred to the Kingston Public Hospital and he called the claimant's wife and took her to the Kingston Public Hospital.

[44] Mr. Norme Clayton in his witness statement indicated that about 4:30p.m. he was riding a motor cycle coming from Port Royal. When he reached a few chains from the Harbour View Round-a-bout he saw two men on a concrete line post which was approximately 45 feet tall. One about three-quarter way up, the other person nearer the bottom. When he was about one chain away he saw the post falling. The man at the bottom jumped off while the other man went down with the post. The post fell on the sidewalk slanting to the road in the sand stone and dirt. When it fell the top end of the post went up about 2 feet, fell back and went up and fell back again. The man was still strapped on the post by a leather belt. When he looked at the man he saw blood coming from his mouth, he was spitting blood and there was a lot of blood and dirt on his face. One of his upper limbs

was twisted behind him. From his account it is clear the man he saw strapped to the pole was the claimant in this matter.

[45] Sabrina Wilkins (Watson) in her witness statement indicated she married the claimant in 1998. In September 2004 she went to the Kingston Public Hospital and saw the claimant when he was brought in by an ambulance. He was unable to answer her when she tried to speak to him. He began vomiting blood about fifteen minutes after he came to the hospital and then he fell into a coma. She visited him every day and not until the third day did she hear him speak. About two weeks after the claimant came home wearing a collar for orthopedic support. When he came home he was not the Ricardo she knew. He was uncharacteristically aggressive to both her and towards their children and verbally and physically abused them. She further stated that about three weeks after the claimant came home she saw him biting his lips and foaming at the mouth. She rushed him to the hospital where he stayed for eleven days. She concluded her statement at paragraph 8 by saying, *"Prior to the accident in September 2004 Ricardo was a good and well behaved man, but since then he has become a danger to himself, his children and myself."*

[46] In respect of the medical evidence of the injuries of the claimant counsel for the 1st defendant submitted that the only medical reports that could assist the court in ascertaining the injuries sustained by the Claimant on September 15, 2004 were:

a) Complete Medical Records from the Kingston Public Hospital (KPH) – Exhibit A**;** and

b) Medical data from South East Regional Authority dated the 16th of November 2009 prepared by Dr. E. Martin Clarke – Exhibit 3.

[47] Counsel maintained that all the other medical reports relied on by the claimant were wholly unreliable as the claimant had not been truthful

about his medical history to the doctors who examined him. They therefore proceeded to make diagnoses without adequate information.

[48] I agree with counsel for the 1st defendant in part. Exhibits A and 3 provide medical information after the 2004 incident and prior to the 2009 incident. The only other medical report which provides information prior to the 2009 incident is the report of Dr. Amza Ali which queries the existence of epilepsy and is inconclusive in that regard. The other reports post the incident of 2009 would however not be wholly unreliable particularly as the opinion of Professor Morgan, which will be addressed in more detail later, is that the injuries he noted are a composite of all three accidents suffered by the claimant.

[49] The value of looking only at Exhibits A and 3 at this time is that they will provide a basis for comparison with the other reports when the court subsequently comes to tackle the unenviable task of seeking to determine what injuries and sequelae are attributable to the 2004 incident; bearing in mind the information deficit which would have affected the conclusions as to causation, arrived at by the doctors who were unaware of the claimant's full relevant medical history.

[50] At page 1 of the medical records from KPH (Exhibit A) the following notation was made for the 15.9.2004, the date of the accident

> 15/9/04 OC: Fell from post.
> HP is 33 yrs old. **No known chronic illness.** In previous accident on the job when # of lower limbs bilateral to head injury Type C. admitted. Where relatively well until 1 ½ hours ago when he fell from 40 foot pole hitting chin on way down.
> (emphasis added by counsel for the 1st defendant)

[51] At page 7 of the KPH medical records among other things it was noted for September 15, 2004 :

O/E a male patient not in obvious distress with cervical collar.
Bp [blood pressure] 130/70 pulse 68/m RR [respiratory rate][3] 20
Conscious, oriented TPP [time, person, place]

[52] At page 8 of the KPH medical records the observations were:

x-ray of the c spine
no fracture
no soft tissue injury
x-ray of the chest – NAB [No Abnormality]
x-ray of the pelvis – NAB [No abnormality]
Assessment - chin laceration

[53] At page 9 of the KPH medical records it details the observations made of the claimant from September 15, 2004 to September 18, 2004. Some are as follows:

16/9/04 CSWR
? C spine injury
Patient is walking around during ward round wearing cervical collar.
C/o [Complained of] – Nil
Ass. [Assessment] – stable
Recheck C- Spine Xray
Trace blood results

17/9/04 CSWR
? C- Spine injury
C/o – nil
Ass. – awaiting C- Spine x-ray

[3] The information in square brackets in the text from Exhibit A is an indication of the meaning attributed to the abbreviations used in the text.

18/9/04 SRWR

? C-spine injury

C/o nil

Repeat C spine Xray was review. No abnormality

P – home [Patient to go home]

No follow up

Analgesic

[54] The next visit the claimant had to the hospital in 2004 was on September 28, 2004 at 10:35am (page 10 of the medical records – Exhibit A) when he complained of dizziness, chest pain and neck pain. On page 11 the notation reads *"was admitted and discharged from hospital 1/52 ago. Complaining of pain in the neck and chest and dizziness. Young man in no CPD [cardio pulmunary distress] CNS, CHEST INTACT."* The observation on page 11 of the medical record was *"tenderness and mild swelling to L upper anterior chest."* The assessment on page 11 was "*blunt trauma to chest and neck. Repeat Brufen."*

[55] The Medical Data prepared by Consultant – Dr. E. Martin dated November 12, 2009 (Exhibit 3) outlines the following findings when the claimant presented on September 28, 2004 (13 days after the accident).

"HISTORY

Mr. Williams was seen in the A&E Department of Kingston Public Hospital on September 28, 2004 complaining of pain in the chest and neck and dizziness. He had a history of falling from a light post *on September 15, 2004 and was admitted to ward. He was discharged on September 18, 2004.*

FINDINGS ON EXAMINATION

Tenderness with swelling to the left upper anterior chest

INVESTIGATIONS

Nil

DIAGNOSIS

Blunt trauma to chest and neck
TREATMENT
Brufen Tablets
DISPOSAL
Sent home with Brufen tablets"
(emphasis added by counsel for the 1st defendant)

[56] The medical records of the KPH (Exhibit A) do not record the claimant visiting the hospital after September 28, 2004 until approximately 1 year later on September 16, 2005. He attended KPH and complained of losing consciousness while on a light pole one day before and then starting to see pebbles and his vision became foggy. He eventually had a blackout and was taken home. Later when he and he wife went to children's hospital for counseling, while walking up the staircase he started to have certain symptoms including foggy vision for one hour, generalized shaky movements and eye rolling. One of the things queried in the notes was whether he had a seizure disorder. He was admitted from September 16-17, 2005 and September 19-21, 2005. On September 21, 2005 he was assessed as having presumed seizure disorder with neuropsychiatric symptoms. (See pages 17-26 Exhibit A).

[57] I accept the submissions of counsel for the 1st defendant that in summary, based on the medical records of the claimant from KPH, the injuries the claimant sustained on September 15, 2004 were as follows: a) blunt trauma to chest and neck; b) pain in chest and neck; c) dizziness; d) tenderness with swelling to the left upper anterior chest; e) X-rays revealed no abnormality to C-Spine, no fracture to C-spine and no soft tissue injury; f) laceration to chin; g) pain in chin; h) no fractures.

[58] Counsel for the 1st defendant invited the court to reject the statements of the claimant that his right knee was badly cut, that his chin was fractured and that the doctor said he got 80 stitches as unsupported by the medical

evidence and in relation to the stitches as also being in breach of the hearsay rule.

[59] Counsel for the 1st defendant also submitted that the evidence of the claimant as to blackouts and fainting spells after September 15, 2004 and treatment he received up to 2008 should be viewed with suspicion and rejected wherever it was not supported by medical evidence, given his view that the claimant had a "blatant disregard for the truth".

[60] Accordingly, the claimant's account at paragraph 4 of his witness statement that in February 2005 he went to Kingston Public Hospital where he was tested by the doctor who told him he could do no hard work like the work he used to do and if he attempted not to use the collar his neck would hurt him greatly, counsel submitted should be rejected as no such record of attendance at the KPH was revealed in the records and it would also be hearsay. On the contrary counsel submitted the notation on the medical record is that on the 18th of September 2004 the x-ray of C-spine showed no abnormalities, no fractures or soft tissue injury and the patient was sent home with no follow up.

[61] The claimant's evidence at paragraph 18 of his statement is however supported by a record of his attendance at the KPH. His evidence is that on September 15, 2005 he had a fall on the Cedar Valley Road and woke up and found himself on drip for two days. The KPH medical records at page 12 noted:

> "15/9/2005 5:40pm PC blacked out today
>
> HP No known medical illness. Relatively well **until today while working on JPS pole** blacked out. Upon this event patient describes short of breath, central chest pains, palpatations ad blacking out." (emphasis added by counsel for the 1st defendant)

[62] At paragraph 6 - 7 of his statement the claimant's evidence is that he was admitted at the KPH on September 23, 2005 for 11 days. The KPH record however does not substantiate this. At paragraph 8 of his witness statement the claimant's evidence is that on the May 25, 2007 he went to Dr. Michele Lee who tested his eyes, ears, hands, feet and whole body. He was *blocking out in the sun and he went to see Dr. Lee who prescribed tablets for him*. No medical record supports this visit. The court notes however that in the Report of Dr Amza Ali dated February 9, 2009 Dr. Michele Lee is noted as the referring physician.

[63] At paragraph 9 of his statement his evidence is that he has been having a sticking sensation in his neck since January 2008 and he started wearing a back strap since June 2008. His evidence was that the pain in his back prevents him from sleeping.

[64] At paragraphs 10 and 14 of his witness statement the claimant gives additional evidence of blackouts in March and October 2008, but these occasions were not supported by any medical evidence. In his further witness statement dated March 14, 2011 at paragraphs 17-20 the claimant gives four further instances of blacking out, two in January 2011 and two in February 2011. However on none of these occasions did the claimant go to a doctor afterwards.

Issue 3: Did the claimant sustain head injuries in an accident in 2009 and if so what was their effect?

[65] At paragraph 18 of his first witness statement dated December 1, 2010, the claimant briefly mentions that *"In August 2009 I also went back to Kingston Public Hospital."* The medical records from KPH (Exhibit A) however disclose significant relevant details.

[66] Page 27 of those records indicate that on August 28, 2009 "*The patient was brought into by some friends. No detailed history got when we*

examined the patient. Presently complains of pain in the right limb." At page 28 of the medical records *"active nose bleeding"* was recorded. At page 31 the Assessment (A) was moderate – severe head injury. "Admit to 2N." The notation on the medical record was "Asked to sedate patient for CT Scan. Patient apparently fell from a height sustained skull fracture # of humerus, head injury."

[67] Having reviewed the KPH records Professor Morgan in his report dated December 23, 2011 at page 2 gave an account of the injuries sustained by the claimant as follows:

> On August 28, 2009, he was brought to the KPH in a "drowsy state" unable to give a history. It was reported that he had fallen from a height. At the time of admission, he was restless and experiencing pain in the right upper limb. **He was assessed as having a severe head injury. The GCS of 5 (E_2, M_1, V_2) indicated that his head injury was severe**. By the following day the GCS had improved to 14 (E_4, M_4, V_5). He required sedation for imaging studies.
>
> Xrays showed that there was a fracture displacement of the lateral condyle of the right humerus.
>
> **Skull X-rays showed fractures of the right parieto –temporal bones of the skull and that there was minimal displacement.**
>
> **CT brain scan showed that there was contusion of the left fronto –temporal area.**
>
> He was evaluated and treated by the neurosurgeons and orthopedic surgeons. His level of consciousness improved and he was discharged home on August 31, 2009**.** (emphasis added by counsel for the 1st defendant)

[68] In cross examination however the claimant denied reporting that he had fallen from a height in 2009 and had to be carried by a friend to the

hospital. He denied that his nose was actively bleeding and that he had a fracture to his skull and injury to his elbow. His evidence in cross-examination was that his "hand break" between his elbow and wrist and the only reason he was admitted was because of the fracture to his hand**.**

Issue 4: What injuries and effects can the court attribute to the accident in 2004?

[69] Counsel for the claimant relied on the medical reports of Dr. Dwight Webster (Exhibits 5A and 5B), Dr. Tamika Haynes-Robinson (Exhibit 9), Professor Crandon (Exhibit 6), Dr. Wendel Abel O.D. (Exhibit 7) and Dr. Ottey (Exhibit 4) who all attributed the aspects of the claimant's condition to which they spoke, as having been caused by the accident of September 15, 2004. Counsel for the claimant also highlighted that Professor Morgan who was called on behalf of the 1st defendant in counsel's words, "conceded" that the axonal injuries described in the medical report of Dr. Golding (Exhibit 8) could have been caused by the fall in September 2004.

[70] On the other hand counsel for the 1st defendant submitted that save for the complete medical records from Kingston Public Hospital, the medical records relied on by the claimant could not assist the court in assessing the injuries received by him in 2004 as the claimant in giving the history of his injuries deliberately failed to disclose to the doctors that he sustained:

a) a head injury in 1997 which resulted in him developing epilepsy and experiencing recurrent syncopal episodes involving loss of consciousness and dizziness; and

b) a moderate to severe head injury in 2009 namely skull fracture.

Further counsel maintained that in giving his medical history the claimant in many instances exaggerated the extent of the injuries he sustained in 2004.

[71] As previously indicated the view of the court is that the reports are all useful in so far as they chronicle and disclose the full injuries and disabilities of the claimant. As the cases indicate, apportionment between competing causes can only fairly be undertaken from the starting point of an assessment of the full extent of the injuries suffered by the claimant. However to the extent that the reports were complied in ignorance of the 1997 and 2009 accidents their conclusions as to causation, in particular that the 2004 incident was the sole cause of the claimant's injuries would be incorrect.

[72] The court will therefore have to rely on the KPH records (Exhibits A and 3) and on the reports of Professor Morgan particularly after he was advised of the occurrence of all three accidents in seeking to arrive at the correct apportionment of injury and damage occasioned by the 2004 incident. However the first requirement is a full appreciation of the extent of the claimant's injuries; then the vexed issue of the causative factors attributable to the 2004 accident will be resolved as best as the court can in the circumstances.

The Medical Reports

Dr. Amza Ali Consultant Physician and Neurologist – February 9, 2009 (Exhibit 2)

[73] The History/Examination of this medical report states "Patient presented with a history of headaches and syncopal episodes? Secondary to head injury sustained in 2005." There was no mention of a previous accident in 1997 in the patient's history nor of the fact that he had recurring syncopal episodes from 1998." Dr Ali conducted a routine awake and sleep electroencephalogram. No epileptiform discharges were recorded. However he noted that "…a normal EEG does not rule out the possibility of epilepsy, as this can be interictally normal even in a patient with definite epilepsy."

Dr. Franklin Ottey (Consultant Psychiatrist) – December 15, 2009

[74] Dr. Ottey found that the claimant was suffering from a Chronic Adjustment Disorder with Anxiety and Depressed Mood with the accident of September 2004 and the ensuing symptoms and problems being the stressor. He assessed his mental impairment on the Global Assessment of Functioning (GAF) at 65 meaning that he was functioning at 65% of his full overall psychological functioning.

[75] It is however worthy of note as pointed out in the submissions of counsel for the 1st defendant that in relaying his history to Dr. Ottey the claimant omitted to mention the head injuries he had received both in 1997 and in August 2009 only a few months prior to the time of Dr. Ottey's examination. While omitting relevant data on the one hand he exaggerated the injuries he sustained on the other hand, in relation to the history he gave of the accident in 2004. He told Dr. Ottey that, "*He also injured both arms and broke and lost several teeth….He was treated as an inpatient for several weeks and then as an outpatient and had last attended the orthopaedic clinic there as recently as about 3 weeks ago."* There is however no medical record of the claimant sustaining injury to both arms and losing teeth in 2004, nor was he admitted as an inpatient for several weeks in 2004. The medical record from the KPH is that he was admitted for 3 days. It is also important to note that at the time of this assessment the claimant did not complain of cervical pain.

Dr Dwight Webster (Consultant Neurosurgeon)

– March 4, 2010

[76] In his first report Dr. Webster indicated that the claimant's chief disability related to his psychosocial problems with the stressor being the accident of September 2004. He noted that he continued to have posttraumatic headaches and cervical pain. He stated that there was the possibility that

his recurrent syncopal attacks could be seizure related. He calculated his combined disability as 16% of the whole person.

[77] The examination from which this report was generated was conducted on November 13, 2009 approximately 2 ½ months after the August 28, 2009 accident. No mention was however made by the claimant of the skull fracture he sustained in that incident, nor of the head injury suffered in 1997. There was also exaggeration of the extent of the injuries he received in 2004. The indication in the report that, "*He reportedly sustained trauma to the head, neck, upper limbs and chest. Blood was noted to be coming from the nose, mouth and ears,"* is not supported by the KPH records.

– March 13, 2011

Following a MRI of the claimant's brain and cervical spine done by Dr Trevor Golding Consultant Radiologist on February 10, 2011 and his report of February 11, 2011, Dr. Webster reviewed the claimant on March 11, 2011. Again there is no indication in this report that Dr. Webster was made aware of any other accident other than that of September 2004.

[78] Dr. Webster indicated that the MRI of the brain showed:

a) Mixed pattern of post traumatic gliosis and cyctic encephalomalacia of the left inferior temporal gyrus and left infrontal lobe convexity.

b) Focal cystic encephalomalacia of the left inferior frontal gyrus

c) Maxillary and ethmoid sinutitis.

[79] Dr Webster noted that the claimant had been seen by Dr. Tamika Haynes-Robinson and recounted her findings. He further indicated that the MRI brain findings were significant and further supported a history of traumatic brain injury. The MRI of the cervical spine was normal. In his opinion the claimant needed long-term psychological/psychiatric treatment.

Professor Ivor Crandon (Consultant Neurosurgeon) – September 13, 2010

[80] Professor Crandon had available to him for the purpose of his medical assessment the following reports:

a) Kingston Public Hospital (Dr. K. Lawson, Consultant) dated 16/10/09.

b) Dr. Amza Ali (EEG report) dated 9/2/09

c) Dr. F. Ottey, Consultant Psychiatrist dated 15/12/09

d) Dr. Dwight Webster, Consultant Neurosurgeon dated 4/3/10

[81] Counsel for the claimant pointed out that at no time was a medical report by Dr. Lawson ever put in evidence. He however surmised that Dr. Lawson by his report must have made reference to any injury sustained on August 28, 2009 since he was a consultant doctor at the Kingston Public Hospital. He continued that still Dr. Crandon found that the injury for which the claimant suffered was sustained September 15, 2004. With due respect to counsel for the claimant that reasoning embraces legal sophistry. There is absolutely no mention anywhere in Professor Crandon's report of the 2009 incident. There is accordingly no basis to suppose that it must have come to his attention. Instead at page 3 of his report without reference to any other incident Professor Crandon said doubtless Mr. Wilkins had suffered a traumatic experience with the fall from the light post. He indicated the claimant's condition was consistent with chronic pain syndrome against a background of depression with suicidal ideation. He indicated the claimant exhibited abnormal behavior in a social context and had mental status impairment.

[82] Counsel for the 1st defendant however highlighted some other important aspects of Professor Crandon's report. On page 2 Professor Crandon noted that the claimant "*did not fill out the past medical history form and*

therefore details of his past medical history were unavailable." The claimant was accompanied on this occasion by his attorney-at-law. No mention was made in the report of recurring syncopal episodes from 1998 or of the skull fracture in 2009. Professor Crandon on page 2 of his report also noted that, "*Cooperation was not full at all times during the examination, which was conducted with some difficulty. He groaned continuously during the examination, pointing to the anterior chest, right upper limb, which he indicated were the sight of severe pain. It was impossible to carry out a complete mental assessment. There was no evidence of dysphasia or dysarthria."*

[83] Counsel for the 1st defendant further pointed out aspects of the report where he submitted the claimant in his account exaggerated the injuries he received in the accident of 2004. Professor Crandon noted "*Mr. Wilkins was well dressed and was led into the office by Mr. Campbell, making short halting steps, wearing a cervical collar, with his eyes closed and groaning.* ***He had to be encouraged to sit, which he did slowly and with seemingly exaggerated postural adjustments****. He was initially non-communicative but in answer to direct questioning, he complained of* ***noticing blood on coughing, neck arm and leg pain, inability to straighten the three ulnar fingers of the right hand. He also indicated that he found it difficult to sleep…"***

[84] ***"****He gave an emotional and tearful description of a fall from a light pole in 2004 resulting in his* ***damaging his arms, legs*** *and chest and his subsequent admission to the Kingston Public Hospital." …There was extreme tenderness over the* ***right forearm hand*** *so much so that even taking the pulse was accompanied by marked protests of pain. The reflexes were normal and symmetrical… There was incomplete extension of the IIIrd to Vth fingers of the right hand. His gait was largely in the flexed position, dragging both legs in an atypical mode, uncharacteristic of a recognized neurological syndrome*."

[85] Professor Crandon concluded that *"Mr. Wilkins has reached maximum medical improvement at this stage, six years after the injury."* He noted that it was not possible for him to calculate the percentage of impairment of the whole person. (emphases added by counsel for the 1st defendant)

Dr Wendel Abel (Consultant Psychiatrist) – September 16, 2010

[86] Dr. Wendel Abel also saw Mr. Wilkins at the request of the defendants through Hart Muirhead Fatta. Dr. Abel to inform his opinion conducted:

a) An interview with the claimant Wilkins

b) A review of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

[87] Thereafter Dr. Abel diagnosed: a) Post traumatic stress disorder; b) Major depression – severe with suicidal ideation; and c) Alcohol dependence. Dr. Abel indicated the claimant's injuries were related to the accident of September 15, 2004. His opinion was that resulting from his injuries which prevented the claimant from functioning as he previously could, his self image, self perception, and how he saw the future had been impacted. He outlined that the claimant's pain might further negatively impact his mental health. He indicated that the claimant's injuries had negatively impacted on multiple areas of functioning such as: a) Role function; b) Social function; and c) Sexual function. He opined that early resolution of this matter was in the interest of the claimant in order to ensure that he got optimum treatment to facilitate the resolution of his symptoms.

[88] Counsel for the 1st defendant pointed out that Dr. Abel was not informed about any other injury than the one in September 2004. Further, that Dr. Abel was another doctor whose opinion suffered from the claimant also not having been honest in his report of the injuries he suffered in 2004. Counsel for the 1st defendant highlighted that the claimant reported that he "was admitted for **three (3) weeks.** He had **surgery to his neck, hand**

and fac… He informed that he recalled waking up in the hospital several days later and being restrained to the bed….. He stated that his **spine was twisted** people tease him and refer to him as an invalid". That account is unsupported by the medical records from the KPH.

Dr. Tamika Haynes-Robinson (Clinical Psychologist-Neuropsychology) – February 21, 2011

[89] Dr. Tamika Haynes-Robinson Clinical Psychologist-Neuropsychology saw the claimant February 21, 2011. Her assessment was based on the following:

a) Clinical diagnostic interview

b) Available medical records *(Reports of Dr. Dwight Webster – March 4, 2010; Professor Ivor Crandon – September 13, 2010; Dr. Wendel Abel – November 22, 2010; Dr. Trevor Golding – February 11, 2011; and Dr. Franklin Ottey – December 15, 2009)*

c) Neuropsychological assessment

d) Review of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition-Text Revision. (DSM-1V-TR)

[90] Dr. Haynes-Robinson's summary of her findings was:

a) Severe impaired verbal and visuospatial attention and concentration

b) Language and visuospatial ability severely impaired.

c) Learning and memory abilities results were severely impaired and may be deemed invalid due to suboptimal effort. His Full Scale IQ was 62 placing his performance in the extremely low range at the 0.1^{st} percentile when compared to same age peers

d) Overarching adjustment and emotional disability appear to affect his cognitive functioning. However it was noted that his emotional and psychological distress state may have been influencing the severity of dysfunction at the time he was seen.

[91] Her neuropsychological diagnoses were Major Depressive Disorder and Traumatic Brain Injury. Counsel for the 1st defendant however pointed out that Dr. Haynes Robinson's report on the health history was *"no significant health problems before 2004"* which was not the case

The Reports and Testimony of Professor Owen Morgan

[92] The following medical reports of Professor Owen Morgan O.J.,C.D.,JP, were tendered into evidence namely:

a) *Medical report dated May 13, 2011 tendered by the claimant - (Exhibit 1)*

b) *Medical Report dated December 23, 2011 tendered by the 1st defendant – (Exhibit 10)*

c) *Medical Report dated December 1, 2013 tendered by the 1st defendant – (Exhibit 11)*

d) *Medical Report dated December 9, 2013 tendered by the 1st defendant – (Exhibit 12)*

Medical report (May 13, 2011)

[93] At the time of this medical report Professor Morgan had to inform his opinion the medical reports of the following doctors the findings of whom he summarised as indicated:

a) Dr. Franklin Ottey – A chronic adjustment disorder with anxiety and depressed mood, a result of the accident.

b) Dr Dwight Webster - Mild head injury with persistent headaches and possible seizure disorder; soft tissue cervical injury; post-traumatic psychosocial disorder.

c) Dr. Tamika Haynes-Robinson - Major depressive disorder. Traumatic Brain Injury.

d) Dr. Ivor Crandon – Traumatic experience from fall. Chronic syndrome against a background of depression and suicidal ideation.

e) Dr. Wendel Abel – Post Traumatic Disorder – resolving. Major Depression – severe suicidal ideation. Alcohol dependence.

f) Dr. T. Golding – MRI Brain – Mixed pattern of Post-traumatic gliosis and cystic encephalomalacia

g) Dr. Amza Ali – EEG. – Normal

[94] In this report Professor Morgan explained that:

> The pathology of head injury included a spectrum of changes. Underlying all non-penetrating brain trauma is diffuse axonal injury a condition in which axons are either sheared at the time of impact or degenerate soon thereafter. Superimposed on these inevitable changes, may be contusions which represent haemorrhage mixed into tissue and haematomas which are more focal collections of blood.
>
> In more severe cases encephalomalacia –softening of brain tissues from haemorrhage or inflammation- results. All of these events impair brain function. In the case under review these findings were reported by the radiologist.
>
> In support of this determination is the fact that (1) He was unconscious and remained in this state for four days, (2) Now experience persistent headaches – not present before the accident, (3) Falls frequently without being aware of events during that time and need to have medical assistance. I believe

> these are epileptic attacks, (4) The grossly abnormal MRI brain findings- encaphalomalacia, softening and gliosis (scarring)…
>
> The evidence for a post-traumatic pain disorder, depression and stress disorder has been made and I support the view that Mr. Wilkins is suffering from post traumatic epilepsy as well. Noting the date of the injury 2004, it is unlikely that any further improvement of brain function will occur and his deficits are permanent and irreversible.

[95] Professor Morgan's assessment was, *"The injuries have no doubt impacted on many areas of function it is my considered opinion that the clinical picture being exhibited epilepsy, depression, uncompromising and relentless headaches represents consequences of a post traumatic state secondary to the head injury sustained on September 2004."*

[96] Professor Morgan's evidence in chief was that at the time of providing his first medical report he was unaware that the claimant sustained head injuries in 1997 and 2009. At page 3 of this medical report Professor Morgan noted similarly to other doctors that ***"It was extremely difficult to obtain a history from him***." From the report it is clear that only the 2004 accident was mentioned.

[97] The claimant also exaggerated the injuries he received in 2004. Based on the history given Professor Morgan indicated in his report that "He sustained ***multiple injuries to the head and neck, both arms, fractured ribs and lost several teeth***." He does not recall being taken for treatment to the Kingston Public Hospital where he was in an **unconscious state for four (4) days**. He was ***discharged from hospital three weeks after admission.*** (emphasis added by counsel for the 1st defendant). The areas highlighted were not supported by the medical evidence from KPH, and as indicated in the extract of his report these exaggerated injuries informed Professor Morgan's assessment.

Medical Report (December 23, 2011)

[98] Professor Morgan became aware of the 2009 accident which occasioned injuries including fracture to the claimant's skull. Professor Morgan did not however at this time know of the 1997 accident and resultant injuries. Professor Morgan reviewed the records of the doctors and nurses who attended the claimant. It is important to note that his medical report bears out the KPH records that the suspicion of the cervical spine injury was not confirmed in September 2004.

[99] Professor Morgan's report also highlights the KPH records of the injuries sustained in 2009 (the second incident) namely:

a) A fracture displacement of the lateral condyle of the right humerus

b) Skull x-rays showing Fracture of the right parieto-temporal bones of the skull

c) CT Brain scan showed contusion of the left fronto-temporal area

[100] Professor Morgan commented on the previous reports submitted and noted that *"the experts would not have been able to pronounce on the importance of the second incident as they would not have had prior knowledge of its existence."* It was Professor Morgan's opinion that *"**the clinical and radiological findings indicate that the Second Incident was a severe injury and must have contributed to the final outcomes of this patient** who now experiences a post traumatic seizure disorder, depression, persistent headaches, behavioural disturbances and other psycho-social problems. An assessment of his present state must recognize the first and second incidents in the genesis of his disabilities."* (emphasis added by counsel for the 1st defendant). Professor Morgan assessed the combined total disability of the claimant as 20 -25% of the whole person.

Medical Report (February 10, 2012)

[101] Professor Morgan indicated that his assessment of disability was based on the combined effects of injuries received in the 2004 and 2009 incident. He further stated that *"If Mr. Wilkins had been examined and evaluated before incident 2 (2009 incident) it would have been possible to determine the contribution of each injury to his clinical condition. Incident 2 (2009 incident) undoubtedly contributed to the findings which I reported on December 23, 2011."* He concluded *that "I am unable to state which of the injuries was responsible for a particular outcome but Incident 2 by virtue of its severity, played a major role in the composite picture exhibited on the occasion of my examination."* (emphases added by the 1st defendant)

[102] In examination in chief, Professor Morgan's evidence was also that the 2009 incident was more severe than the one in 2004. Counsel for the 1st defendant submitted that this report underscored how the claimant's non-disclosure of his injuries in 2009 to his medical advisors and the court's experts have severely affected the ability of the experts to properly assess the disabilities, if any, he sustained as a result of the 2004 accident.

Medical Report (November 20, 2012)

[103] In this report Professor Morgan indicated that the claimant was suffering from seizures of a complex partial nature and that the diagnosis of seizure disorder was made in 2004. Counsel for the 1st defendant however submitted that the conclusions in this report ought to be disregarded as at that time Professor Morgan did not have knowledge of the claimant's injuries in 1997 or that he developed epilepsy from then.

Medical Reports (December 1, 2013 & December 9, 2013)

[104] In 2013 the defendant's attorneys disclosed to Professor Morgan the fact of the claimant's 1997 accident in which he sustained head injuries and which was not previously disclosed to any of the medical experts.

[105] In his report dated December 1, 2013 Professor Morgan referred to the medical report of Dr. Graham dated April 3, 1998 and concluded ***"the syncopal attacks experienced by the Claimant in 1998 were in all likelihood epileptic seizures which had been present before August 2004.*** The first mention of the presence of skull fractures was in August 2009." Professor Morgan concluded that "***it could be argued that Mr. Wilkins had suffered from epileptic seizures of a idiopathic nature ie of undetermined origin prior to 2004 and that his head injuries rendered him more susceptible to seizures."***

[106] In his report dated December 9, 2013 Professor Morgan indicated that *"From the report of Tuesday April 3, 1998 the complaints of dizziness and loss of consciousness – described as syncopal attacks – which caused Mr. Wilkins to visit the Casualty Department, suggest that the episodes of loss of consciousness were of a recurrent nature and could have been epileptic in nature. <u>This observation would therefore impact the view that epilepsy was caused by the injury sustained in 2004."</u>* (emphasis added by counsel for the 1st defendant.)

[107] Professor Morgan went on to state in his December 1, 2013 report that his figure of 22 – 25 % disability to the whole person was reasonable. In his December 9, 2013 report he explained that this represents the measurement of disability "resulting from all 3 injuries." This was explained again in examination in chief to mean his aggregate disability, Professor Morgan's evidence being that it was difficult for him to apportion the disability. According to Professor Morgan the combined disability of all three injuries (1997,2004 and 2009) was broken down as follows:

> Mr Wilkins has post traumatic epilepsy with psychoses of a violent nature. They may be characterized as ictal, postictal, and chronic interictal psychoses. …Post traumatic epilepsy of the partial complex seizure type with psychoses is quantified at 20% and post traumatic headaches at 2%, giving a total of 22%.

Analysis

The Credibility of the Claimant

[108] The credibility of the claimant is a central concern of the court in seeking to determine which injuries were suffered by the claimant in 2004 and their resultant effect. As highlighted by counsel for the 1st defendant the claimant has engaged in consistent non-disclosure of the accidents of 1997 and 2009 and on the other hand on more than one occasion exaggerated the injuries suffered in 2004 in his reports to doctors consulted.

[109] Counsel for the claimant in response downplayed the non-disclosure submitting that the accident of 1997 was not serious. This he said was evidenced by the fact that the claimant was back at work within two weeks after that accident and was at work when he fell with the pole in 2004. In respect of the accident of 2009 the submission of counsel for the claimant, which will be addressed in more detail later in this analysis, is that the accident of 2009 was a continuing effect of the injuries suffered in 2004. A reality which was unknown to the claimant and one which it should be found he did not deliberately conceal, given that, if the view was accepted that the 2009 injury was the result of sequelae from the 2004 incident, to reveal it would have been beneficial to the claimant.

[110] The facts speak for themselves. The claimant, (and his counsel), would have been aware of the incident in 1997 and resultant action brought by the claimant in 1998, at the time he went to see the myriad doctors he consulted in this case. In that 1998 claim he indicated he was severely injured having suffered, he claimed, a fracture to the skull, (later shown not to be the case though he did receive a head injury), inability to stand up to exposure to the sun and inability to work in any meaningful way — to the extent where he claimed 96 weeks loss of earnings!

[111] That undermines the submission of counsel for the claimant that the injuries sustained in the 1997 accident were not serious. Additionally the strenuous disavowal of his affidavit in which he set out those injuries and maintained that they were serious, indicated to the court the extent to which the claimant would go to avoid that which he viewed as being unfavourable to his case against the defendants. Critically this conduct has to be viewed in the light of the fact that the list of injuries from the 1997 injuries mirror closely some of the injuries that the claimant claims he suffered in 2004 and which he maintains are the cause of his problems.

[112] The non-disclosure of the 2009 incident cannot be “papered over” in the manner suggested by counsel for the claimant. It has not escaped the court that a flurry of medical consultations occurred after the accident of 2009. It is true that the EEG done by Dr. Ali in search of signs of epilepsy, which was inconclusive, was done prior to the fall from height in August 2009. However all the other reports are post the 2009 accident. Why is this so? Is it that it was just coincidence that it was after the 2009 incident that the claimant decided to actively pursue assessment of the injuries received in 2004? Or could it be as counsel for the first defendant suggests that it was because the 2009 accident caused severe injuries?

[113] The lack of even a passing reference to the 2009 incident in the reports of his history to the several doctors, I find to be deliberate and misleading non-disclosure, just as was the failure to disclose the 1997 incident. It is interesting that though counsel for the claimant suggests the claimant did not mention the 2009 accident as it was merely a continuing effect of the 2004 incident, the claimant was keen, as has already been demonstrated, to record several incidents of falling down or blacking out, to the extent that he even gave a further statement filed March 14, 2011 in which he recounted additional incidents when he claimed he blacked out subsequent to his appearance in court January 2011. It is clear therefore

the non-disclosure of the 2009 incident as I have already indicated, was calculated to deceive.

[114] The claimant withheld critical information. That however was not his only evidential vice. That which he disclosed was often subject to significant exaggeration. He is a master of hyperbole and sometime purveyor of untruth. Professor Crandon's detailed account of the dramatic entry of the claimant into his office led by his counsel in this matter, the claimant's behaviour during the assessment and Professor Crandon's observation that his gait was not typical of any known neurological condition, supports the view that the claimant was exaggerating his injuries.

[115] This court was not spared the dramatic talents of the claimant either. The court vividly recalls the claimant being called to give evidence and proceeding to the witness box haltingly dragging a bag of tools. It was only after the court's query of his counsel as to how tools could assist in the determination of the quantum of damages that that dramatic ploy was abandoned. Subsequently while sitting in court, during the evidence of other witnesses, the claimant wearing a neck collar sat prominently in the face of the court, two pill containers in his outstretched hand trying his best, in the view of the court, to look like death warmed over. This in stark contrast to the belligerence with which he responded to counsel, when he was later cross-examined by Mr. Foster Q.C.

[116] The several instances, highlighted by counsel for the 1st defendant, of the claimant exaggerating the injuries he suffered in 2004 to more than one doctor behooves the court to look with extreme caution at any claims of injuries and their sequelae made by the claimant, which are unsupported by medical evidence. Simply put the credibility of the claimant is in tatters.

What were the 2004 injuries and sequelae?

[117] The question remains in the context of the non-disclosure and the exaggeration of the claimant, what injuries and sequelae can properly be attributed to the 2004 accident? The submission of counsel for the claimant was that regardless if there was a residuary and latent epileptic condition subsisting in the claimant on September 15, 2004, the condition did not prevent him from working as a linesman. The court is being asked to find on the evidence that it was by 2005 following the accident of 2004 that the claimant had developed a seizure disorder, rendering him unfit for the work that he was trained in.

[118] Referring to the results of the MRI conducted by Dr. Golding, counsel for the claimant submitted that those serious brain injuries could not have come from any possible injury that occurred to the claimant prior to September 2004. Counsel relied on the findings of the several doctors who all pointed to the accident of 2004 as being the cause of the claimant's troubles based on the history they had been given by the claimant.

[119] Further as addressed earlier in the context of non-disclosure, counsel asked the court to view the injuries of 2009 as a continuing injury from 2004. This he submitted based on the fact that apart from the evidence of the claimant there was evidence from Marie Dixon that prior to the incident of August 28, 2009 the claimant had been suffering from fainting spells. Counsel advanced that a significant feature of the injury sustained August 28, 2009, according to the hospital records in evidence was that within a matter of days the claimant had shown the same level of improvement that he showed after the September 15, 2004 injury was sustained.

[120] Counsel for the claimant also pointed to the fact that even after Professor Morgan became aware of all three accidents Professor Morgan indicated in his testimony that the axonal injuries (brain injuries) he commented on

in his first report, could have been caused by the accident of September 2004. He therefore asked the court to find that the pivotal and operative injury were those sustained in 2004 with the head injury suffered in 2009 being a continuation of the 2004 injuries.

[121] Counsel for the 1st defendant maintained his submission that the KPH records were the only true indication of the injuries suffered by the claimant in 2004. I accept that from the KPH records the injuries sustained in 2004 were as follows: a) blunt trauma to chest and neck; b) pain in chest and neck; c) dizziness; d) tenderness with swelling to the left upper anterior chest; e) X-rays revealed no abnormality to C-Spine, no fracture to C-spine and no soft tissue injury; and f) laceration to chin, pain in chin.

[122] The claimant remained in hospital for three days from September 15 to 18, 2004. And again presented at hospital September 28, 2004 when he was sent home with Brufen tablets. Significantly he did not present at the KPH again until September 15, 2005 when he complained of having blacked out while on a pole. It was clear therefore that he was fit enough to have been working.

[123] After the visit in 2005 the medical records of KPH reveal he next returned in August of 2009 — almost 4 years later when he sustained a fracture to his skull. I agree as submitted by counsel for the 1st defendant that the long absence from the Kingston Public Hospital indicates that the injuries the claimant received in 2004 were not as serious as made out by the claimant and likely did not seriously affect his pre-existing epileptic condition.

[124] What is clear is that the bulk of the claimant's medical records from KPH relate to his 2009 injuries (pages 27 – 75) and the claimant visited psychiatrists and neurologists after the skull fracture in 2009. The medical records and opinion of Professor Morgan confirms that the claimant's injuries in 2009 were far more severe than 2004 in that he sustained a

skull fracture in 2009 which he did not in 2004. In addition in 2009 he also fractured his humerus. There is no basis for the conclusion urged by counsel for the claimant that within a matter of days the claimant had shown the same level of improvement that he showed after the September 15, 2004 injury was sustained. The fact that in both instances the claimant was discharged after three days cannot be the only basis for comparison. It also has to be borne in mind the opinion of Professor Morgan that the 2009 injury to the head was moderate to severe and that it was after the 2009 injury that the claimant sought a wide range of specialised medical care.

[125] Professor Morgan's evidence was clear that the claimant's total permanent whole person disability of 22% represents the combined disability of all three accidents. 20% of whole person disability relates to post traumatic epilepsy of the partial complex seizure type with psychoses. Counsel for the 1st defendant submitted and I accept that the greater portion of disability arising from epilepsy must be attributable to the 1997 and 2009 accidents.

[126] Professor Morgan assessed the total disability rating for the persistent headaches at 2%. As pointed out by counsel for the 1st defendant, the claimant on his own account suffered persistent headaches and inability to stand in sun from 1998. He was admittedly however working outdoors at the time of the accident in 2004. There were however no recorded complaints of headaches in 2004 or 2005 when he went to the KPH. I agree with counsel for the 1st defendant that the complaints of headaches resurfaced after the 2009 incident and therefore none of the 2% disability rating for headaches should be attributable to the 2004 incident.

[127] Professor Morgan in his evidence in chief and medical reports was clear that he could not specifically assign a disability rating to the 2004 accident. In his medical report dated February 10, 2012 he indicated that he would

have been able to do this if Mr. Wilkins had been examined and evaluated before the 2009 accident. However that opinion was proffered when Professor Morgan was still unaware of the incident of 1997. Counsel for the 1st defendant submitted that the court should not embark upon a speculative exercise to assess whether, or if at all, the 2004 injury aggravated the epilepsy, simply because Professor Morgan had given a composite disability in relation to the three injuries. He argued that Professor Morgan had only done this because he did not have the requisite medical history which had been concealed by the claimant. Counsel submitted that the suppression of information was deliberate and the claimant should not be permitted to enjoy an unfair advantage because of his dishonest conduct.

[128] The fact of non-disclosure to all of the doctors except Professor Morgan of the injuries sustained in the 1997 and 2009 incidents prevented those doctors from assisting the court with any view disaggregating the effects of each injury. Had there been full disclosure however it is likely it would still have been difficult for the doctors to indicate the separate effects of the 2004 and 2009 incidents as he did not present for examination by them prior to the 2009 incident. Their reports are therefore useful to the extent that they reveal the claimants full disabilities, but unhelpful in so far as any disaggregation into which incident caused or aggravated certain conditions.

[129] Professor Morgan was clear in his final assessment that the claimant's total permanent whole person disability represents the combined disability of all three accidents. I have already indicated why in agreement with counsel for the 1st defendant based on the evidence, I have found that the 2004 incident did not contribute to the 2% disability for headaches. There is however evidence of synchopal episodes after the 2004 incident. It is true the claimant was suffering such episodes from at least 1998 and that given the tenuous nature of the claimant's credibility, the court, even on a

balance of probabilities, has some doubt concerning the veracity of some of the claims of blackouts and fainting spells. However, some of these episodes were supported by other witnesses such as Marie Dixon and Sabrina Wilkins (Watson) and I accept there were some continuing episodes. I also accept the evidence of Professor Morgan that all three accidents would have contributed to the disability he assessed.

[130] Stripped down to their core and devoid of the exaggerations of the claimant, the injuries suffered by the claimant in 2004 do not appear to be that serious. The epilepsy suffered by the claimant was present from 1998. The injury of 2009 was far more severe involving a fractured skull and brain injury. In 2004 so far as head injuries are concerned the claimant suffered a laceration to the chin, but no fracture to the head or cervical spine. The court will not engage in speculation. It is however the nature of the work of the court to make the best approximations possible based on the evidence available, especially when other professionals are unable to come up with exact apportionment. That was the task the courts had to perform in the cases of ***Holtby v. Brigham & Cowan*** and ***Allen & Ors v. British Rail Engineering Ltd. & Anr.*** and that is the task this court has to complete.

[131] Bearing in mind the prior existing condition of epilepsy from at least 1998, the extent of the injuries in 2009 when compared to those of 2004, and the evidence of blackouts especially where supported by evidence other than from the claimant, I find that the 1997 and 2009 incidents are responsible for 80% of the post traumatic epilepsy of the partial complex seizure type with psychoses, which accounts for 20% of the claimant's whole person disability. I therefore conclude that the 2004 accident is responsible for only 20% of the claimant's 20% whole person disability caused by post traumatic epilepsy. In other words I find the 2004 accident responsible for 4% of the claimant's 20% whole person disability caused by post traumatic epilepsy. Based on my earlier conclusion I find the 2004 accident is not

responsible for any of the 2% whole person disability caused by recurrent headaches.

Issue 5: ***What is the quantum of damages to be awarded to the claimant in respect of pain and suffering and loss of amenities for injuries sustained by him in the 2004 accident?***

[132] The injuries and sequelae from the 2004 accident for assessment of damages are therefore: a) blunt trauma to chest and neck; b) pain in chest and neck; c) dizziness; d) tenderness with swelling to the left upper anterior chest; e) X-rays revealed no abnormality to C-Spine, no fracture to C-spine and no soft tissue injury; f) laceration to chin, pain in chin; g) the claimant remained in hospital from September 15 to 18, 2004. Claimant presented at hospital again on September 28, 2004; and h) 4% contribution to 20% permanent whole person disability caused by post traumatic epilepsy of the partial complex seizure type with psychoses.

[133] Counsel for the claimant relied on the case of ***Julian Levy v. Swire, Rochester et al*** Khan's Recent Personal Injury Awards Vol. 5 at page 266 (June 16, 2000). This case is however wholly unhelpful. In ***Levy*** the claimant a 20 year old woman of sub-normal intelligence having missed the last bus to St. Thomas went to the Central Police Station for shelter. There she was raped by three police men with one of them additionally buggering her. She suffered laceration to the walls of her rectum, bleeding from the rectum and severe post traumatic stress disorder. She was awarded $5M for pain and suffering and loss of amenities with a further $720,000 for 5 years of future psychotherapy and medication. Using the September 2013 CPI the sum of $5M updated to $18,990,825.69. Counsel submitted that claimant's case is far more serious than ***Levy's*** based on the fact that in the instant case there exists the additional features of suicidal ideation, loss of his children and wife, vacuum in his life being unable to work, uncompromising and relentless headaches and criminal

irresponsibility causing injury to his wife and child. Counsel submitted these additional features of this case required an additional $15M to be added to the updated sum in Levy to arrive at an award of $33,990,825.69.

[134] I have outlined this case cited by counsel for the claimant in deference to the fact that it is the only case cited by him. However it is wholly dissimilar and does not assist the court in any way. The trauma suffered by the unfortunate victim in ***Levy*** could in no way be compared to the result of the claimant's injuries arising from the 2004 accident. It also assumes findings as to inability of the claimant to work, which as will be discussed subsequently, the court does not accept. Finally it is to be remembered that the award will only be in relation to the injuries which the court has found are attributable to the 2004 accident. Those are the only injuries for which the 1st defendant is liable.

[135] Counsel for the 1st defendant cited a number of authorities. In ***Henry Bryan v. Noel Hoshue & Wilbert Marriat Blake*** Khan Recent Personal Injury Awards, Vol. 5, page 177 (September 30, 1997) the plaintiff a 37 year old security guard, suffered the following injuries in a motor vehicle accident: shock, excruciating pains, dizzy spells, abrasions over the frontal region of the scalp, pain and suffering in back and severe headaches. He was treated at St. Ann's Bay Hospital and sent home. He later twice attended a private doctor. The assessment was that the injury was not serious and not likely to cause permanent disability. General damages was assessed at $350,000.00 which updated is $1,627,852.86 (November 2013). Counsel submitted the cited case was more serious than the claimant's case and that the award should be discounted to $1M.

[136] In ***Melvin Smith v. Others v. Deneice Brooks***, Harrisons Assessment of Damages page 149 the infant plaintiff was injured in a motor vehicle accident and was admitted into the Spanish Town hospital where she

spent three days. She was later transferred to the Medical Associates Hospital where she spent three (3) days. Her face was very swollen and she suffered from minor cuts and bruises. She was awarded a sum of $200,000.00 for pain and suffering and loss of amenities. This sum was upheld on appeal. This award when updated is $847,396.04 (November 2013).

[137] In ***Lincoln Anthony Scott v. Luxemburgh Salmon et al***, Khan's Recent Personal Injury Awards, Vol. 4, page 166 (December 1996) the plaintiff an advertising executive was injured in a motor vehicle accident on September 11, 1992. He suffered the following injuries: Trauma to head and neck, bruises to both knees, ¾" laceration to mid forehead and pain in left arm and trapezius. The plaintiff's lacerations were sutured at Andrews Memorial Hospital and he was given medication for pain. X-rays were done of skull and neck. He wore a neck brace for 2 weeks and had physiotherapy. The claimant in his evidence claimed that he had difficulties with his neck and that he was now unable to play tennis which he played regularly before the accident because when his neck moves suddenly, it was painful. He also had difficulty looking behind when he reversed his car and felt tired at the end of the day as fatigue would set in. He admitted that he recommenced driving 1 week after the accident. General damages for pain and suffering was awarded in the sum of $170,000.00 which updated is $851,622.91 (November 2013).

[138] In ***Gilbert McLeod v. Keith Lemard*** (March 1996) Khan's Recent Personal Injury Awards, Vol. 4, page 205 the plaintiff suffered the following injuries: pain and tenderness to right side of chest, multiple scattered abrasions to right thigh, knee and leg, 4cm laceration to right side of forehead, 5cm laceration to right foot and loss of consciousness. He was hospitalized for two days. General damages was awarded in the sum of $100,000.00. Updated this sum is $538,757.96 (November 2013).

[139] ***Manley Nicholson v Ena Thomas et al.*** Khan's Recent Personal Injury Awards Vol. 5, page 165 (January 2000), the claimant suffered from unconsciousness; whiplash to neck with soft tissue injuries, cerebral concussion, tenderness over junction of Thoracic and Lumbar spine, abrasion of the scalp in left pariento-temporal region and chest and back pain. The x-rays of the cervical spine were normal but those of the Thoracic spine showed mild scoliosis though no bony injuries were present. He was seen a few days later complaining of chest pains, persistent headaches, pain in the upper back and neck. He was awarded $450,000.00 for General Damages which sum was reduced on appeal to $250,000. This award updates to a sum of **$1,790,276.72** (November 2013). Counsel submitted the ***Manley Nicholson*** case was more serious than the instant case and the award should be discounted to $1M.

[140] In ***Claston Campbell v Omar Lawrence et al*** Suit No. C.L. C-135 of 2002 (unreported) the plaintiff sustained the following injuries in a motor vehicle accident: laceration to chin, trauma to chest resulting in severe chest pain and difficulty in breathing, trauma to back resulting in severe pain and swelling and difficulty walking for 3 weeks and whiplash injury to neck. His injuries caused him to stop playing all sports. General Damages of $650,000 were awarded which updated is $2,091,304.34. (November 2013). Counsel submitted the injuries in the cited case were far more severe than those suffered by the claimant in the instant case and therefore the award should be discounted to $1M.

[141] Accordingly counsel submitted a global sum of $1M for pain and suffering and loss of amenities was reasonable in all the circumstances. It should however be noted that in none of the cases cited either by counsel for the claimant or by counsel for the 1st defendant, was there any award made in relation to disability caused by epilepsy.

[142] In ***Gavin Stewart (b.n.f. Earl Stewart) v Ewen Haughton*** C.L. 201 S. 203 Khan's Recent Personal Injury Awards Vol. 6 page 203 (December 20, 2004) a student aged 20 at trial was injured in a motor vehicle accident on April 13, 2001 while being towed on a pedal cycle. He suffered the following injuries: unconsciousness, splitting of left ear lobe, deep laceration over forehead, fracture of left temporal bones, facial and periorbital swelling of the left side with complete closure of his palpebral fissure, reduced extra-ocular muscle movement, fracture to roof of left orbit and early post traumatic epilepsy.

[143] He was admitted to the Spanish Town Hospital and after initial treatment was transferred to KPH. A CT scan revealed diffuse axonal injury and hemorrhagic contusion in the left frontal lobe. He was treated with antibiotics and anti-convulsants. He made good neurological recovery and was discharged on April 24, 2001. He was reviewed in March 2004 complaining of left sided headaches associated with black outs and foggy vision. In May 2004 he was treated using Dilantin, his neurological evaluation was unremarkable and he was advised to continue Dilantin regularly for seizure control. He was then functioning independently, but carried a risk of having seizures in the future when compliance with medication was poor.

[144] In August 2004 he was referred to Dr. Ivor Crandon who reviewed previous CT scan notes and conducted his own examination. Gavin's brain scan showed low density change in the left frontal lobe with localised dilation of the left frontal horn of the lateral ventricle consistent with encephalomamalacia from his previous injury. He indicated that the claimant would have to take anti-convulsant medication for the rest of his life and his condition would have obvious limitations on his suitability for some types of employment. Dr. Crandon assessed the claimant as having permanent post-traumatic epilepsy with paroxysms that cause loss of

consciousness which caused a whole person impairment of 22%. He was awarded $2,900,000 for pain and suffering and loss of amenities.

[145] ***Gavin Stewart's*** case I find to be of great assistance in quantifying the damages that should be awarded for the contribution of the 2004 accident to the epilepsy suffered by the claimant in the instant case. In the instant case the whole person impairment caused by epilepsy is 20%. The overall injuries in the cited case also appear to be more serious that the injuries of the claimant in the case at bar. The difference is not that significant however as there are features in the instances case absent in the cited case such as psychoses including suicidal ideation. It is therefore appropriate to discount the global award to $2,650,000.00. This has to be further discounted by 80% to arrive at the figure that should be used for update in light of the conclusion that only 4% or 1/5th of the 20% whole person disability is attributable to the 2004 accident. The figure to be updated is therefore $530,000. Using the latest available CPI of 215.9 (June 2014) this updates to an award of $1,360,768.22.

[146] I am of the view that the other injuries caused by the 2004 incident should be compensated by a slightly higher figure than the $1M suggested by counsel for the 1st defendant. I find therefore that the appropriate global award for all the pain and suffering and loss of amenities suffered by the claimant as a result of the 2004 accident is $2.5M. $1,360,768.22 of this global figure represents the sum for the 4% contribution made by the 2004 accident to the claimant's 20% permanent whole person disability, caused by post traumatic epilepsy of the partial complex seizure type with psychoses.

Issue 6: Is the claimant entitled to damages for handicap on the labour market?

[147] At item 27 of the claimant's Second Further Amended Particulars of Claim it is claimed that, *"Because of his injuries the Claimant is unable to climb*

poles as he usually did to earn a living so that up to the 17/3/10 he has not worked and or earned and this condition will probably be permanent". The claimant is thereby alleging that he has a handicap on the labour market.

[148] Counsel for the claimant highlighted that the report of Dr. Haynes-Robinson and that of Professor Morgan dated May 13, 2011 reveal that the claimant had developed post traumatic brain disorder and was unable to learn. Professor Morgan comments on the encephalomalacia – softening of brain tissue for haemorraghe or inflammation that was found in the claimant by the radiologist. Professor Morgan states in that report it is unlikely that further improvements of the brain will occur and that the claimant's deficits are likely to be permanent and irreversible.

[149] However as submitted by counsel for the 1st defendant the claimant must first cross the hurdle of causation by proving that his earning capacity was reduced as a result of the 1st defendant's tortious act. In ***United Dairy Farmers Limited & Another v. Goulbourne (by next friend Williams)*** SCCA 65/81 (January 27, 1984) Carberry J.A. at page 5 of the judgment said in relation to awards, "*Awards must be based on evidence. A plaintiff seeking to secure an award for any of the recognized heads of damages must offer some evidence directed to that head, however tenuous it may be."*

[150] In ***Delroy Dobson v. John Hall Aggregates Limited***, (November 12, 2009), Lawrence–Beswick J opined at paragraph 14 of her judgment that:

> In matters concerning damages for handicap on the labour market, the court is asked to assess the plaintiff's reduced eligibility for employment or the risk of future financial loss. Evidence must therefore be adduced in order to prove the loss even though in arriving at an award under this head of damages there has to be some amount of speculation**.**

[151] The court has already held that the claimant suffered from a pre-existing condition of epilepsy which caused recurring syncopal episodes from at least 1998. The court has also found that the major causes of the epileptic condition of the claimant were due to the 1997 and 2009 accidents. The fact that the claimant has shown himself to be frequently unfamiliar with the truth, also does not advance his cause in seeking to fix liability on the 1st defendant for any handicap he may currently suffer.

[152] The fact is in the 1998 suit the claimant alleged, *"inability to work in any meaningful way".* Further he claimed for 96 weeks loss of earnings. However contrary to those claims counsel for the claimant advanced that the claimant was only off work after the 1997 accident for two weeks. If the claimant's claim was spurious in the 1998 claim might it not be similarly devoid of merit in relation to the present claim? The court however does not have to speculate. There is uncontroverted evidence that the claimant worked after 2004. When he presented to the KPH on September 14, 2005 almost a year after the 2004 accident he reported blacking out on a JPS pole while at work.

[153] Further I agree with counsel for the 1st defendant that it is also not credible that the claimant would be incapacitated by his injuries to the point where he could not work and yet not visit the KPH or some other medical facility on a regular basis during such periods of incapacitation. After October 2004, the claimant's next visit to the KPH was to report the blacking out in September 2005 — while working. He did not return to the KPH until the time of the third accident on August 28, 2009. This conduct I find was not consistent with someone who could not work because of the effects of his injuries. This conclusion is buttressed by the evidence of Mr. Wayne Francis whose evidence is that he employed the claimant as a linesman for 11 days between August 2006 and September 29, 2006. He indicated at paragraph 10 of his witness statement that he saw the claimant climb poles and perform highly physical manual labour satisfactorily. The

paragraph concludes as follows, *"When I saw him doing his work he did not appear to me to have any physical defect of disability at all, or I would not have hired him."*

[154] On the evidence therefore whether or not the claimant after the 2009 accident was incapable of working as he did before, after the 2004 incident there is no evidence that he suffered a handicap on the labour market. That is the only incident for which the 1st defendant is liable. There is therefore no basis for an award to be made under the head of handicap on the labour market.

Loss of Future Earnings

[155] For the same reasons that disqualified the claimant from receiving an award for handicap on the labour market the claimant is not entitled to any award for loss of future earnings. Such loss, if any, cannot be attributed to the accident of 2004.

Issue 7: Have the items and amounts claimed for special damages been specifically proven?

[156] During the course of the hearing, after counsel from Nunes Schofield DeLeon and Co took over the representation of the 1st defendant, issues arose concerning what had been agreed between Mr. George who first represented the 1st defendant and Mr. Ainsworth Campbell on behalf of the claimant.

[157] Mr. Ainsworth Campbell for the claimant maintained that the medical reports, save for those of Professor Morgan generated after the matter commenced as well as special damages amounting to $392,400.00 were all agreed. The notes of the court however only revealed that the very first exhibit, the report of Professor Morgan dated May 13, 2011 was admitted on the first day of the hearing. The court had no record of being advised of agreed special damages.

[158] Mr. Foster Q.C. undertook to consult with Mr. George concerning the agreed items. He subsequently indicated that Mr. George confirmed that he had agreed the medical reports but that he had not agreed special damages. On February 11, 2014 when the matter was first set for oral closing arguments the issue was again raised as Mr. Campbell maintained that the special damages had been agreed, while the court reiterated it had no such record and Mr. Foster Q.C. again advising he had no such instructions from Mr. George. The matter was adjourned to February 18, 2014 to facilitate the recall of the claimant to seek to tender certain receipts and invoices. However on February 18, 2014 Mr. Campbell advised he had not been able to secure the attendance of the claimant though he had been able to contact him. The receipts and invoices in relation to the proof of special damages were therefore never received in evidence and submissions proceeded.

[159] It is important to note before going further that even if there had been an agreement arrived at between Mr. George and Mr. Ainsworth Campbell, the question would have arisen as to whether or not any such agreement would have been vitiated by the critical non-disclosure subsequently revealed. There being no agreement the requirements of the law in respect of the proof of special damages had to be complied with by the claimant. The analysis conducted below, after the discussion of the law, will demonstrate that the court in determining what was proven was concerned not just with whether there was strict proof of a particular item of expenditure. The court was also and sometimes moreso concerned about whether the item of special damages could properly be laid at the feet of the 1st defendant.

[160] It has long been settled law that every head of claim for special damages must be properly pleaded and strictly proved. See for e.g. ***Stroms Brukes Aktie Bo lay v. Hutchinson*** [1905] A.C. 515. An early application of the principle in Jamaica can be seen in the Court of Appeal case of ***Robinson***

and Co. Limited & Jackson v. Lawrence (1969) 11 JLR 450. A comprehensive review of the relevant law in this area was undertaken by Cooke JA in ***Attorney General of Jamaica v. Tanya Clarke (nee Tyrell)*** SCCA No. 109 of 2002 (December 20, 2004). At pages 8 – 9 he stated:

> From the authorities reviewed I extract the following considerations:-
>
> 1. Special damages must be strictly proved:- **Murphy v. Mills[4]; Bonham-Carter v. Hyde Park Hotels Ltd.[5]; (supra)**
>
> 2. The court should be very wary to relax this principle: **Ratcliffe v. Evans[6];** (supra)
>
> 3. What amounts to strict proof is to be determined by the court in the particular circumstances of each case: **Walters v. Mitchell[7]; Grant v. Motilal Moonan Ltd. and Another[8] (supra)[9];**
>
> 4. In the consideration of 3. supra, there is the concept of reasonableness.
>
>   a. What is reasonable to ask of the plaintiff in strict proof in the particular circumstances **Walters v. Mitchell; Grant v. Motilal Moonan Ltd. and Another (supra);** and
>
>   b. What is reasonable as an award as determined by the experience of the court: **Central Soya of Jamaica Ltd. v. Junior Freeman.[10]** See also **Hepburn Harris v. Carlton Walker** SCCA No. 40/90 (Unreported).
>
> 5. Although not usually specifically stated, the court strives to reach a conclusion which is in harmony

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[4] (1976) 14 JLR 119
[5] (1948) 64 TLR 177
[6] [1892] 2 QB 524
[7] (1992) 29 JLR 173
[8] (1988) 43 WIR 372
[9] See also on this point my own judgments of ***Shaquille Forbes (an infant who sues by his mother and next friend Kadina Lewis) v Ralston Baker, Andrew Bennett and the Attorney General of Jamaica*** 2006HCV02938 (March 10, 2011); ***Omar Wilson v VGC Holdings Limited*** 2010HCV04996 (November 21, 2011); and ***Morrison (Cedric) v Reginald White and Guardsman Group Limited*** [2013] JMSC Civ 186.
[10] (1985) 22 JLR 152

> with the justice of the situation. See specifically **Ashcroft v. Curtin**[11]**; Bonham-Carter v. Hyde Park Hotels Ltd.** (supra)

[161] The above summary of the law by Cooke JA was cited by the Court of Appeal in the decision of ***Barbara McNamee v. Kasnet Online Communications*** RMCA 15/2008 (July 30, 2009) as clearly encapsulating the applicable law.

Loss of Earnings

[162] The claimant has claimed loss of earnings from September 15, 2004 to the February 18, 2014 at $8000.00 per week and continuing – a period of approximately 9¾ years. The claimant's evidence as to his loss of earnings is contained in paragraphs 4, 7, 11, 20, 25 and 29 of his witness statement filed on December 1, 2010.

[163] At paragraph 4 of his witness statement filed December 1, 2010 the claimant states that in February 2005 he went to the KPH and was told by a doctor that he should not do hard work like he used to. He stated that he had to wear the collar as if he didn't his neck pained him greatly. He indicated he tried to do electrical work but he couldn't take the sun. He said he worked with Garfield his friend for 2 days who gave him $6000.

[164] There is no medical record of the Claimant attending KPH in February 2005. The doctor's statement would in any event be hearsay. The concern about the sun is also something that the claimant complained about from 1998. At paragraph 7 of his said witness statement the claimant stated that he had been feeling very bad from August 2005 fainting and going unconscious regularly. He stated that he worked for rural electrification for 2 days and they paid him $6000, but as he was fainting in the job they could not keep him. It is to be noted that the claimants indication of his

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inability to work is linked to the fact that he is constantly fainting, a condition which existed from 1998 as indicated by Professor Morgan.

[165] At paragraph 11 of his statement he relates the incident when he was arrested by the police for brutalizing his child and indicated that he had not been back to work since the accident. This the court interprets to mean since the incident with his child.

[166] The medical evidence from the KPH does not support the fact that the claimant was unable to work for approximately 9¾ years as he claims. The claimant was hospitalised for three days from September 15 – 18, 2004. After discharge the claimant returned to the hospital on September 28, 2004. The claimant next presented at the KPH almost a year later on September 16, 2005 indicating that he had fallen off a pole while at work. The claimant did not return to the KPH until four years later on the occasion of the third accident on August 28, 2009. The suggestion by the claimant that he attended a private doctor on one occasion after he blacked out, has not been definitively substantiated by any other evidence. The court has already rejected the argument that the incident of 2009 was a continuing injury. Therefore any consideration of loss of earnings after 2009 would have to be linked to the 2009 accident particularly if no significant loss of earnings is proven to have resulted from the 2004 incident.

[167] I agree with the submission of counsel for the 1st defendant that having regard to the medical evidence it is reasonable that the claimant would not have worked from September 16, 2004 to September 28, 2004. The medical records reveal that on September 28, 2004 when the claimant presented he was given a repeat of brufen as he was complaining of chest pains. It is reasonable to assume that he may have required some time from work to further recuperate and therefore a period of 4 – 6 weeks would be reasonable to allow for this. Accordingly having regard to the

medical records I agree that overall a period of two months is reasonable for loss of earnings in all the circumstances.

[168] This conclusion is buttressed by the evidence of Wayne Francis which I have already indicated I accept, where he stated that the claimant worked for him for 11 days in 2006 and seemed physically fine. I also accept the evidence of Ms. Shellion Farquharson who stated in her witness statement that for two months after the accident the company continued to pay the claimant and pay for his medication, until she received information which led her to believe the claimant was not being truthful about his injuries and his inability to work.

[169] At paragraph 14 of her witness statement Mrs. Farquharson's evidence was that:

> On one of my visits to Mr. Wilkins home to provide him with a payment I saw him doing work in his yard. However when I left my vehicle and went inside his home and upstairs to his bedroom he was lying down in his bed with a cervical collar around his neck. He told me that he was in so much pain and that he was unable to leave his bed all day.

[170] There is therefore abundant evidence that the claimant's pattern of exaggeration of his injuries has extended to him falsely maintaining that he was unable to work for several years when that was patently untrue.

[171] The claimant at paragraph 20 of his first witness statement indicated that he used to earn $28,000.00 per fortnight. Then at paragraph 25 he stated that he used to earn $8,000 per week. In evidence in re-examination he stated he used to get $34,000 - $35,000 per fortnight and when everything was drawn out it would go down to $24,000 - $25,000. There is therefore an inconsistency, as on his accounts the claimant's fortnightly remuneration would either have been $16,000, $24,000 - $25,000 or $28,000. At paragraph 7 of his witness statement dated March 14, 2011

he outlined that Powtronics always paid him by cheque except when he was in the country part when he would get paid by cash. At paragraph 8 he explained the absence of pay slips by alleging they were destroyed in a fire at Delacree Road St. Andrew.

[172] In cross examination the claimant acknowledged that he was paid by cheques delivered to him by Mrs. Farquharson which he signed at the back before cashing them at the bank in Half Way Tree or New Kingston. He however denied in cross examination that he received any payments from the company after the accident. Also as he did in relation to his affidavit in the 1998 suit, he denied that it was his signature on cheques for payments received both before and after the accident which were shown to him. Cheques in various amounts with what the court finds was the claimant's signature at the back, were admitted in evidence through Mrs Farquharson.

[173] The exhibits numbered C1 – C9 and the purposes for the payments for C1- C5 were explained as I now indicate. C6 – C9 represent payments made to the claimant after the accident. They are listed as follows: **C1** dated 16.07.2004 for $1500 (for one day's work); **C2** dated 16.03.04 for $1500; **C3** dated 30.07.04 for $4500 (for three day's pay); **C4** dated 13.08.04 for $3500.00 (for two day's pay); **C5** dated 05.06.04 for $4000 (for digging 5 holes at $800 per hole); **C6** dated 21.09.04 for $5,500; **C7** dated 28.09.04 for $3500; **C8** dated 04.10.04 for $3500; and **C9** dated 14.10.04 for $3500.

[174] Mrs. Farquharson in evidence which I accept stated that, contrary to the evidence of the claimant and of Mr. Derrick Wright, the claimant was not permanently employed to Powtronics from 2002. She was employed to the 1st defendant from 2003. I accept her evidence that the claimant was employed on a project by project basis from 2004. Mrs Farquharson also stated, which I accept, that the claimant worked an average of three days

per week and not seven as alleged by the claimant. The information as to employment dates and wages paid is directly within the knowledge of Mrs. Farquharson, the responsibility for employment and payment of wages being part of her functions as Operations Manager of the 1st defendant.

[175] Based on Mrs. Farquharson's evidence the claimant earned approximately $1500 per day and worked at most 3 days per week. The claimant at best therefore worked $9000.00 per fortnight and approximately $18,000.00 per month. Based on Exhibits C6 – C9 the claimant was paid $14,000.00 by the 1st defendant during his period of recovery.

[176] The total sum for loss of earnings would be $36,000.00 representing two months loss of earnings at $18000.00 per month. The payments made by the 1st defendant of $14,000.00 should be deducted from this amount leaving a balance of $22,000.00

Extra Help

[177] The claimant's evidence at paragraph iii) of the Addendum to his witness statement filed on December 1, 2010 was that up to June 2007 his wife Sabrina cooked, washed, cleaned and looked after him and when he comes into funds he expects to pay her. At paragraph iv) he stated that after his wife left Cheryl Blake began assisting him. She washed, cooked and cleaned his house and also took him to the barber by walking and leading him. He stated that at the time of the statement she still did that and he would always need somebody like that to assist.

[178] There is also evidence from Miss Marie Dixon was that she has washed cooked and cleaned for the claimant him since January of 2008 and that though she hasn't received any pay from him, she expects when he is able he will pay her $4,500 per week.

[179] There is no medical evidence at all to support the claimant's requirement for extra help as a result of the injuries he sustained in 2004. Actually on

September 16, 2004, the day after the accident, the KPH records reveal that the claimant was walking around during ward rounds. The x-rays of his cervical spine showed no abnormality, no fracture and no soft tissue injury. There is no medical evidence that the claimant was unable to do the type of work his wife, Miss Dixon and Miss Blake did such as washing, cooking and cleaning. On the contrary Mrs. Farquharson's evidence that she saw the claimant sweeping up his yard when she went to visit him after the accident is eloquent evidence that the claimant was not in need of extra help and could assist himself.

[180] It is to be expected that the claimant's wife would take care of him by washing cooking and cleaning. These are normal everyday domestic duties performed by both wives and husbands. Further the claim that Ms. Blake had to lead the claimant to the barber is not credible. There is no evidence that the claimant suffered any disability that would require assistance in walking or that would indicate the need to be led. The claimant's account of the help he was receiving also shows an overlap in the time period that he was supposedly being assisted by both Ms. Blake and Ms. Dixon. Is it that the claimant had two ladies washing, cooking and cleaning his house at the same time?

[181] No out of pocket payments are alleged to have been made for any help the claimant may have received. The work if any which the claimant's wife, Miss Blake or Miss Dixon did for the claimant would have been gratuitous and not necessitated by his medical condition. There is accordingly no basis for any award to be made under this head.

Medication up to March 19, 2010 and continuing

[182] The claimant seeks to recover medication expenses up to March 19, 2010 and continuing. The evidence is that the claimant sustained a severe head injury in 2009 and that the claimant had a pre-existing condition of

epilepsy. Without receipts the court is unable to say what the expenses are related to.

[183] Further it was Mrs. Farquharson's evidence that the 1st defendant paid for the claimant's medication for approximately two months after the 2004 accident. There is therefore no basis to make an award for medication costs in the circumstances.

X-ray

[184] Based on the KPH medical records the claimant did do x-rays in 2004, a fact also attested to by Mrs. Farquharson. However no receipts were tendered in evidence, in a context where the claimant suffered another injury in 2009 which necessitated x-rays. I therefore agree with counsel for the 1st defendant that the figure claimed should be discounted by a half to take account of the real likelihood that some of the costs would be due to the 2009 injury for which the 1st defendant is not responsible. The sum of $9,500 will therefore be awarded.

Registration

[185] Though no receipt was provided it is not in dispute that the claimant received treatment at the KPH. Therefore the claim for the fee of $300 will be allowed.

Medical Bill including Consultation Fees and Medical Reports

[186] Though no invoices or receipts have been tendered in evidence, as the medical reports are before the court, it is not in dispute that the claimant consulted with doctors. Counsel for the 1st defendant however maintains that the fees claimed should be disallowed as the doctors reports were rendered of no assistance to the court by the claimant's non-disclosure of the injuries he received in 1997 and 2009.

[187] That is however overstating the position. The reports were of some value, as Professor Morgan's opinion was that the claimant's combined disability was the result of all three accidents. The court therefore first had to determine the overall disability of the claimant, which the reports spoke to and then the court had to consider apportionment. The non-disclosure affected this latter exercise. In the circumstances therefore the cost of the reports should be discounted by half given that they were rendered less useful than they should have been by the deliberate non-disclosure of the claimant, as well as by his exaggeration of the injuries he sustained in 2004. The sum of $59,500 is therefore allowed under this head.

Costs for Electroencephalogram and MRI

[188] Though no receipts have been tendered, applying the same reasoning as that in relation to the consultation fees and medical reports I will allow fifty percent of the costs of these items. The sum of $70,000 is therefore awarded under this head.

Travel Costs

[189] At paragraph 2 of his witness statement filed December 1, 2010 the claimant indicated that he paid $700 to take a taxi home when he was discharged from the hospital. There is evidence that he returned to the hospital on September 28, 2004 was given more brufen and released. It is reasonable that he would have taken a taxi to and from. Those three journeys would amount to $2,100. However to account for other travel which might have been necessary the sum allowed will be $4000.

Loss of Tools (Belt and Spur), adjustable spanners, pliers and safety boots

[190] No receipts have been presented to the court in proof of these items. It was also the evidence of Mrs. Farquharson in her witness statement at paragraph 15 which I accept that, *"In an effort to assist I had Powtronics provide Mr. Wilkins with some hand tools to replace those he had lost."*

Mrs. Farquharson's oral evidence which I also accept is that she provided Mr. Wilkins with linesman spanner and pliers. I also find there is no credible evidence that the claimant lost safety boots. There is no basis for an award under this head.

Loss of pants and shirt

[191] The claimant alleges that the pants and shirt had to be cut from his body. The sum of $700 claimed is allowed.

Total Special Damages

[192] The total sum allowed for special damages is **$166,000.**

ORDER

[193] **Special Damages** awarded in the sum of $166,000.00 with interest thereon ***a)*** on the sum of $36,500 at the rate of 6% per annum from September 15, 2004 to June 21, 2006 and at the rate of 3% per annum from June 22, 2006 to August 5, 2014; and ***b)*** on the sum of $129,500 at the rate of 3% per annum from February 9, 2009 to August 5, 2014; *(I have chosen the date of February 9, 2009, (the date of the first medical report) as the start date for interest in respect of the medical reports, the encephalogram and the MRI as these costs were incurred significantly later than the date of the 2004 accident.)*

[194] **General Damages** for pain and suffering awarded in the sum of $2,500,000.00 with interest thereon at the rate of 6% per annum from the August 26, 2005 to June 21, 2006 and at the rate of 3% per annum from June 22, 2006 to August 5, 2014.

[195] The court will hear further submissions in relation to the issue of costs.