IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No: G154/2001

BETWEEN:

AX
(Suing by his *Guardian ad litem* Ms. Tabitha Philander, Clerk of Courts)

PLAINTIFF

AND:

1. **A**
2. **B**
3. **C**

DEFENDANTS

Appearances: **Mr. Jonathan A. D. Jones Q.C. and Ms. Kim Grandage of Samson & McGrath for the Plaintiff**

Mr. Hector Robinson of Mourant Ozannes for the Defendants

Before: **Mr. Justice Malcolm Swift Q.C. (Actg.)**

Heard: **10th – 20th May 2016**

JUDGMENT

1. At the commencement of this hearing I made a provisional anonymity order to prevent the identification of the Plaintiff in any reporting of the case in the media. The press were present on the first day of the case when I indicated that I would be prepared to hear any representations from them if the order was opposed. No representations have been made and so I now confirm the order as permanent. Although this judgment identifies the parties, the text hereof may not be disseminated without anonymity measures and/or redaction so as to prevent identification of the Plaintiff and no facts or matters may be reported which might tend to identify the Plaintiff.

BACKGROUND

2. In 1998, the Plaintiff who was then 12 years old, suffered appalling face and head injuries in a boating accident. Liability was established in proceedings in the Grand Court with damages to be assessed.

3. In summary, the Plaintiff suffered a severe complicated brain injury requiring emergency neurosurgery and a frontal lobectomy, multiple lacerations and fractures to the facial bones, effective blindness in the right eye and reduced vision in the left eye, damage to the teeth and he required reconstruction of the skull. Obviously there was extensive scarring to the head and face and equally obviously he suffers regular headaches.

4. Considering the gravity of the injuries, the Plaintiff has made a remarkable recovery. However his underlying difficulties and the life-changing effects of his injuries on his abilities, personality and behaviour cannot be underestimated. He developed epilepsy in 2011. He has poor memory and concentration.

His vision is substantially defective. His brain damage is permanent and irreversible and results in issues with organising ability, abnormality of thought processes such as planning and decision-making, attention deficits, impulsivity, distractibility, lack of insight and poor safety awareness, inability to deal with and to control emotions (in particular anger) and general behavioural problems. His relations with the opposite sex are abnormal. He is suggestible so that he is prey to being disadvantaged by others, he cannot manage his own financial affairs or make decisions affecting his life, he is incapable of undergoing further education and significantly, in the view of the jointly instructed expert, Dr. Hamilton, he is completely and totally unable to hold down gainful employment. Dr. Hamilton's view is echoed by other medical experts but is not agreed by Ms. Lam the occupational therapist instructed by the Defendants as I shall explain in due course. The Plaintiff's apparent normality of behaviour is achieved only by daily monitoring and supervision, guidance and advice, care and management. It is easy to underestimate the reliance, direct and indirect, placed by the Plaintiff on the management of his life by his father whose own health has deteriorated and who is clearly, as I observed when he gave evidence, nearing the point at which he can no longer cope. I would like to pay tribute to the dedication and selflessness of the Plaintiff's family who have done their utmost to ensure that the Plaintiff might lead a life as close to normal as is possible in the circumstances. At times, that must have seemed a formidable, frustrating and often unrewarding challenge. Because of his impaired brain function, the Plaintiff has become involved in unsatisfactory relationships, has associated with unsuitable people, has consumed drugs, has come to the attention of the Police and has been on the receiving end of incidents of violence. The latter in particular has the potential for further catastrophic injury.

5. The level of general damages for pain, suffering and loss of amenity is not agreed. The Plaintiff's capacity to earn is in dispute. The level of future care and the type of care to be provided is in issue. Even the costs involved in ensuring that the damages awarded are properly used for the benefit of the Plaintiff who is not capable of administering his own affairs are contentious.

6. I have been provided with helpful summaries of the issues including the Plaintiff's Schedule of Loss (with an updated version), Opening and Closing Skeleton Arguments and the Defendants' Counter-Schedule (with an updated table of losses) together with a Closing Skeleton Argument. The matters contained in these documents have been developed in closing oral arguments.

7. I have read the following witness statements and affidavits relevant to the outstanding issues in dispute, namely:

Family members

a. AXF – father of the Plaintiff – who also gave oral evidence and was cross-examined;

b. AXB – brother of the Plaintiff – who also gave oral evidence and was cross-examined;

c. AXS – sister of the Plaintiff – who also gave oral evidence and was cross-examined;

d. AXM – mother of the Plaintiff – who also gave oral evidence and was cross-examined;

e. It was at a late stage envisaged by the Defendants that they would apply for leave to call the Plaintiff himself as a witness to be cross-examined but, happily, at the commencement of the hearing, common-sense prevailed and that idea was abandoned.

Expert evidence

f. Travis Walters – Statistician at the Economics and Statistics Office – (statement dated 26th August 2014) who also gave oral evidence about salary levels in the Cayman Islands derived from the 2010 Cayman Census and was cross-examined;

g. Lisa Gager – Client Services Manager of CINICO – (statement dated 10th December 2015) who also gave oral evidence about health insurance available to the Plaintiff and was cross-examined;

h. Mrs. Michelle Clarence – Plaintiff's Care Expert – (report dated 1st December 2014 and supplementary report dated 1st December 2015 and the joint report of the meeting with Ms Lam dated 27th August 2015) who also gave oral evidence and was cross-examined;

i. Ms. Miriam Lam – Defendant's Care Expert – (report dated 8th July 2015 and the joint report detailed above) who also gave oral evidence and was cross-examined;

j. Dr. Richard Hamilton – Consultant Neuropsychologist - who was called for questioning despite having provided a report dated 1st September 2009 for the Plaintiff following service of which he was then instructed jointly to answer specific questions in his addendum dated 17th June 2014. He was questioned by both parties;

k. Mr James Akinwumni – Consultant Neurosurgeon – (report dated 16th July 2014, supplementary report dated 13th November 2015 and addendum dated 6th May 2016) called by the Plaintiff and who dealt principally with the Plaintiff's epilepsy prognosis, gave evidence and was cross-examined;

l. Mr Piers Stradling - Trusts Administration expert – (statement dated 27th April 2016) who was called by the Plaintiff, gave evidence and was cross-examined;

m. Dr. Gary Starkman – Neurologist called by the Defendants (reports dated 8th March 2016 and 18th May 2016) in relation to the Plaintiff's epilepsy and gave evidence and was cross-examined;

8. I have seen and read the following additional reports:

(i) Dr. Harry Hamburger – Opthalmologist – (reports dated 29th July 2009 and 1st April 2010);

(ii) Dr. Elena Coello-Jemmali – Consultant Neuropsychologist – (reports and letters between April 1998 and July 2010 appearing in Divider 2 of Documents Bundle Volume 1 at pages 15 to 78)

(iii) Mr Andrew Needham – Trusts Administration expert instructed by the Defendants – (statement dated 26th March 2014).

The above is not an exhaustive list of all the reports and materials supplied to me and I have read other documents and reports (for example the reports of Dr. Simon, Dr. Ibars, Dr. Lockhart and Dr. Triggs and the documents attached to the statement of Claire Murphy on behalf of the Defendants) contained within the two volumes of documents, the Core Bundle containing mainly witness statements and various reports and the supplementary bundles on both sides. I have paid particular attention not only to the medical evidence but also to the educational records and employment documents. I shall refer to the more important documents, records and reports in the course of this judgment. I shall present much of the evidence in summary form.

9. I am required to decide the quantum of the following heads of damage.

GENERAL DAMAGES FOR PAIN, SUFFERING AND LOSS OF AMENITY

10. The Defendants argue that the case falls within category A(c)(i) of the Judicial College Guideline covering Moderate Brain Damage. The range is between £114,100.00 and £166,500.00. It had originally been common ground between the parties that the case fell into that bracket until further evidence emerged that the Plaintiff's post-traumatic epilepsy had worsened from 1 to 2 seizures per month to several times per week. He has been under the care of Dr Starkman since January 2016 and attempts have been made to find a drug regime which controls or limits the seizure activity. As at the time of trial, drug treatment is not yet controlling the seizures although Dr. Starkman is hopeful that eventually the right dosage of a drug or of a cocktail of drugs will reduce their frequency. Even if successful the Plaintiff is still likely to suffer epileptic seizures (the experts differ on the frequency) for the remainder of his life.

It is also now apparent (and agreed) that the Plaintiff's life expectancy has been reduced by 10 years. The Plaintiff submits that the case now falls within category A(b) of the Judicial College Guideline covering Moderately Severe Brain Damage and falls within the bracket between £166,500.00 and £214,350.00). It is submitted by the Plaintiff that the case falls below the middle of the range and merits an award of £180,000.00 (CI$216,815.00) whereas the Defendants argue that the case remains in category A(c)(i) but at the upper end of the range and that £160,000.00 (CI$190,400.00) is appropriate.

11. The Guideline for 'Moderately Severe Brain Injury' requires that;

> '*the injured person will be very seriously disabled. There will be substantial dependence on others and a need for constant professional and other care. Disabilities may be physical, for example limb paralysis, or cognitive, with marked impairment of intellect and personality. Cases otherwise within (a) above may fall into this bracket if life expectancy has been greatly reduced. Where there is a risk of associated future development of other severe medical problems such as blindness an award in excess of the bracket would be justified. The level of the award within the bracket will be affected by the following considerations: the degree of insight, life expectancy, the extent of physical limitations, the degree of dependence on others, ability to communicate, behavioural abnormality, epilepsy or a significant risk of epilepsy .....*'

12. The brain injury was moderately severe. The Plaintiff is seriously disabled in the sense that there is a marked impairment of intellect and personality with substantial dependence on others and a need for constant professional and other care.

Life expectancy has been markedly reduced, it is agreed, by 10 years. He has serious sight issues. His epilepsy is at present insufficiently controlled and there may be a need for future surgical intervention if the drug regime achieves no satisfactory outcome. The parties dispute whether the Plaintiff has any prospect of employment (an issue I shall determine in due course but which is a factor I have included within my assessment of the level of general damages).

13. I have been referred to a number of reports of brain injury cases (***Brown 2001*** Kemp & Kemp; ***Page –v- Sheerness Steel 1998*** Kemp & Kemp and ***C –v- W 2011*** Kemp & Kemp) but no two cases are identical and the purpose of the Guidelines is to remove or minimise the need for lengthy reference to earlier decisions. My task is to decide the correct category into which the case falls and to assess where in that range of damages this case sits according to the presence and severity of the factors required to be present (set out above). The additional factors particular to this type of case and which in my view push this case easily into the A(b) range are the serious, frequent and life-threatening epileptic seizures and the much reduced expectation of life.

14. In my view the case falls easily into the category of 'moderately severe brain injury' and I agree that, subject to the following issues, the damages appropriate for pain suffering and loss of amenity in this case should be in the sum of CI$216,815.00.

15. However, the Plaintiff submits that a 20% uplift in the damages is appropriate to reflect the suggested higher cost of living in the Cayman Islands in contrast to the United Kingdom and seeks to uplift the suggested award to CI$260,000.00. The Plaintiff seeks to justify that increase by relying on the local case of ***Archer –v- UBS*** [2009] CILR 531 in which Mr Justice Quin upheld an increase on that basis. He said:

> *"This Court traditionally follows English case law, the helpful authorities contained in Kemp & Kemp and the guidelines from the Judicial Studies Board with a small increase to reflect the higher cost of living in the Cayman Islands. It is my view that this court can take judicial notice of the fact that we have no income tax and therefore the cost of living is higher than in the United Kingdom."*

Although there was no statistical or other evidence before the Judge in that case in support of the suggested uplift, or indeed of any uplift, the Judge took 'judicial notice' of the higher cost of living here in Cayman and expressed the uplift as part of the 'traditional approach'. However it is not clear from that decision what the actual percentage uplift applied by the learned Judge in fact was. The Defendants have referred me to the decision of the CICA in the case of ***Chin -v- Yates*** 2014 (2) CILR 196 in which the Court of Appeal referred to the decision in ***Archer*** saying

> *"(the judge) then followed Quin J's approach (in **Archer**) and uplifted the award to $80,000. There has been no challenge to the making of an uplift which is done to reflect the higher cost of living in the Cayman Islands."* (per Newman J.A. at para 19).

It was not suggested obiter that this approach might have been wrong. Whilst it is not clear what percentage uplift was applied by Quin J in ***Archer***, the uplift in ***Chin*** at first instance was from $74,102.50 to $80,000.00, an increase of approximately 7.5%.

The Defendants have also referred me to the decision in ***Wilson –v- Ebanks*** [2011] 1 CILR 447 where Smellie CJ, when dealing with the assessment of damages in a brain injury case, was referred to the Judicial Studies Board Guidelines for the assessment of damages in personal injury cases (the predecessor of the current Guidelines) and, in a detailed and carefully constructed ruling, made no reference to any jurisdictional uplift saying only (at paragraph 27)

> "*Of course, as a judge assessing damages in this jurisdiction which has its dissimilarities with England and Wales, I am obliged to consider the appropriateness of a simple straightforward adoption of awards from that jurisdiction*".

Later, when dealing with the increase in awards in catastrophic injury cases that followed the decision in the leading case of ***Heil –v- Rankin*** [2001] QB 272, the learned Chief Justice said (at paragraph 30):

> *"Having regard to our traditional reliance on the common law as developed in England and Wales for guidance in this jurisdiction, I am satisfied that the Guidelines, as they reflect the decided cases, can indeed be an essential tool in the assessment of general damages in this jurisdiction as well. However, as the introduction to the 10th Edition emphasises, the authors of the Guidelines do not attempt to describe what levels of damages ought to be awarded – rather to set out what they consider to be the current level of awards and settlements adjusted where necessary for inflation. It thus remains for the judge in every case to exercise his judgment by examination of the circumstances of the case by reference to the decided cases and say what the actual amount of the award should be."*

It seems to me that, in the same way that judges in this jurisdiction may adjust levels of awards in reported cases or in the Guidelines to account for upward inflationary pressure, so equally they may properly take into account the obvious differences in the cost of living between the United Kingdom and the Cayman Islands.

Such adjustments, reflecting one aspect of the 'dissimilarities' between the Cayman Islands and England and Wales referred to by the Chief Justice, are perhaps so well established as to have become 'traditional' in the sense of that word as used by Mr Justice Quin in ***Archer*** and as such, are usually taken into account by Judges in this jurisdiction without the need ordinarily to make specific reference to the fact that an uplift has been applied. I have also been referred to ***Simmons –v- Castle - Practice Note*** [2013] 1 WLR 1239 in which the UK Court of Appeal approved a 10% increase in the level of damages giving effect to the Jackson Report recommendation and made plain that the increase applied to cases already in the court system (paragraph 13).

However that increase was designed to reflect the changes made in the new civil costs regime applicable in the United Kingdom after 2012 which of course have no application here in the Cayman Islands.

16. I shall apply a 10% increase from the Plaintiff's starting point following the 'traditional approach' in this jurisdiction but I do not apply the increase set out in the 2013 UK Practice Note. The increase I have applied is slightly above that applied in ***Chin*** but less than the Plaintiff claims (I can find no authority for an uplift of 20%) and is intended to provide a clear guide to the general approach to the application of UK levels of damages in this jurisdiction. Applying that uplift, I reach a figure for general damages for pain, suffering and loss of amenity of **CI$238,500.00**.

INTEREST ON GENERAL DAMAGES

17. The parties have agreed the approach to interest and in accordance with that agreement, I award interest on general damages in the sum of **CI$72,329.00.** That sum is based on 5,534 days to the date of trial at CI$13.07 per day.

18. Because of the way this judgment has been structured, it is convenient at this stage to deal with multipliers.

MULTIPLIERS

19. There is agreement that the lifetime multiplier is **26.84** taking into account the reduction of life expectancy by some 10 years. The Defendants have also agreed the multiplier on loss of earnings to age 65 at 22.59 with a discount of 0.95 to **21.64**. The agreed earnings discount takes into account lower unemployment rates in the Cayman Islands and accords with the decision in ***Bodden –v- Solomon*** [2008] CILR 385.

DISCOUNT OF THE MULTIPLICAND (EARNINGS LOSS)

20. At an earlier stage in the proceedings, there was a suggestion that the Defendants would seek to discount the "but for" multiplicand by 10% on the basis that (i) earnings loss overlaps with the claim for care and (ii) a deduction should be made for the cost of earning the income. The arguments were not pursued in closing submissions. In any event, as the Plaintiff submits, (i) above is not applicable since there is no overlap with the claim for care and (ii) above is not relevant in the Cayman Islands where the costs associated with earning an income (eg travel costs) are minimal. In extreme cases, such a deduction might be proper but this case is not one. The courts tend to shy away from such deductions in any event (see the powerful comments of Lord Griffiths in ***Dews v NCB*** [1988] AC 1 at page 13 and ***HS v Lancashire Teaching Hospitals NHS Trust*** [2015] EWHC 1376). In ***Eagle v Chambers (No 2)*** [2004] EWCA Civ 1033 where the trial judge had deducted 15% from past earnings as travelling expenses but had failed to make a similar reduction in respect of future earnings, the Court of Appeal declined to interfere with the decision but suggested by implication that, if the trial judge had been referred to the comments of Lord Griffiths in ***Dews*** the outcome might have been different (Waller LJ at P152 para 66-68).

THE FUTURE MANAGEMENT OF EPILEPSY AND FUTURE MEDICAL TREATMENT

21. I heard detailed and extremely helpful evidence from Dr Starkman (called by the Defendants) who is the Plaintiff's treating neurologist and from Mr Akinwumni (called by the Plaintiff) on this topic. It quickly became clear that the introduction of an effective drug control regime was in its early stages despite the seizures having started several years ago. I accept Dr Starkman's unchallenged evidence that there is probably a long way to go trying different dosages and different types of anti-epileptic medication before the optimum combination of drugs has been identified. This could take between 12 months and 2 years but I shall adopt the lower figure of 12 months. Mr Akinwumni says that ideally the Plaintiff should go to hospital if he has a seizure and he is likely to be there for 3 nights if he is in seizure at the time of admission. If the seizure has stopped prior to admission, he is still likely to be in hospital overnight for observation. However this assessment is complicated by the fact that the Plaintiff does not at present invariably go to hospital but often remains at home. I must assume therefore that hospitalisation occurs some of the time and factor that into the calculations although it is statistically insignificant.

22. Mr Starkman appears to be seeing the Plaintiff monthly and that frequency is agreed as appropriate by Mr Akinwumni.

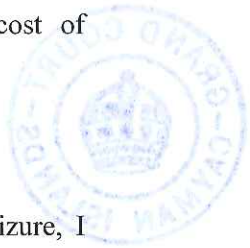
The Plaintiff will require life-long reviews. However for the first 12 months, during which time the drug regime is being established, I would expect the monthly reviews to continue and to reduce in frequency thereafter to one review every 3 to 4 months (as there will still be a likelihood of life-long seizures though at the reduced rate of 1 to 2 seizures per month according to Mr Akinwumni or 1 to 2 seizures per quarter according to Dr Starkman). It is uncertain whether the Plaintiff will ever be seizure-free even after achieving the optimum dosage regime.

23. There is clearly therefore an issue as to the likely frequency of the seizures at the time when drug treatment has been fully explored. The Defendants submit that future treatment costs should be based on Dr Starkman's evidence since he is better placed to assess the nature of the Plaintiff's level of improvement and that the evidence of Mr Akinwunmi was given without the benefit of Dr Starkman's explanation as to the extent to which the Plaintiff will likely improve with additional medication. The evidence of Dr Starkman is that the treatment is continuing and the likely result is one seizure every 2 to 3 months. It is further submitted that the evidence suggests that the recent increase to 2 to 3 seizures a week (Plaintiff's father in evidence) was not consistent with his previous seizure activity and will not continue. It is therefore argued that hospital costs should be based on 5 seizures per year after the first 12 months. Mr Akinwumni took the view that there was a 90% to 95% chance of the frequency of seizures reducing to 1 or 2 seizures per month but that there was still a 5% to 10% chance of no real improvement occurring. He said that the chance of eventually being seizure-free after drug treatment and surgery (see below) was 6.25% (i.e. 25% chance of improvement x25% chance of elimination).

24. In the light of that difference between experts both of whom are of equal standing and experience, I can only attempt to find some middle ground and I assess the rate of likely seizures at 12 per annum after 12 months of drug treatment. As at the date of this trial in May 2016, the seizures are running at the average rate of between 1 and 3 seizures per week (with some spikes) and I can only assume that the frequency will reduce gradually as the dosage is adjusted over the ensuing months as Dr Starkman thought likely.

25. I allow monthly visits to the neurologist for review at the rate of CI$160 for the first 12 months (until midway between Dr Starkman's estimated minimum and maximum times for stabilising the medication). The cost is **CI$1,920.00**. As from the middle of 2017, adopting the agreed multiplier of 25.84 (26.84 – 1) and a multiplicand of CI$576.00 (3.5 x CI$160.00), the cost of continuing neurologist review is **CI$14,884.00**.

26. Epileptic medication costs are now agreed at the upper end of the range between CI$65.00 and CI$108.00 per month producing an annual cost of CI$1,296.00 to which a multiplier of 26.84 is to be applied producing an overall cost of **CI$34,785.00**.



27. Although the Plaintiff currently sometimes stays at home following a seizure, I must assume that, under the planned care regime, hospitalisation will become the norm.

On the basis that the current seizure frequency (2 to 3 seizures per week) will reduce to 12 per annum in 12 months, it is reasonable to assume that the Plaintiff will be admitted to hospital for a 3-day stay with treatment approximately 6 times per annum and for a 1-day stay 6 times per annum. I have considered the Defendants' argument that intensive treatment will only be required 25% of the time but have insufficient evidence on which to base such a finding. Doing the best I can with limited assistance, I consider that the above assumption is a reasonable one to make. The seizures usually occur at night and, if still in seizure on arrival, hospitalisation would cost CI$1,830.00 per 3-day stay (annual cost assuming one such hospital stay 6 times per annum = CI$10,980.00). If the seizure has ceased by the time of admission, hospitalisation for observation would cost CI$330 for one night under observation (annual cost assuming one such hospital stay 6 times per annum = CI$1,980.00). I accept these figures as reasonable.

28. There must also be added the costs associated with hospitalisation following epileptic seizures during the first 12 months during which his drug treatment regime is being refined. The Plaintiff accepts the method of calculation based on the median figure for the reduction in seizures in the first 12 months. The parties are therefore agreed on the method of calculation to be applied. The difference between the parties is that the Defendants say the median figure is 62 (reduction from 130 to 5 per annum) whereas the Plaintiff says it is 71 (reduction from 130 to 12 per annum). I accept the reduction to 12 per annum as already indicated and thus the median figure of 71.

29. The cost calculation is therefore:-

First 12 months (assuming epilepsy improves)

35.5 x CI$1,830.00 (3-day hospital):	CI$64,965.00
35.5 x CI$330.00 (1-day hospital):	CI$11,715.00
Multiplicand:	CI$76,680.00
Multiplier:	0.99
Total:	CI$75,913.00
92.5% chance of improvement:	x 92.5%
Total:	CI$70,219.50

After first 12 months if epilepsy does not improve

The Plaintiff's calculations (below) are based on a starting level of seizures of 2 to 3 fits per week and assume 12 x 3-day hospital stays per annum (12 x CI$1,830.00 = CI$21,960.00) and the remainder as 1-day stays (2.5 x 52 -12 = 118 fits per annum x CI$330 = CI$38,940.00)

Annual cost of 3-day hospital stays:	CI$ 21,960.00
Annual cost of 1-day hospital stays:	CI$ 38,940.00
Total (Multiplicand):	CI$ 60,900.00
Multiplier:	26.84
Total:	CI$1,634,556.00
7.5% chance of no improvement:	CI$122,592.00

After first 12 months if epilepsy improves

6 months of 3-day hospital stays:	CI$ 10,980.00
6 months of 1-day hospital stays:	CI$ 1,980.00
Total (Multiplicand):	CI$ 12,960.00
Multiplier:	25.85
Total:	CI$335,016.00
92.5% chance of 12 seizures pa:	x 92.5%
Total:	CI$309,890.00

30. There is a risk that further surgery may be required to alleviate the Plaintiff's epilepsy should seizures fail to lessen in frequency as hoped/expected.

31. Mr. Akinwunmi advises that the surgery would either be a brain resection at a cost of CI$30,000.00 or more likely the insertion of a Vagal Nerve Stimulator (VNS) at a cost of CI$80,000.00 to CI$100,000.00. I consider future elective brain resection to be unlikely and the chance of it resulting in any real worthwhile benefit to be low and regard the VNS option to be the more likely route. It is also less intrusive. If that route is taken the batteries in the stimulator will need to be replaced twice in its (and the Plaintiff's) lifetime.

32. The Plaintiff submits that there is a 50/50 chance of further VNS surgery being required. The Defendants argue that the chances should not be assessed as a 50/50 chance of the Plaintiff undergoing the VNS procedure but as a less than 10% chance based on Mr Akinwumni's original assessment of the likelihood of such surgery being required. It is submitted that Mr Akinwunmi changed his opinion as to the chances of the Plaintiff requiring surgery without the benefit of Dr Starkman's evidence regarding the progress of the Plaintiff's treatment so that it would be reasonable for the Court to assess the likely need for surgery at Mr Akinwunmi's original assessment of less than 10%. However Mr Akinwumni stated that he would advise the Plaintiff to have the operation (if drug treatment results only in controlling seizures to the predicted level of 12 per annum) and I must assume that there is substantial reason to believe that the Plaintiff would follow that advice.

33. In evidence Mr Akinwumni said that there was a 20% to 30% chance of the VNS operation succeeding and I regard that as another reason why the Plaintiff would be likely to elect surgery.

34. The Plaintiff's estimate of the chances of that operation being required as 50/50 seems to me to be a generous concession and one which I shall apply.

35. Dr Starkman and Mr Akinwumni costed the operations differently. In short, Dr Starkman adopted the cost of treatment in the United States. Mr Akinwumni costed the operations as if carried out in the Cayman Islands. The cost of local treatment in the Cayman Islands is much lower than in the United States and I can see no practical or other objection to accepting the figures provided by Mr Akinwumni who also said categorically that in his opinion it would be far better for the Plaintiff for the operation to be carried out and followed up on island.

36. The VNS operation costs and subsequent procedures are therefore:

Cost of VNS surgery and follow up:	CI$ 90,000.00
Battery replacement:-	
20 yrs - CI$40,000 x 0.6103	CI$ 24,412.00
40 yrs - CI$40,000 x 0.3724	CI$ 14,896.00
Total	CI$129,308.00
x 50% of the cost:-	**CI$ 64,654.00**

37. I accept Dr Hamilton's evidence that the Plaintiff would benefit from continuing psychological and psychiatric treatment (10 to 12 sessions of psychological counselling per year for life at a cost per session of $210.00). This head of claim is now agreed in the total sum of **CI$59,048.00**.

38. Based on Dr Hamburger's reports, the Plaintiff will require eye examinations at the cost of USD$85.00 per visit twice per year and polycarbonate safety glasses to protect his functioning left eye at a cost of USD$450.00 every two years. There is a possibility that the Plaintiff will develop a cataract in his right eye and/or a retinal detachment and the assumed 25% chance of the cost of surgical repair (USD$20,000.00) is claimed at the one-off cost of USD$5,000.00 (CI$4,100.00). The overall cost claimed and allowed is now agreed in the sum of **CI$12,793.00**.

39. Treatment costs: (summary of above)

Medical Treatment	**Cost in CI$**
Neuropsychological care	$59,048.00
Eyesight & eye surgery costs	$12,793.00
Neurology first year	$1,920.00
Neurology future years	$14,884.00
Medication (epilepsy)	$34,785.00
Hospital treatment (refractory)	$122,592.00
Hospital treatment (improved)	$309,890.00
Hospital treatment (1st 12 months)	$70,220.00
Cost of future surgery (vagal nerve)	$64,654.00
Total Cost:	**CI$690,786.00**

40. The Defendants contend that these costs must take into account the fact that the Plaintiff is claiming separately the cost of obtaining health insurance from CINICO which, according the evidence of Ms Lisa Gager, covers pre-existing conditions (Document Bundle 2 Divider 15 page 680) and that insurance should be applied in part to the cost of treatment arising from the Plaintiff's injuries. The Defendants say they should only be required to pay the costs not covered under the policy and the Plaintiff should claim for his epilepsy treatment under the policy. The Defendants agree to pay for certain costs such as eye treatment, epilepsy surgery, neurological treatment and medication costs in respect of which the policy has modest limits, since the chances of the coverage limit being exceeded in those cases are relatively high. They submit that hospital in-patient treatment, including surgery, on the Plaintiff's costs analyses will be fully covered by the policy up to the limit of $100,000 per annum, save for a modest co-insurance of 20% of the cost up to $5,000 which the Defendants would have to bear.

41. The Plaintiff says that he is currently uninsured but would join CINICO's "Challenger" programme. The cost is CI$196 per month with a CI$12 government stamp duty = CI$2,364 per annum.

42. It is conceded by the Plaintiff that the insurance with CINICO will cover pre-existing conditions, but all claims are subject to a maximum limit [Document Bundle 2 Divider 15 page 680] inadequate to meet all of his health needs. For example, the estimated cost of prescriptions for epilepsy drugs is CI$1,296 per annum (now a minimum figure), but the policy only allows CI$400 per annum. Future surgery and out-patient appointments could exceed CI$225,000 when the policy limit is CI$100,000 per annum. It is perfectly conceivable that the life-time limit under the policy of CI$1m could be exceeded.

43. The Plaintiff also says that there is too much uncertainty ahead to pin future claims to a last-resort policy of insurance. The anticipated improvements in the Plaintiff's condition may not occur, there could be other serious health issues ahead, there is no guarantee that the policy will continue to be available during the whole of the Plaintiff's life-time, premiums may be increased if his claims record causes a re-evaluation of the risk and the policy terms and conditions (including the introduction of means-testing) may change in the future.

44. Further it is said that the only way the Plaintiff can be put in the position he would have been in "but for" the accident (the well-known principle of '*restitutio in integrum*') is for him to take out the CINICO insurance but in addition to be compensated in full in respect of the cost of his epilepsy and future medical needs in order to ensure that the policy will cover all non-accident related conditions as would have been the position if the accident had not occurred.

45. The CINICO policy provides modest medical cover. The maximum limits of the available cover seem to be aimed at fairly simple conditions and straightforward illnesses or injuries not requiring extensive treatment.

46. Notwithstanding the duty on the Plaintiff to mitigate his loss and, if the insurance is taken out, the right to claim the cost of future medical treatment under the policy up to the limits set by the policy, there is a distinct possibility that, after exhausting the policy cover by making claims arising out of this accident, the Plaintiff could well be faced with a requirement to pay for his own medical expenses arising from events unrelated to the accident without the benefit of cover under the policy.

47. It is my clear view that the CINICO policy of insurance is intended to place the Plaintiff in the position in which he would have been if the accident had not occurred and to provide cover for events which may befall him aside from those resulting from this accident. To decide otherwise would be to expose the Plaintiff to uninsured risk once cover under the policy is exhausted, limited or even withdrawn. Accordingly the treatment costs are not liable to be reduced as a result of the CINICO policy of insurance being effected.

48. I therefore allow the Plaintiff's claim under this head of damage in the total sum of **CI$690,786.00.**

LOSS OF PAST AND FUTURE EARNINGS

EARNING CAPACITY, EARNING POTENTIAL, COMPARATORS AND WHETHER OCCUPATIONAL THERAPY MIGHT ENABLE THE PLAINTIFF TO OBTAIN AN INCOME.

49. It is convenient to deal, as linked issues, with the following matters:-

(a) the relevance of the Plaintiff's pre-accident performance at school;

(b) the likely career path of the Plaintiff had the accident not occurred;

(c) whether the Plaintiff has any, and if so what, capacity to earn, and

(d) the role of care, if any, in rehabilitation of the Plaintiff with a view to him entering and maintaining some kind of gainful employment.

50. The Plaintiff submits that he has lost the capacity to earn. The Defendants accept that pre-trial loss of earnings should be assessed on the basis of total loss of earning capacity (subject to his short periods of actual but aborted employment) but say that he has the residual capacity to work in a fairly low level capacity so that his past and future loss of earnings should be assessed in line with those of his father who has always worked in the service industry (earning over the past 14 years a total net income of CI$221,108.27). It is argued that his net income would have risen from around CI$10,000.00 per annum to around CI$25,000.00 over that period (based on the statistical evidence produced by Mr Walters). Later the Defendants modified their position arguing that the Plaintiff might have become a clerical support worker or similar (see infra).

The Defendants also dispute the contention that the Plaintiff would, if the accident had not curtailed his progress, have followed in the footsteps of his brother AXB who, when he was 29 years of age in 2011, was earning CI$43,200.00 per annum (updated for the period to 2014 – when the Plaintiff reached the age of 29 – at the average Consumer Prices Index rate of 1.57% per annum would result in a 2014 salary of CI$45,261.00). AXB has had a promotion and is now earning around CI$48,000.00 per annum together with full pension and health insurance.

EDUCATIONAL HISTORY

51. School records before the accident show that the Plaintiff was under-achieving. He was not working hard and was not applying himself. He was absent from school, or so it would appear, but I do not know whether this was truancy or the result of some legitimate cause. I lean towards an innocent explanation for 2 reasons. First because the absences are not remarked upon adversely in his reports and second because his Senior Tutor says the Plaintiff '*had to miss so much schooling during his first year at GHHS*' which strongly suggests to me that the absences were not blameworthy (Document Bundle Volume 1 Divider 11 page 437). His mother also refutes the suggestion that he skipped school but agrees that she had to speak to his teachers about his performance at school and poor grades. She said the school would contact parents about children who were absent from school but she received no such calls about the Plaintiff. There is evidence that he suffered a broken arm on 2 separate occasions prior to this accident. There were positive comments too. The teachers however all appeared to recognise his underlying ability.

52. I have heard evidence from the Plaintiff's parents, AXF and AXM, and from his brother, AXB, about his history. AXM described the Plaintiff before the accident as a loving jubilant child, a normal boy playing marbles, climbing trees, stealing birds' eggs and riding bikes. He was, said his father, AXF, 'rambunctuous'[1] and 'a toughy'. It is important not to lose sight of the fact that he was only 12 years old when his life was altered in this catastrophic manner. Significantly I assess the entire family of the Plaintiff as consisting of hard-working members of the community who each, in their lives and work, and despite adversity and personal problems, have surpassed their educational achievements and have aspired to succeed in their chosen careers.

53. My attention has been drawn to the school reports both before and after the accident. They paint the picture of a child who was not realising his potential and was disruptive and inattentive before the accident. The Defendants argue that the Plaintiff's school reports refer to him as *'impulsive', 'disruptive', 'easily distracted', 'day-dreaming', 'hyper-active', 'tends to lack concentration', 'often involved in conflict' and 'tends to become irate',* all traits which, combined with his apparent frequent absences from school, suggest that he may not in future have changed his behaviour and so may not have progressed as the Plaintiff predicts. The Defendants suggest that the Plaintiff's behaviour points to a child with possible ADHD symptoms and family issues together indicating likely worsening behaviour and declining educational achievement rather than simply going through a pre-teenage phase.

[1] Rambunctious

It is true that these schoolboy behavioural traits appear to have been magnified or to have become uncontrolled as a result of the effects of the brain injury and that AXB, from the little we know, displayed none of these traits during his schooling.

54. Why was he not doing his best at school prior to the accident? Dr. Hamilton describes him as a C/D student with attention problems and behavioural problems in high school who occasionally made higher scores. He says that the inconsistency in scores does not reflect adversely on his ability and points to no pre-morbid issues. Psychological factors and immaturity may have been playing their part and he did not believe that primary school grades or IQ level act as a predictor for future achievement. As he put it, whatever the Plaintiff was predicted to achieve, statistically the prediction would be correct 25 per cent of the time. The Plaintiff's under-performance and anti-social behaviour coincided with his parents' separation and his father's drug-taking. He had time off for twice breaking his arm. No-one suggests that he did not have the underlying ability to succeed – all he needed was effort and application. In any event, I accept his mother's evidence that he was just a normal typical boy with whom she had no real difficulties and whose conduct at school caused her to visit on 2 or 3 occasions. He was generally a well-behaved child but his father said that he got into a few fights. Dr. Hamilton rejected in evidence the suggestion that the Plaintiff was suffering from ADHD before his accident. The comments in the school reports were, in my judgment, meant to highlight emerging underperformance caused by family and other pressures with a view to nipping it in the bud before it became entrenched.

55. Significantly, the Plaintiff's older brother AXB had only modest academic achievements (His SATS results and CV are at Documents Bundle Volume 1 at Divider 13 pages 508-9) but has nevertheless obtained steady work progressing gradually in his career. He started his working life as a mailroom clerk much as the Plaintiff did. For the past 5 years he has worked for a public body as Fleet Manager. His role was upgraded recently to give him greater responsibility for stores. Asked about any comparative differences between himself and the Plaintiff, AXB said that his brother was 'a younger version of me', 'active and athletic', 'a smaller image of me', 'we did everything together'. He could see no real differences. They were clearly very close to each other.

56. I am satisfied that the Plaintiff's pre-accident schooling was marked by a failure to behave, pay attention and work hard which was out of character or simply a phase through which he was going, perhaps affected by interrupted schooling, absences and family problems.

57. After the accident, when the Plaintiff finally returned to school, he attended Faulkners Special School. I accept AXM's evidence that the accident had a dramatic effect on his educational progress, his progress was set back by 3 to 4 years, not only did he have to learn to walk again, he had to learn to read again, his ability to construct sentences was impaired and he was almost inevitably placed with much younger children causing him to feel isolated and inferior. However in his 2 years at Faulkners, although his behaviour deteriorated towards the end, the Plaintiff made good progress and proceeded to attend John Gray High School until the time came to leave school. His schooling was interrupted for medical treatment. However the Plaintiff showed considerable sporting talent.

His upper body strength improved and over a comparatively short time he made significant sporting achievements. Sadly within a short time of leaving school, his interest in this sport, in which he had achieved so much, faded and he became disinterested.

I have no doubt that his change of attitude in sport is symptomatic of the general loss of concentration and application brought about by his brain injury and that his behavioural problems result from the effects of his injuries. As his mother said, after the accident he would want to do something and then suddenly he would not want to do it anymore.

58. The Defendants submit that, based on clear authority (***Cassell –v- Hammersmith & Fulham Health Authority*** [1992] PIQR Q168 (a case of an 8 year old) and ***M (a Child) –v- Leeds Health Authority*** [2002] PIQR Q4 (a 2 year old)), the approach in the case of child of 12 at the time of the accident should concentrate upon his own likely achievements and, as he grows older, less emphasis should be given to the performance of parents and siblings. Of course I accept and apply that approach. I also note, in passing, that in the former case, the costs of the Court of Protection and of a professional receiver were awarded.

59. The Defendants further submit that, rather than follow slavishly the assumption that the Plaintiff's career path would have mirrored that of his brother, the court should instead look at the range of incomes based on national average wages for the broad field of occupations the Plaintiff would be likely to have entered.

60. In ***M (A Child) v Leeds Health Authority*** (*supra*), where the claimant suffered brain damage aged two as a result of negligent surgery, Sullivan J used the national average earnings for females (para 53) of £14,500 per annum, which he increased to £16,000, based on evidence of the child's family background which suggested a higher than average level of achievement (para 57).

The learned judge stated that it would be *'unrealistic to postulate any particular career path, whether as teacher, nurse or clerk ... because there was so little information to go on'*. I emphasise that this is not the position in the present case where I have clear evidence from which I am able to draw career conclusions.

61. My attention has also been drawn to ***Waseem Sarwar v Kamran Ali*** [2007] EWHC 1255, where the Claimant was 17 years old at the time of the accident and there was evidence that he might have obtained a degree and achieved professional status working in finance in the City of London. The Court used, as the basis of his likely income, the average gross annual earnings of male professional employees in finance-related occupations as derived from the Annual Survey of Hours and Earnings (para 19). In that case there was evidence that the Claimant was, by his examination grades, not realising his true potential and that none of his siblings had embarked on a career path comparable to his. I note that the trial Judge appears to have taken the mean average gross annual income of all eight UK occupational groups (added together) in arriving at the figure for the likely average gross earnings of the Claimant (£55,000.00) which coincidentally also represented the mean average gross annual income of professionals and employees working in the City of London, in London, in Slough and throughout the UK. I suspect that would be a course to which the Defendants would subscribe.

However the Judge in that case had clear evidence of the kind of work the Claimant was likely to have obtained and was therefore able to identify with sufficient precision the income group to which his potential occupation would have belonged. I do not have that advantage.

62. The Defendants submit that the comparable approach for the Cayman Islands would be to use the data collected in the 2010 Cayman Islands Population and Housing Census, because the Plaintiff was only 12 years old and had no ascertained career ahead. It is argued that to assume that the Plaintiff would have followed the same career path as AXB would be speculative and that it is likely that the Plaintiff would not have been as successful in his career as his brother whose occupations since leaving school were mailroom clerk, customer sales representative, warehouse supervisor, vehicle inspector and fleet manager. None of these jobs, it is submitted, places him above Group 4, ('clerical support workers') in the United Nations International Standard Classification of Occupations. The Defendants now accept for comparison purposes that the Plaintiff might have achieved lifelong employment within Group 4.

63. The Plaintiff was 25 in 2010. From the 2010 Census (Additional Documents produced by Travis Walters Tab 2 page 12) the Defendants have taken the mean 2010 annual income for males aged 25 to 29 as CI$29,445 and have used inflation statistics (not in dispute) as described later in this judgment to calculate the loss up to and beyond 2010.

64. Accordingly the Defendants' calculation of the Plaintiff's past loss of earnings is as follows:-

Year	Age	Actual Salary	Pension	Expected Salary	Expected employer Pension Contribution (5%)	Loss
2003	18	$6,000.00	$300.00	$5,539.00	$277.00	$0.00
2004	19	$6,000.00	$300.00	$17,365.00	$869.00	$11,934.00
2005	20	$6,000.00	$300.00	$24,315.00	$1,216.00	$19,231.00
2006	21	$6,000.00	$300.00	$26,091.00	$1,305.00	$21,096.00
2007	22	$6,000.00	$300.00	$26,300.00	$1315.00	$21,315.00
2008	23	$6,000.00	$300.00	$27,063.00	$1,353.00	$22,116.00
2009	24	$6,000.00	$300.00	$28,173.00	$1,408.00	$23,281.00
2010	25	$6,000.00	$300.00	$29,445.00	$1,472.00	$24,617.00
2011	26	$6,000.00	$300.00	$29,533.00	$1,477.00	$24,710.00
2012	27	$6,000.00	$300.00	$29,916.00	$1,495.00	$25,111.00
2013	28	$0.00	$0.00	$30,574.00	$1,529.00	$32,103.00
2014	29	$0.00	$0.00	$30,971.00	$1,549.00	$32,520.00
2015	30	$0.00	$0.00	$33,701.00	$1,685.00	$35,386.00
May 2016	30	$0.00	$0.00	$12,904.00	$605.00	$3,509.00
Total		$60,000.00	$3,000.00	$351,890.00	$17,555.00	$296,929.00

65. By way of comparison it is helpful to insert at this point the Table produced by the Plaintiff demonstrating that, although differing (but equally acceptable) methods of calculation have been used, the principal matters in dispute are the type of career the Plaintiff would have pursued and the level of salary he would have enjoyed but for the accident. The approach adopted by the Plaintiff is to assume a notional starting salary of $22,000.00 in September 2003 (based on his brother's earning history). It has been assumed that the Plaintiff would have matched his brother's earnings by age 29 so that annual increments have been applied and thereafter his notional earnings have been adjusted by 1.57% per annum in accordance with the Consumer Prices Index (the Defendants used 1.5% for their calculations).

Year	Age	Actual Salary	Pension	Expected Salary	Expected Employer Pension Contribution (5%)	Loss
2003	18	$6,000.00	$300.00	$7,260.00	$363.00	$1,323.00
2004	19	$6,000.00	$300.00	$24,114.64	$1,205.73	$19,020.37
2005	20	$6,000.00	$300.00	$26,229.28	$1,311.46	$21,240.74
2006	21	$6,000.00	$300.00	$28,343.92	$1,417.20	$23,461.12
2007	22	$6,000.00	$300.00	$30,458.56	$1,522.93	$25,681.49
2008	23	$6,000.00	$300.00	$32,573.20	$1,628.66	$27,901.86
2009	24	$6,000.00	$300.00	$34,687.84	$1,734.39	$30,122.23
2010	25	$6,000.00	$300.00	$36,802.48	$1,840.12	$32,342.60
2011	26	$6,000.00	$300.00	$38,917.12	$1,945.86	$34,562.98
2012	27	$6,000.00	$300.00	$41,031.76	$2,051.59	$36,783.35
2013	28	$0.00	$0.00	$43,146.40	$2,157.32	$45,303.72
2014	29	$0.00	$0.00	$45,261.00	$2,263.05	$47,524.05
2015	30	$0.00	$0.00	$45,971.60	$2,298.58	$48,270.18
May-16	30	$0.00	$0.00	$19,455.56	$972.78	$20,428.34
Total		$60,000.00	$3,000.00	$454,253.36	$22,712.67	$413,966.03

66. The Plaintiff's method of calculation differs from that adopted by the Defendants in that the Plaintiff has increased the starting salary by a notional amount so that his earnings matched those of his brother at age 29 whereas the Defendants have taken the 2010 Census average salary for a man in Group 4 in the age bracket 25 to 29 and adjusted that figure for earlier and later years by applying inflation adjustments. The Plaintiff does not dispute that the Defendants' method of calculation is one proper way to approach loss of earnings, if the Court is minded not to equate the Plaintiff's career with that of his brother, but submits that the base figures suggested by the Defendants are 6 years old and are skewed by failing to differentiate part-time and full-time workers and workers with multiple jobs.

It is submitted that the figures underestimate the earnings of full-time workers of whom the Plaintiff would have been one.

67. The statistical evidence relied upon by the Defendants was given by Mr Travis Walters a Statistician at the Economics and Statistics Office. I found Mr Walters to be a clear and impressive witness. Mr Walters conceded in cross-examination that the value of employee benefits such as lodging, motor vehicles, healthcare, clothing and refreshments were not reflected in the mean salaries which represented money payments and that no account was taken of hours worked and of whether the respondents were full or part-time workers. Only the main occupation of the respondent was used. Mr Walters did not accept that the mean figure would be skewed downwards by inclusion of part-time workers because he claimed that some part-time workers might earn more than the mean figure and some full-time workers would earn less than the mean figure.

Mr Walters said that, to an extent, it would have been possible to distinguish the mean figures for part-time and full-time workers but that exercise had not been carried out. He conceded that AXB's occupation (Fleet Manager responsible for Stores) did not necessarily fall into Group 4 (and particularly into Group '4419 - Clerical Support Workers not elsewhere classified' which appeared to be the nearest category fitting AXB's occupation).

68. I accept Mr Walters' evidence that mean incomes are not skewed by failing to distinguish part-time workers from full-time workers and I find that the exclusion from the mean figures of the value of fringe benefits is inconsequential in this case because no-one suggests that AXB has any such benefits other than pension and health insurance. However, I find it difficult to accept that AXB's occupation fits neatly into the description of 'clerical support worker not elsewhere classified' or into Group 4 generally. The Note to the List of Major Groups (Tab 1 Mr Walters' Additional Documents) states "Fleet Manager could be classified into 2 headings: Fleet Manager under the Managers groups (Group 1) and Fleet Supervisor under the Clerical Support Workers (Group 4)". I understood that AXB's job description was quite widely drawn ranging from responsibility for the vehicle fleet to overall responsibility for Police stores. Although it has been suggested that his occupation does not fall into any group higher than Group 4, his job (or part of it) could just as easily fall under any one of the following headings:

'1324 Supply, distribution and related managers'	CI$58,864.00
'1439 Services managers not elsewhere classified'	CI$60,697.00
'3341 Office supervisor'	CI$47,440.00
Part of his job might conceivably also be described as:	
'4321 Stock clerks'	CI$24,693.00

I also note that AXB's current salary equates to that of a Police Officer (CI$47,560.00) in 2010 which means either that he has a job with serious responsibilities or that Police Officers are seriously under-remunerated. I prefer the former explanation. The only sensible conclusion to draw is that to attempt to pigeon-hole any occupation is fraught with difficulty.

69. I therefore cannot accept the evidence that AXB's employment is properly categorised as a 'clerical support worker not elsewhere classified' or that the likely average wage available for his occupation was CI$29,445.00 in 2010 or that it is appropriate to assume that the Plaintiff's likely career course would have taken him into a job classified within Group 4 or with a mean salary at the category 4419 level or at around the average mean wage for the Group as a whole.

70. I can find no reason to doubt that the Plaintiff would have overcome what I consider to have been temporary personal difficulties at school, would have achieved similar examination results to those of his siblings and would have taken a career path which mirrored that of his brother. The Plaintiff also points out his interest in cars and suggests that he might easily have had a career in motor maintenance justifying a Group 3 earning capacity.

71. I am satisfied that the Plaintiff would, but for the accident, have followed in his brother's footsteps with a similar level of employment achievement. I therefore accept the Plaintiff's calculation of loss of past earnings in the sum of **CI$413,966.03**.

ABILITY TO WORK

72. The Plaintiff has attempted to work since the accident. My clear understanding of the evidence of his parents leads me to the conclusion that they have both done their utmost to protect the Plaintiff and to shield him from any criticism arising out of his inadequate performance of the jobs he has undertaken. They have, unsuccessfully as it turned out, sought (not deliberately) to mask his shortcomings from his employers. The Plaintiff's mother was instrumental in obtaining work for her son ("*I got all his jobs after he left school. I helped fill out application forms and people who knew me and him gave him jobs*") and she tried her best to help him when he was out of his depth finding his way around when trying to deliver items for his employers. His father helped too. When he worked at the Ports Authority, his job involved checking things in the warehouse but he would forget the paperwork or forget where he had put things. At MailFast, he would leave paperwork in the car and forget where it was and wouldn't be able to find the places he was supposed to be delivering to. Supervisors would call his mother and say he had gone home for food and he would turn up at work 2 hours later. The Plaintiff's mother says he tries to do something but just can't follow it through, losing concentration or forgetting where he was supposed to be going. He would forget to deliver items at all. At best his jobs were token attempts to permit him to enter the labour market at the bottom but the Plaintiff simply did not pass muster. His employers at Scotia Bank where he was employed as a post-boy kept him on as long as they could but in the end were forced to terminate his employment.

At September 2005, Scotia Bank had already realised that the Plaintiff was taking '*excessive time to complete the regular deliveries, delivering the payroll to the wrong branch, leaving envelopes overnight in (his) drawer and parking in the customer parking lot'*. The Bank noted his willingness to work but noted also '*your lack of concentration, forgetting to collect or deliver items, not completing the daily logbook and taking excessive time to collect and deliver envelopes even in the downtown area'* and '*not returning to your desk ... in a reasonable and timely manner'* (Document Bundle Vol 1 Divider 12 P455). His employment was terminated (ibid page 456) because by October 2005 no significant improvement had been noted despite coaching and monitoring. In August 2007, the Plaintiff's employment with Hydes & Sons was terminated for failure to attend work sites and perceived lack of cooperation and reluctance to act as instructed. I suspect that the employers were observing the effects of his injuries. There is also an undated letter from Captain Parsons (ibid page 466-7) who said '*he was consistently late for work in the mornings', 'he would have to leave and go back home because he forgot something', 'while at work sometimes he would forget what he was there to do', 'he wasn't able to be on time once', 'at times (he) was very distracted from what he was supposed to be doing'*. Captain Parsons also referred to the Plaintiff disappearing for 1 or 2 hours at a time. There is a letter dated 14th January 2014 from Mailfast Services (ibid page 496) to the contrary effect to which I attach little weight due to its inconsistency with the preponderance of the other evidence, the fact that it appears to be based on very limited exposure to the Plaintiff's shortcomings during 'temporary fill-in' part-time employment and the evidence from his parents to the effect that he was hardly ever actually called upon to work for Mailfast.

73. His inability to concentrate and persist in a task, even one he enjoyed and in which he performed well, is also demonstrated by his refusal to continue in sports in which he excelled.

74. The Plaintiff's father assessed his son's job prospects as follows. Asked if the Plaintiff could hold down a job with the assistance of rehabilitation, he said he regarded that as impossible – '*it's a fairy tale*' he added *'we've tried everything. They'd have to put the missing brain matter back first and I saw how much he lost.'* AXS, the Plaintiff's sister, who was a brief but impressive witness put the matter more bluntly. Asked if she was saying her younger brother was a 'no-hoper' she replied '*sadly, yes*'.

75. The Defendants submit that there was credible expert evidence that the Plaintiff would have some '*residual capacity, especially with appropriate compensatory and amelioration strategies to be implemented in his care plan, (and) might be capable of some form of work for which he could earn income*'.

However, as was clearly acknowledged in the course of the evidence, such work as the Plaintiff might perform would require a sympathetic employer, a supporter at his side, only token earnings and would be mainly therapeutic in nature.

76. It is convenient at this stage to examine the expert evidence concerning earning capacity and the role of care in any possible rehabilitation aimed at achieving gainful employment of some kind.

CASE MANAGEMENT, PROVISION OF OCCUPATIONAL AND/OR RECREATIONAL THERAPY, REHABILITATION ASSISTANCE WITH A VIEW TO GAINFUL EMPLOYMENT AND ASSOCIATED CARE SERVICES

77. The issues are whether and, if so, to what extent the Plaintiff's future care needs should be administered by a Case Manager in overall charge of the provision of care, whether an Occupational Therapist should be employed and, if so, the extent of the therapy required and/or whether a Recreational Therapist is required. I must first consider whether care services might lead to the Plaintiff's rehabilitation with a view to some realistic future gainful employment. There are linked issues concerning the need for a sleeping nurse to deal with epileptic seizures as and when they occur, an advisory companion or 'buddy', domestic services, childcare, transport and various other anticipated future expenses.

78. The principal witnesses dealing with these issues were Mrs Michelle Clarence (for the Plaintiff) and Ms Miriam Lam (for the Defendants). Although there had been a joint meeting between these experts, in fact little had been agreed between them and the record of the joint meeting serves mainly to set out their rival proposals in tabular form.

79. Mrs Clarence qualified as an Occupational Therapist in 1991 but is now a very experienced Case Manager and Life Care Planner who has a long history of dealing with and managing the provision of care in traumatic brain injury cases (her curriculum vitae is at Core Bundle Divider 28 P523). She is experienced as a witness in court proceedings and knew what was expected of her.

Her reports and her evidence were objective and thorough. Ms Lam is also experienced since 2003 in Occupational Therapy having dealt principally extensively with children. She had the advantage of working in the Cayman Islands. Her experience of traumatic brain injury cases seems to have been limited to two periods of hospital placement in brain injury units, each of 2 months' duration in 2002 and 2003 at the beginning of her career, coupled with some experience of encountering brain injured patients during her general clinical experience over the past 12 years (her curriculum vitae is at Core Bundle divider 31 P551-3).

80. Ms Lam's focus in this case has been on her perception that the Plaintiff, with fairly intensive occupational therapy, can regain an earning capacity thereby enabling him to obtain some sort of financially rewarding employment or self-employment. Ms Lam has structured her care proposals around that perception. Hence she sees the need for predominantly occupational therapy (rather than recreational therapy) exploiting the Plaintiff's residual abilities and thus enabling him to gain some form of earning potential. She lists some 18 possible vocational/occupational activities (Joint Report Core Bundle Divider 32 P561) as having the potential to produce earnings. These activities are principally community-based or internet-based depending predominantly on creating an on-line or community market to show-case the Plaintiff's artistic strengths, local historical knowledge and general creativity. Ms Lam also suggests a number of possible part-time stable income roles for which she says the Plaintiff may be qualified especially with intensive occupational therapeutic support (Core Bundle Divider 31 P542).

81. Ms. Lam's optimism as to the Plaintiff's future is not shared by others. Dr Hamilton (the jointly instructed expert) says that the Plaintiff shows overall decreased intellectual efficiency (severe in terms of processing speed and impairment of working memory and mathematical ability) and mild impairment of executive functions (Core Bundle Divider 22 P414). He has of course developed epilepsy. Dr Hamilton also says that the Plaintiff is able to live independently but needs on-going supervision in the form of daily monitoring, financial management and protection from undue influence (Core Bundle Divider 23 P421). He has limited ability to cope with stress, lowered frustration tolerance and poor judgment. He adds that the Plaintiff is permanently and totally incapacitated for gainful employment. He says that the work already attempted by the Plaintiff is the pinnacle of what he could ever perform (and he seems to have been unaware of the extent to which the assistance given by the Plaintiff's parents masked his actual performance). Dr. Hamilton politely disagreed with Ms. Lam's suggestion that the Plaintiff might, with rehabilitation and support, work as a security guard, a desk clerk, in telemarketing, as a barista, in customer services, in graphic design or in on-line marketing. He said he viewed as 'scary' the prospect of the Plaintiff as a security guard due to his impulsive behaviour and his difficulty controlling aggression or in being able to analyse safety issues. As a desk clerk he would be unable to cope with stress or to process information and deal with customers. The multi-tasking demands of the job of a barista would be too much for him. Dr Hamilton said the Plaintiff could carry out some aspects of each suggested job but would never be able to perform each job in its entirety.

In any event towards the end of Ms Lam's evidence I understood her to withdraw the idea that the Plaintiff might ever be fit enough to hold down any of those suggested jobs without enormous support, a very understanding employer and without much prospect of other than token earnings. In reviewing the Plaintiff's abilities, Dr. Hamilton took into account the medical records, the psychiatric records, the family history, and all the available information about him and then assessed his employment potential supplemented by the results of the tests he had arranged to be carried out. He did not accept that the Plaintiff was ever likely to improve in his cognitive ability no matter how much rehabilitation by an Occupational Therapist was attempted. The future for the Plaintiff is being assisted to cope with his cognitive defects rather than trying to alleviate them. He accepted that some improvement to working memory had emerged from studies of the effect of computer use on the brain but the clinical significance was minimal. Dr. Hamilton said that if the Plaintiff could be assisted and supervised in fixing cars or helping in a garage (not competitively or gainfully or full time) with a benevolent employer who would look the other way when the Plaintiff failed to perform, that would be helpful but only in terms of improving his self-worth. Mr Akinwumni Consultant Neurosurgeon in his report says that he does not believe the Plaintiff will be able to be in long-term gainful employment (Core Bundle Divider 26 P452) – but he was not cross-examined on that issue. Dr Coello-Jemmali who was the Plaintiff's treating neuropsychologist, although she was not called to give evidence on the topic, on the 10th July 2010 forcefully reported that the Plaintiff "will not be able to work or sustain gainful employment". Mrs Clarence agrees with these conclusions and has structured her recommendations around them (infra).

82. The Plaintiff says the Defendants' contention that, after 3 years of occupational therapy/rehabilitation, he will be capable of working 30 hours per week and earning about CI$10,000 per annum is not only unrealistic but is not supported by Ms Lam, who accepted in cross-examination that the most that he could work would be 1 to 2 hours every other day with a support worker. Further there was no evidence of the likely earnings of someone in social media, posting material on the internet or in any of the other occupations/activities suggested by Ms Lam except for her own limited personal experience.

83. Mrs. Clarence accepted that supportive employment would benefit the Plaintiff and that such employment should be paid to avoid a feeling of being under-valued although, whilst Dr. Hamilton agreed that such employment (for example helping at a gas station or carrying out simple car maintenance tasks) would be valuable, he said a wage was not essential. Clearly, it would be beneficial to the Plaintiff to obtain some supportive work (in particular perhaps voluntary work), but in any case the assistance of a support worker would be necessary.

84. I have come to the conclusion that the real gulf between Ms Lam and the other experts is not so much rival views of the Plaintiff's ability to perform activities such as those listed by Ms. Lam but rather whether those activities should be regarded as a purely recreational therapeutic tool designed to improve his quality of life. Ms Lam believes that his musical and creative abilities, nurtured with the assistance of Occupational Therapy, are likely to result in income via social media and through contracts to tell his life story or in a variety of other ways.

If successful, that result would nullify the need for any recreational therapy as the improvement to his quality of life would have been achieved and would be maintained by continuing employment with appropriate support and management. Mrs. Clarence supported by medical opinion believes that the Plaintiff's abilities are too limited even for employment-directed therapy to have any positive gainful results. There is clearly a chance that, in the current internet or 'millennial' age, incomes can be generated via websites, postings on YouTube and the like and that a determined or lucky individual might be financially successful, but I find myself unable to conclude that generating an income by that means in this case is either a probability or a realistic possibility against the background of the problems which the Plaintiff, even with support, would have to overcome. As Dr Hamilton said, for every internet success there are thousands of failures. I fully understand he has the ability to make music and accept that, albeit subject to a limited attention span, he can perform some tasks such as making a CD or drawing. However, I am unable to accept that any earning potential from his vocational activity could ever be realised. I too, like Dr Hamilton, am concerned at the psychological damage potential of repeated efforts by the Plaintiff to re-live and tell the story of his experience to an audience and the agitation and stress this would likely cause. Ms. Lam obviously formed a very favourable impression of the Plaintiff on first meeting him, because he was superficially not what she was expecting, and Ms Lam is clearly well-meaning and enthusiastic in her support for the Plaintiff but I found her, on her own admission, too personally and emotionally involved in the Plaintiff's case and in her own global vision for the future of internet working as to tarnish her objectivity.

At times I found that Ms. Lam forgot her role as an expert witness (in which I find her experience was limited) and ventured into speculation and unscientific prediction based on anonymous blogs, apocryphal stories and other non-specific documents and materials available somewhere on the internet and thus by their very nature incapable of being tested in cross-examination or otherwise. Throughout her evidence, Ms. Lam embarked on prolix, tangential, anecdotal evidential excursions stopping only when she realised that she had forgotten the question asked. Although I admire Ms. Lam's enthusiastic support for her vision of the Plaintiff achieving internet or community success, I cannot factor such dreams and hopes into an award of damages and therefore reject the contention that the Plaintiff is ever likely to earn. The vast preponderance of the expert opinion is that any work he does in the future will be no more nor less than a hobby. Any earnings he may achieve will be merely token or charitable.

85. The Plaintiff calculates the future loss of earnings by taking a multiplicand of CI$46,693.00 based on AXB's gross annual earnings, applying a multiplier of 22.59 discounted by 0.95 to 21.64 producing a total claim for loss of future earnings of CI$1,002,055.00.

86. The Defendants submit that the Plaintiff's likely 2016 annual earnings, using the mean annual income by age group (male) for Group 4, (clerical support workers) in the United Nations International Standard Classification of Occupations, updated for inflation, would be CI$34,206.00 so that, also applying the discounted multiplier of 21.64, the Plaintiff's loss of future earnings would be CI$740,218.74.

87. For reasons already stated, I do not accept the Defendants' categorisation of the type of career the Plaintiff is likely to have pursued if the accident had not intervened. I have already indicated that the Plaintiff would in my judgment have followed in the footsteps of his brother although not necessarily along an identical career path. I can see no valid reason to think that the Plaintiff could not have enjoyed similar earnings to those of his brother and I therefore accept the Plaintiff's calculations of future loss of earnings.

88. I therefore find that the Plaintiff's loss of future earnings is the sums he would have earned in employment in a similar capacity to his brother and that his lost earning capacity is total. The calculation of lost future earnings is therefore in the total sum of **CI$1,002,055.00**.

CARE AND ASSISTANCE

89. Past Care and Assistance is agreed in the sum of CI$224,286.00 subject to determination of whether the loss is recoverable and/or should be discounted.

90. The Defendants submit that, where care has been provided gratuitously, the commercial cost ought to be discounted by 25% to reflect the fact that the cost was not in fact paid or received. In ***Housecroft v Burnett*** [1986] 1 All ER 332 at 343, O'Connor LJ said that the commercial rate would be *'the ceiling'* of the amount to be awarded and that the question to be determined was '*is this sufficient to provide for the Plaintiff's needs, including enabling her to make some monetary acknowledgement of her appreciation of all that her mother has done for her?'*

In ***Evans v Pontypridd Roofing Ltd*** [2001] EWCA Civ 1657, the English Court of Appeal upheld the trial Judge's 25% discount of the commercial cost. May LJ was at pains to point out that trial Judges should not be required to apply a conventional formalised calculation or a conventional percentage due the variability of differing cases. The Defendants say that the commercial cost should be reduced to **CI$164,082.00.** This sum, they say, would be more than adequate to allow the Plaintiff to show appreciation – especially to his mother – for her past care.

91. The Plaintiff says that such discounts are normally intended to reflect income tax and national insurance so that, in a jurisdiction where no such liabilities exist, no discount is appropriate. However, as was also pointed out in ***Evans***, the discount or scaling down of the award for gratuitous care was required to reflect the fact that the notional cost of providing the care on the open market was not actually being paid or received but was still intended to compensate the voluntary carer. Here the Plaintiff's parents had not given up gainful employment in order to care for him. The care provided was not of the intensive type exemplified in the reported cases. As May LJ pointed out in ***Evans*** (at para 30):

> "*Any determination of the services for which the court has to assess proper recompense will obviously depend on the circumstances of each case. There will be many cases in which the care services provided will be limited to a few hours each day ..... but they do not, in my view, have to be limited in every case to a stop-watch calculation of actual nursing or physical assistance..... It is obviously necessary for judges to ensure that awards on this basis are properly justified on the facts, and not to be misled into findings that a gratuitous carer is undertaking full time care simply because they are for other reasons there all or most of the time.*'

92. I am satisfied that caring for the Plaintiff, whilst at times exhausting, physical and fraught with difficulty and frustration, was not so intensive and full-time as to cause either parent to have give up their employment or to spend an excessive amount of time caring for the Plaintiff. I have to keep in mind that the Plaintiff has had live-in girlfriends taking some of the pressure off his father. The seizures do not occur on a nightly basis though they have been very frequent. During the day-time, the care is more supervisory in nature. I have therefore come to the conclusion that the Defendants' submissions are correct and I apply a 25% discount to the amount claimed by the Plaintiff in respect of past gratuitous care reducing the award to **CI$164,082.00**.

FUTURE CARE AND ASSISTANCE

GENERAL PRINCIPLES

93. The approach to be adopted in respect of awards for future care and assistance where there is evidence of competing care regimes was considered in ***Sowden v Lodge*** [2005] 1 WLR 2129 where the English Court of Appeal decided that the question to be determined is whether the care regime advanced by the Plaintiff is reasonable having regard to the specific nature and extent of his needs and to his preferences as opposed to considering (i) what would objectively be reasonable care for a notional "reasonable" person with his disabilities or (ii) what is in his best interests or (iii) whether a different or cheaper care regime will or may objectively meet his needs.

94. I must therefore consider in the present case (i) the Plaintiff's needs, (ii) whether the care regime chosen by the Plaintiff is reasonable having regard to his specific needs and preferences and (iii) what are the reasonable costs of the chosen regime.

95. I must have regard to all the relevant circumstances (see ***Whiten v St George's Healthcare NHS Trust*** [2011] EWHC 2066). In particular I must take into consideration that the Plaintiff's father said that he is unlikely to be able to continue to care for the Plaintiff for more than the next 2 to 3 years. Accordingly, the Plaintiff claims care and case management (i) when living at home with his father (2.5 years) and (ii) when living independently from his father (2.5 years onwards). In both periods, the Plaintiff has claimed:

a) Case management
b) Recreational therapy
c) Agency support workers
d) Gratuitous care
e) Respite care/overnight care

All of these categories of care are fully explained in the reports of Mrs Clarence.

96. The Defendants agree the general applicable principles and submit that the care plan proposed by the Plaintiff's expert is unreasonable because (i) it makes no provision for any real attempt to rehabilitate the Plaintiff to compensate for or ameliorate his disabilities being based on the faulty premise that the Plaintiff is incapable of any real improvement and (ii) it defaults to the most expensive route to care without even exploring the avenues for less expensive care.

It is, say the Defendants, a care plan heavy on management and light on professional therapy. For example, the plan chooses care providers from overseas without exploring the resources available on island. It is submitted that the Court must have regard to whether any reasonable person not pursuing a claim for damages would have opted for the alternatives proposed by the Plaintiff's expert and whether any part of the proposed care package was recommended by the treating medical or psychological experts or based on the wishes of the family. Whilst taking care to ensure that the Plaintiff receives an appropriate award to meet his needs, the Court should examine the care proposals to ensure that the Plaintiff is not over-compensated.

97. My attention has been drawn by the Defendants to an extract from *Butterworth's Personal Injury Litigation Service* (1460) where the following appears:

> *'In some serious cases, the claimant may require on-going access to a privately instructed occupational therapist to assess his/her home and or working environment and maximise quality of life. If a care expert has been instructed, provision for this should be included in the report. The input of an occupational therapist is likely to be periodic in nature, occurring once every certain number of years. Again, it is important to ensure that the medical evidence justifies the need for such input on an on-going basis...'*

98. The care experts disagree about the provision of case management, recreational therapy and occupational therapy. There are disagreements about the rates to be paid and the hours to be worked. I will do my best to find a solution to these difficult issues.

CASE MANAGER AND/OR OCCUPATIONAL THERAPIST

99. Mrs Clarence explained in oral evidence that a Case Manager is crucial to the care plan being required to:

a. Formulate a care plan and perform a risk assessment;

b. Choose an appropriate care agency and assist in the recruitment of suitable qualified and experienced occupational therapists, support workers and nurses. This is a continuing obligation the turnover of carers and Licensed Practical Nurses (LPNs);

c. Provide training and assistance;

d. Monitor the care plan and deal with any crises;

e. Act as an advocate for the Plaintiff and be his first point of contact;

f. Facilitate the Plaintiff's involvement with his treating doctors and accompany him to appointments;

g. Liaise with the Plaintiff's family.

(See also Ms. Clarence's report at [Core Bundle Divider 28 P484-485])

100. Dr. Hamilton's evidence was that case management would be very useful for the Plaintiff and was the glue which held the care package together.

101. Mrs. Clarence researched Case Managers on island, concluded that there were few if any and decided that it would be necessary to use a Case Manager from Miami. Understanding that it would be preferable for the Case Manager to be based on-island it emerged that the only Occupational Therapist who might be able to take on that role was Ken Figuera. Ms. Lam contacted Mr Figuera but he stated that he was only prepared to provide psychosocial occupational therapy.

102. On the basis that the Plaintiff will not be rehabilitated, the Plaintiff submits that a Case Manager is essential to ensure that the care plan achieves its purpose – namely to provide the Plaintiff with a structured, positive, rewarding and safe life.

103. The Defendants rely on their expert Ms Lam who takes the view that an Occupational Therapist can perform the role of Case Manager and who proposes three years of intensive occupational therapy to get the Plaintiff as close as possible to being vocationally active. The Defendants further point to the fact that both Mrs Clarence and Dr Hamilton accept that it would be good for the Plaintiff's well-being to engage in some meaningful paid or unpaid employment activity.
Also this would lead to greater functionality sustained over subsequent years and would be much more advantageous for the Plaintiff than the care plan proposed by Mrs Clarence.

104. Ms Lam, who has practised on island, proposes using therapists available on island and those who she believes to be able to perform the dual roles of Occupational Therapist and Case Manager, and she has latterly increased the case management hours to allow for that need to be met. Ms Lam was unable to say which of the other Occupational Therapists on island (apart from Mr Figuera) was able to assist. Those listed by Ms Lam seemed to have no experience of treating TBI patients [Core Bundle Divider 36 P572].

105. The Plaintiff submits that, against that background, it would not be reasonable to base a lifelong care package on the basis that appropriate Case Managers will be available on island or on delegating that role as an additional responsibility of an Occupational Therapist.

106. There is considerable gulf between the experts as to what hours a Case Manager (or Occupational Therapist acting as Case Manager) should be required to carry out and how much that person should be paid. Mrs Clarence assesses that a Case Manager would carry out 72 hours work in the 1st year, 40 hours in the 2nd year and subsequent years until the Plaintiff moves away from his father when the hours rise to 64 in the 1st year of independence and fall to 54 in subsequent years.

Ms. Lam allows 12 hours for each of the first 3 years during a period of intense occupational therapy (and as part of the role of the therapist) for the first 3 years and 6 hours in each subsequent year. After the Plaintiff begins to live independently, Ms Lam makes no separate allowance for case management as she says that that work will be done as part of the reduced level of occupational therapy once the Plaintiff has become vocationally active. The rival approaches are so different that it is almost impossible to carry out a meaningful comparison. It is sufficient to point out the basic differences of approach by each expert to each care role and function and to indicate that the rival contentions are set out in detail in the joint report to which I have already referred (Core Bundle Divider 32 P555 et seq).

OCCUPATIONAL/RECREATIONAL THERAPIST

107. Mrs Clarence recommends a recreational therapist in order to build a *"well rounded weekly schedule of meaningful activities."* [CB2/28/487]. Mrs Clarence accepted in oral evidence that an occupational therapist on island could fulfil this role and might be more versed in strategies of daily living than a recreational therapist. Dr Hamilton agreed that recreational therapy would be useful in this case.

108. The Plaintiff therefore submits that, once travel is taken out of the equation, the cost of a recreational therapist is similar to that of an occupational therapist. The Plaintiff submits that this service is crucial to the success of the care regime, whether it is provided by an occupational therapist or a recreational therapist, such a therapist being required to organise activities for the Plaintiff and to arrange supportive employment, without which the care plan runs the risk of losing focus and structure.

109. The Defendants say that any recreational therapy is subsumed in the work of the Occupational Therapist and they set out in argument the anticipated costs as calculated by Ms Lam.

110. The Defendants' approach to the costs of the Occupational Therapist (with case management functions) is set out in the calculations below based on Ms Lam's proposals (and contained in the Defendants' closing skeleton argument):

Occupational therapy for psychosocial health:

Year 1 to 3: CI$135 per hour once per month (CI$1,620.00 pa).

Multiplier: 2.91 x CI$1,620 = CI$4,714.00

Year 4 onwards: CI$135 per hour once per 2 months (CI$810.00 pa)

Multiplier: 25.45 x CI$810 = CI$20,614.00

Occupational therapist with TBI experience:

Year 1: 3 hours pw x 52 weeks = CI$21,060.00 pa

Multiplier: 0.99 x CI$21,060.00 = CI$20,849.00

Year 2: 1 hour pw x CI$135 ph x 52 weeks = CI$7,020.00

Multiplier: 0.99 x CI$7,020.00 = CI$6,949.00

Year 3: 1 hour pm x CI$135 ph x 12 months = CI$1,620.00

Multiplier: 0.99 x CI$1,620.00 = CI$1,603.00

Year 4 onwards: 6 hours pa x CI$135 ph = CI$810.00

Multiplier: 25.45 x CI$810.00 = CI$20,614.00

Additional case management hours:

All years: 6 hours pa x CI$135 per hour = CI$810.00

Lifetime multiplier: 26.84 x CI$810.00 = CI$21,740.00

Total for occupational/recreational therapy and case management

(Adding all underlined totals above) - **CI$97,083.00**.

111. The Plaintiff's calculations for Care and Case Management are set out in the Schedule of Loss from which the following is taken:-

Medium Term Care and Case Management (Years 1 to 4)

Year	Cost
Year 0 to 1	Per Annum
Case Management - 72 hrs, travel and subsistence	$9,420.00
Recreational therapy – 50 hours	$8,125.00
Agency support workers	$19,720.00
Agency support worker for supportive employment – 6 hours	$4,608.00
Respite care	$4,094.00
Gratuitous care by father	$7,372.00
Total	$53,339.00
Year 1 to 2.5	Per Annum
Case Management - 40 hrs, travel and subsistence	$5,860.00
Recreational therapy – 26 hours	$4,976.00
Agency support workers	$19,720.00
Agency support worker for supportive employment – 6 hours	$4,608.00
Respite care	$4,094.00
Gratuitous care by father	$7,372.00
Total	$46,630.00

Transition and Long Term after 2 to 3 yrs

Year 2.5 to 3.5	Per Annum
Case Management - 64 hrs, travel and subsistence	$9,382.00
Recreational therapist – 26 hours	$4,976.00
Agency support workers	$29,784.00
Agency support worker for supportive employment – 6 hours	$4,608.00
Sleep-in-care	$53,426.00
Family support	$1,365.00
Total	$103,541.00
Year 3.5 to Plaintiff age 65	Per Annum
Case Management - 64 hrs, travel and subsistence	$8,325.00
Recreational therapist – 26 hours	$4,976.00
Agency support workers	$29,784.00
Agency support worker for supportive employment – 6 hours	$4,608.00
Sleep-in-care	$53,426.00
Family support	$1,365.00
Total	$102,484.00
Plaintiff age 65 onwards	Per Annum
Case Management - 64 hrs, travel and subsistence	$8,325.00
Recreational therapist – 26 hours	$4,976.00
Agency support workers	$29,784.00
Sleep-in-care	$53,426.00
Family support	$1,365.00
Total	$97,876.00

Capitalised Value

From	To	No of Yrs	Fixed Term	%age	Multiplier	Multiplicand	Total
10/05/2016	09/05/2017	1.00	0.99	3.57%	0.96	$53,339.00	$51,110.80
10/05/2017	09/11/2018	1.50	1.43	5.16%	1.38	$46,630.00	$64,540.76
10/11/2018	09/11/2019	1.00	0.93	3.35%	0.90	$103,541.00	$93,202.58
10/11/2019	17/10/2050	30.94	19.84	71.55%	19.20	$102,484.00	$1,968,023.94
18/10/2050	17/02/2063	12.33	4.54	16.37%	4.39	$97,876.00	$430,095.31
Totals		46.76	27.73	100.00%	26.84		**$2,606,973.40**

112. Before setting out my conclusions concerning the different costs set out in the above lists and tables, it is convenient to consider other aspects of the care regime set out in the Plaintiff's tables (supra).

LICENSED PRACTICAL NURSE (LPN)

113. It is accepted by the Defendants that a Relief LPN for AXF for Years 1 to 3 was required and the Plaintiff's claimed annual cost of CI$3,896.00 is accepted (Multiplier 2.89 x CI$3,896.00 = CI$11,259.00). In the final Schedule of Loss, the Plaintiff has adjusted the annual cost to CI$4,094.00. I shall assume that the Defendants would wish to amend their calculations in line with that adjustment (ie: Multiplier 2.89 x CI$4,094.00 = CI$11,831.66). For this purpose, the Defendants accept the higher hourly rate claimed (CI$22).

114. However, for Year 4 onwards, on the basis that an LPN will be required every night after AXF no longer resides with the Plaintiff, the Defendants submit that it would be excessive to engage an hourly employee for this purpose and that any person not pursuing a claim for compensation would employ a full time nurse with allowance for relief.

115. The Defendants have referred me to the mean annual earnings for health care assistants at **Tab 1.1.1** of the Additional Documents Provided by Travis Walters at page 8 (item no. 5321). Such a person in 2010 earned CI$32,620.00 per annum (though it would be necessary to adjust that figure for inflation). The hourly rates may then be used, it is submitted, to cover the relief worker for weekends and holidays, (i.e: CI$22 per hour x 4 hours per day x 115 (104 weekend nights and 11 public holidays) = $12,650.00 for relief LPNs).

Total annual cost = CI$45,270.00 (CI$32,620.00 + CI$12,650.00)

Multiplier (from year 4): 25.45 x CI$45,270.00 = CI$1,152,122.00

Total Cost for LPN: CI$11,259.00 + CI$1,152,122.00 = **CI$1,163,381.00**

116. The Plaintiff submits that, although it was suggested in cross-examination of Mrs Clarence that the LPN could be directly employed, it would then be necessary to employ several LPNs and to pay for sickness cover, insurance, health insurance and pension thereby increasing case management responsibilities. Far more sensible and reliable, says the Plaintiff, is to employ agency personnel (at a higher hourly rate of course) but removing from the Case Manager the burden and extra time involved in dealing with changes of nurse, holidays, illness, overheads, travel and all the other hidden costs accepted by the agency under the fee umbrella. Mrs Clarence now assesses respite care based on a seizure frequency, after 12 months, of 12 times per annum at CI$4,050.00 (instead of CI$4,094.00 – the figure for the first 12 months) resulting in a multiplicand for long-term support of CI$52,898.00 (from year 2.5 to age 65).

117. Hence, the Plaintiff has assessed the cost of a nurse for sleep-in care at the rate of CI$22 per hour. In order to test the reasonableness of that claim and to compare it to the figures put forward by the Defendants, my calculation of the Plaintiff's claim for future LPN care is set out below:

Year	**No of years**	**Multiplier**	**Multiplicand**	**Total**
0 to 1	1	0.96	$4,094.00	$3,930.24
1 to 2.5	1.5	1.38	$4,050.00	$5,589.00
2.5 to 3.5	1	0.90	$52,898.00	$47,608.20
3.5 to 65	30.94	19.20	$52,898.00	$1,015,641.60
65 et seq	12.33	4.39	$53,426.00	$232,222.22
Total		26.84		**$1,304,991.42**

118. I am satisfied that the Plaintiff's calculations (whilst calculated on a completely different basis to those of the Defendants) are not so greatly out of kilter with the Defendants' figures as to cause me concern and the difference is probably accounted for by the extra agency overheads which I find to be a reasonable expense in the circumstances of the efficient conduct of the care regime. Accordingly I find this part of the Plaintiff's care calculations to be fair and reasonable.

SUPPORT WORKERS

119. In respect of the hourly rate of support workers, the experts agree that the range is CI$12 to CI$16 per hour. Mrs. Clarence justified taking the top of the range because of the Plaintiff's complicated care needs. Ms. Lam accepts that a good worker is required but then takes the middle figure of CI$14 [Core Bundle Divider 32 P583]. The Defendants submit that CI$16 per hour is too high and CI$14 per hour is more reasonable. The Plaintiff submits that Mrs. Clarence's approach is better informed and will guarantee that an appropriate support worker can be obtained. The differences in opinion are in relation to the rates of pay and as to whether training time should be included or added. Both experts however agree that the role requires someone with particular characteristics and Mrs Clarence says this justifies the higher rates proposed compared to the hourly rates for ordinary care givers.

120. The Defendants suggest that excluding training time is also more reasonable on the basis that training is a natural part of every job. It would not, say the Defendants, be unreasonable to have training time included as part of the job. It is conceded that the cost of a relief worker at weekends should be added at CI$14 per hour x 8 hours x 52 = CI$5,824.00. It is argued that it would be justified to use hourly rates rather than full time annual wages.

121. I have concluded that it will be necessary in this jurisdiction to offer to pay the higher rate of CI$16 per hour in order to attract suitably qualified and dedicated care support workers. I reject the suggestion that training should be deducted as this is essential to ensure that the Plaintiff's needs are met. This is a case requiring expertise and clear knowledge of the requirements of the caring roles. Training for this specific case will be essential.

DOMESTIC HELPER INSTEAD OF CARE-WORKER

122. The Defendants contend that a full-time domestic helper could fulfil many of the tasks required of the care workers proposed by Mrs Clarence.

123. The Plaintiff submits that provision of a full time live-in domestic helper as contended for by the Defendants is not supported by any evidence, is not endorsed even by Ms Lam and would not meet the Plaintiff's reasonable needs since:

a. a domestic helper would not be trained in dealing with people with head injuries or epilepsy and would not expect to be disturbed at night in the event that the Plaintiff suffered a seizure;

b. the cost proposed by the Defendants of CI$19,865.00 per annum is to employ someone during the normal working day, not at night;

c. no provision is made for training, holidays and sickness;

d. such an arrangement would be unlikely to comply with, inter alia, section 24 of the Labour Law (2011 Revision) which states that the standard working day shall not exceed 9 hours.

124. The Plaintiff submits that for care workers to carry out such activities will waste valuable therapy time during the day and may undermine the relationship between the support workers and the Plaintiff. It may also make the recruitment of a suitable support worker more difficult if the support worker is required to clean the toilets, mop the floors, hoover etc.

125. One principle plank of the care regime is to rehabilitate the Plaintiff so that he can carry out domestic tasks by himself rather than leaving domestic chaos in his wake as his father suggested was the situation. I can see no reason to employ someone who would be expected to act as a domestic helper in addition to performing other care tasks and find the idea unnecessary and counter-productive. I will deal separately with the provision of domestic assistance later in this judgment.

FUTURE GRATUITOUS CARE (YEAR 1 TO 2.5)

126. This claim is agreed at CI$7,372.00 per annum subject to the Defendants submission that a 25% discount should be applied. It is pointed out, in addition to the arguments referred to earlier, that the Plaintiff's father is living rent-free in accommodation purchased for the Plaintiff out of interim payments already made towards the award of damages.

127. For reasons already stated (supra), I shall apply the 25% discount as contended for by the Defendants.

3 years x CI$7,372.00 per year x 0.75 = CI$5,529.00

Multiplier: 2.89 x CI$5,529.00 = **CI$15,978.00**

The Plaintiff's claim must therefore be reduced under this head by the sum of **CI$5,327.08**

FAMILY SUPPORT (YEARS 2.5 ONWARDS FOR LIFE)

128. This claim is also agreed at CI$1,365.00 per annum subject to whether the 25% discount should be applied due to the gratuitous nature of the support and I again apply the discount as earlier indicated.

Years 2.5 onwards for life x CI$1,365.00 per annum x 0.75 = CI$1,024.00

Multiplier (from year 4): 25.45 x CI$1,024.00 = **CI$26,060.00**

The Plaintiff's claim must therefore be reduced under this head by the sum of **CI$8,679.25**

GENERAL

129. I have also taken account of the following matters raised in oral and written submissions by the parties.

130. The Plaintiff submits that, even on the basis of Ms Lam's views as to the likely effect of rehabilitation, she is still of the view that support workers, LPNs and family care will be required. It is submitted that Ms Lam's allowance of CI$810.00 per annum for an occupational therapist to *"promote independence in cognitive, domestic, vocational and relational areas"* is inadequate [Core Bundle Divider 32 P582].

131. The Defendants criticise the costs estimated by Mrs. Clarence on the basis that they are said to be contrived and not realistic.

132. Direct comparison between the Plaintiff's calculations and those of the Defendants is not simple because the Plaintiff has based his calculations on AXF continuing to care for his son for two and a half years whereas the Defendant' calculations are based on 3 years.

133. The Plaintiff points out that the Defendants in their Counter Schedule have claimed intense occupational therapy for the first 2 years, thereafter reducing to a level of CI$2,430.00 per annum [CI$23,490.00 (year 1); CI$9,450.00 (year 2); CI$4,050.00 (year 3) and CI$2,430.00 (year 4)], and the provision of a full time live-in domestic helper at CI$19,865.00 per annum for the whole period [Core Bundle Divider 9 P64-66] but appear not to have accepted the evidence of Ms Lam that, when living with his father after the trial, the Plaintiff requires in addition:

a. An agency support worker for 4 hours per day x 5 days per week plus expenses = CI$17,160.00 per annum based on an hourly rate of CI$14 rather than CI$16 (Mrs Clarence favours the higher rate) which is based a typical helper rate plus bonus [Core Bundle Volume 2 Divider 32 P579];

b. Respite care = CI$1,960.00 per annum (based on an hourly rate of a support worker as Ms Lam was uncertain of the cost of a Licensed Practical Nurse or of an equally skilled equivalent on island [Core Bundle Volume 2 Divider 32 P579];

c. Gratuitous care = CI$7,372.00 per annum [Core Bundle Volume 2 Divider 32 P579];

134. Furthermore, says the Plaintiff, when dealing with the period of living independently of his father, the Counter Schedule adopts only the continuing need for occupational therapy (CI$2,430.00 per annum onwards [Core Bundle Volume 2 Divider 32 P582]) whereas Ms Lam accepts that the Plaintiff requires in addition:

a. An agency support worker for 4 hours per day, 7 days per week and expenses = CI$22,984.00 per annum, again at an hourly rate of $14 [Core Bundle Volume 2 Divider 32 P583];

b. Sleep in care = CI$26,222.00 per annum. Ms Lam accepted she had little experience of such an arrangement and provided for a support worker rather than a nurse [Core Bundle Volume 2 Divider 32 P583].

c. Gratuitous care = CI$1,365.00 per annum [Core Bundle Volume 2 Divider 32 P584].

135. I have taken all of the above matters into account in reaching my conclusions.

136. From my earlier findings, it is obvious that I do not accept Ms Lam's evidence. It follows from my findings in relation to earning potential that Ms Lam's assessment of the Plaintiff's needs is wide of the mark. I reject the idea that an intensive course of occupational therapy for 3 to 4 years aimed at returning the Plaintiff to some type of work is either necessary or beneficial. I also accept that a Case Manager is essential in this case and thus accept the views on this subject of Mrs Clarence and Dr Hamilton who said a Case Manager was essential to, as he put it, glue the care plan together. I do not accept the opinion of Ms Lam that a Case Manager is really superfluous to a role which could be carried out by an occupational therapist. There must be continuity of therapy by suitably qualified persons. Oversight of the case cannot be left to family members or to an agency or even to an inexperienced occupational therapist. Finally, contrary to Ms Lam's view, Dr Hamilton extolled the role of the Recreational Therapist (advocated by Mrs Clarence) and said they fulfil a useful function because they are needed to help with meaningful activities, make the patient feel better about themselves and to stimulate brain function. I therefore accept Mrs Clarence's opinion that the roles, employees and hours recommended by her are required to make a difference to the Plaintiff's life are as set out in her report.

137. The rival proposals of Mrs Clarence and Ms Lam are set out in their joint report [Core Bundle Volume 2 Divider 32 P555 to 589]. It is unnecessary to set out those contentions in this judgment for the following reasons. As already indicated, I found Ms Lam to be an unsatisfactory witness. I find that her proposals for the future were predicated on the basis of her conviction that the Plaintiff would within a few years be fulfilling his earning potential and that she has demonstrated insufficient insight into his true future needs. As already indicated there were areas of care with which Ms Lam seemed unfamiliar. I am left with serious doubts that some aspects of the type of care proposed by Ms Lam are even available on island or that those experts mentioned are either willing or able to provide it. I found her care plan proposals inadequate. I entertain serious doubt as to whether Ms Lam even understood the cost differences between a care worker supplied by an agency and someone independently engaged or even the advantages and disadvantages of one versus the other. When asked in evidence to give her opinion about the care regime and costs proposed by Mrs Clarence (in the event that the Court rejected Ms Lam's evidence) she said that she could not do so on the basis that she was committed to her own opinion. I found that approach both blinkered and unhelpful.

138. By contrast I found Mrs Clarence to be a very experienced, knowledgeable and careful witness. She had made some enquiries on island to find appropriate care professionals but the provision had been found wanting. Her care plan and proposals are reasonable and deal sensibly with the Plaintiff's needs and desires. The costs are within reasonable bounds especially in the light of what services are available on island.

139. In the end, I have had to choose between 2 fundamentally different care regimes which embody 2 diametrically opposed approaches to the Plaintiff's care. I did not think that Mrs Clarence was choosing expensive options when cheaper similar provision was available. Rather I thought she was doing her best to solve the problem of inadequate availability of local resources and the intrinsic need to ensure that the overall care package worked.

140. It follows that I accept the figures proposed by the Plaintiff for the future cost of care and assistance subject to deduction of discounts in respect of respite care and family support (total CI$14,006.33). The claim under this head of damage is allowed therefore in the total sum of **CI$2,579,975.56.**

141. I am satisfied that the Plaintiff's proposed future care regime will meet his needs, is reasonable having regard to his specific needs and preferences and is of reasonable cost.

142. I was at first somewhat concerned that, despite what I have been told was a substantial interim payment, a care regime had not yet been put in place, but have concluded that it might have been unwise to do so without first ensuring that the long term funding of the care plan required by the Plaintiff was guaranteed.

PAST CHILDCARE

143. These commercial costs are agreed in the sum of **CI$59,903.00** subject to determination of the question whether the claim is too remote or whether the care was rendered gratuitously and so is subject to discount.

144. The Defendants' contention that the claim for childcare is too remote has not been supported by legal authority. The Plaintiff says that claims for childcare are often made in personal injury claims (***Kemp & Kemp***, chapter 13 at para 13-13 and ***Lowe v Guise*** [2002] QB 1369) and that the suggestion that this item of loss is too remote is wrong. The Defendants counter by saying that the Plaintiff spends only the time with his son that any father would and that his daughter lives with her grandmother anyway so that there is a risk of duplication of the award. It suffices to say that I have heard no compelling submissions that this claim is too remote and hold that it is a proper head of claim.

145. The 25% discount for past gratuitous care should again be applied. The sum of CI$59,903.00 should therefore be discounted to **CI$44,927.25**

146. It is convenient here to deal also with the claim for future childcare.

FUTURE CHILDCARE

147. These costs are agreed in the sum of **CI$128,932.00** subject to determination of the question whether the claim is too remote or whether the care was rendered gratuitously. For the same reasons as stated above I reduce the agreed total by a discount of 25% and award the resultant sum of **CI$96,699.00.**

PAST CLEANING COSTS

148. These costs are agreed in the sum of **CI$26,820.00**

PAST OVERSEAS EXPENDITURE

149. These costs are agreed in the sum of **CI$54,906.00**

PAST MISCELLANEOUS EXPENDITURE

150. These costs are agreed in the sum of **CI$126,002.00**

GRAND COURT CAYMAN ISLANDS

INTEREST ON SPECIAL DAMAGES

151. The Defendants submit that interest is to be calculated taking into account the interim payments made by the Defendants. Interest is payable on special damages at half the rate under the Judgment Debts (Rates of Interest) Rules, 1995 (the 1995 Rules) from the date of the injury to the date of judgment or earlier payment: ***Yates v Radtke*** [1997 CILR 448]; ***Carter-Ebanks v Jefferson Pizza Limited*** [2004-05 CILR Note 21]. The parties have calculated the total interest rate over 18.10 years at 75.11%. Half the special account rate is therefore 37.56% producing a total for interest on special damages of CI$314,081.60. Giving credit for interest on interim payments (total CI$1,508,742.00) in the sum of CI$135,309.89, the total interest on special damages is in the sum of CI$178,772.00 (see interest calculation supplied on the 10th June 2016).

152. I have indicated my agreement with the Defendants' submission in relation to the effect of interim payments on the calculation of interest and award interest on special damages in accordance with the agreement now reached between the parties (taking interim payments into account and giving credit as appropriate) in the sum of **CI$178,772.00** .

OTHER FUTURE LOSSES

LOSS OF PENSION

153. The Defendants agree that the Plaintiff would be entitled to recover the loss of the 5% employer's contribution to his pension. The Defendants submit that, by section 26(1) of the National Pensions Law (2011 Revision), the normal retirement age up to which contributions to a pension are required to be made is 60 and that, by section 25(1) of that Law, the obligation to contribute to a pension plan ends at age 60 so that the Plaintiff's loss of pension should therefore be calculated only up to age 60. The Plaintiff disputes that interpretation of the law and argues that the pension contributions should continue up to age 65.

154. The Defendants' calculation of the pension claim (using their figure for lost earnings – CI$34,206.00) is therefore as follows:-

Multiplicand:	(5% of CI$34,206.00) = CI$1,710.00
Multiplier:	20.30 (20.78 with a discount of 0.48 to age 60)
Total:	CI$34,713.00

155. The Plaintiff's calculation of the pension claim (using their figure for lost earnings – CI$46,693.00) is as follows (I have adjusted the calculation marginally):

Multiplicand:	(5% of CI$46,693.00) = CI$2,334.00
Multiplier:	21.64 (22.59 with a discount of 0.95 to age 65)
Total:	CI$50,508.00

156. The issues for determination are (i) what is the correct multiplicand, and (ii) up to what age should the pension contributions be deemed to be payable?

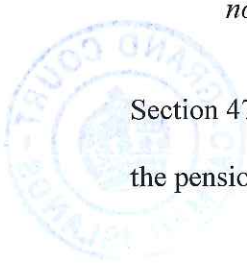
157. Section 25(1) of the National Pensions Law (2012 Revision) provides:

> '*Subject to subsection (2), all employees between the ages of eighteen years and sixty years shall be members of a pension plan.*'

Section 25(2) states that employers are not required to provide pension plans for employees in certain circumstances who do not have Caymanian status or who are not permanent residents.

Section 26(1) provides:

> '*The normal retirement date under a pension plan submitted for registration under this Law, in this Law referred to as the normal retirement date, shall be not later than one year after a person has attained 60 years of age.*'



Section 47(1) sets out the obligation on both employer and employee to contribute to the pension plan.

158. After the conclusion of the hearing, I drew to the attention of the parties the provisions of the National Pensions (Amendment) Bill 2016 which, by clause 3(c) provides for amendment of the normal retirement date to age 65. At the time of writing this judgment, the Bill has been gazetted and awaits a commencement order of the Cabinet stating the date when this amendment will be brought into force. The Plaintiff invites me to apply the anticipated new provision in upholding his claim. The Defendants have emailed a response which *states "We confirm that once the amendment law has extended the normal retirement age for pensions to 65, the award for loss of future pension should be calculated up to age 65 and not age 60".*

159. I would have no hesitation in finding that, until the amendment passes into law, the Law at present requires that pension plans must be provided for a Caymanian up to the age of 60 years. I find that to be a minimum requirement and that nothing in the Law prevents anyone from either working beyond the normal retirement date or being a member of a pension plan which permits membership after age 60.

160. It would follow that, until the amendment becomes law, I could not conclude that the Plaintiff would, even if following in his brother's career path, have joined a pension plan allowing membership beyond age 60. I do not have any sufficient information to allow me to draw any such conclusion. For all I know, in practice all pension plans may terminate at age 60 or all plans may permit membership beyond that date or they may vary widely in their scope. However if the amendment becomes law, all that will change.

161. If I was to accept the Defendants' argument that the pension award should be calculated to age 60, I would adopt the salary which I have allowed under the claim for loss of future earnings. The calculation would then be:-

Multiplicand:	(5% of CI$46,693.00) = CI$2,334.00
Multiplier:	20.30 (20.78 with a discount of 0.48 to age 60)
Total:	CI$47,380.00

162. However, I cannot see how it is fair to the Plaintiff to award a sum for lost pension rights based on a law which I am aware is about to change imminently. Therefore I adopt the Plaintiff's calculation of loss as set out in paragraph 155 above in the sum of **CI$50,508.00**.

163. If for any reason no commencement order is issued so that the existing law remains in force preserving the retirement age at 60, I grant the Defendants Liberty to Apply to amend this award as appropriate (absent any agreement).

FUTURE TRAVEL

164. The Plaintiff should not drive on account of his epilepsy. The Plaintiff submits that he will require taxis in order to convey him to his mother's house and into town. It is submitted that 11 trips per week is reasonable when a support worker will only be with him for 4 hours per day. The Plaintiff says he will also require transport when he is with his support worker, but because the Plaintiff would have owned a car in any event, the parties have agreed that, in respect of the car alone, he is only entitled to the extra cost of insuring his car for his carers in the sum of CI$115 per annum. The Plaintiff's claim is as follows:

Taxi Allowance	CI$13,520.00
Increased insurance (agreed)	CI$115 per annum
Total	CI$13,635.00 per annum
Less running costs	CI$2,000.00 per annum
Multiplicand	CI$11,635.00
Life multiplier	26.84
Total cost	**CI$312,283.00**

165. The Plaintiff submits that uninjured he would have used his car to travel to work, for shopping and for recreation but now it will only be used by his support workers and will travel fewer miles. The Plaintiff therefore offers a credit of $2,000 per annum.

166. The Defendants say that, apart from the increased insurance costs, no other allowance is justified since he would have a support worker with him every day and in particular the taxi cost should not be allowed because, had the Plaintiff not been injured, he would most likely have been employed and would not have had the opportunity to take drives around the island especially on work days. There was also evidence that he is currently driven by his current girlfriend in her own car and it would be reasonable to expect that any trips in addition to those with the support worker will be taken in a similar manner, either by a girlfriend using her own or his car or by a family member similarly. The Defendants say the loss is:

Multiplier: 26.84 x CI$115 = **CI$3,086.00**

167. In my view the Plaintiff will not only have a car available to him at any time but will have access to support workers, family members, friends and girlfriends who will be able to fulfil his transport needs at most reasonable times. Just as in the case of normal people without his disability, the Plaintiff may have to adapt his lifestyle and travel requirements to their availability. I do not see that this will interfere unduly with his freedom of movement, which, but for the accident, would have been somewhat limited by the requirements of employment and family commitments.

168. Accordingly, I accept the Defendants' submissions and award the Plaintiff the sum of **CI$3,086.00.**

FUTURE AIDS AND EQUIPMENT

169. These costs are agreed in the sum of **CI$27,982.00**.

DOMESTIC ASSISTANCE

170. Domestic assistance has already been mentioned in the context of whether care workers could or should provide domestic services. I now consider whether there should be an allowance for domestic assistance.

171. The Defendants accept that a payment would be appropriate in principle but argue that the award should be at the current rate of CI$60 per week.

Multiplicand :	CI$60 x 52 = CI$3,120.00
Multiplier:	26.84
Total:	CI$83,741.00

172. The Plaintiff says that the evidence from AXF was that, because the Plaintiff is messy at home, AXF carries out much of the cleaning and washing but a domestic assistant attends once per week. I was reminded of the evidence of Dr Hamilton that this lack of organisation and motivation to keep clean is one of the symptoms of frontal lobe damage and that the Plaintiff "*will need to be reminded to do things and be supervised or otherwise he could not look after himself properly, such as getting himself up in the morning*" [Core Bundle Divider 23 P421].

173. I am sure that AXF will not in 2 to 3 years' time stop helping his son with domestic chores even though they will not be living together. Indeed I would regard that as part of the gratuitous family assistance to be provided in future.

174. Mrs Clarence accepted in cross-examination that the present arrangement could continue when the Plaintiff is living by himself with his family organising the domestic worker. Accordingly this head of claim is allowed in the sum of **CI$83,741.00**.

FUTURE HOME MAINTENANCE

175. These costs are agreed in the sum of **CI$51,700.00**.

PRIVATE HEALTH INSURANCE

176. The Plaintiff says cost of taking out the CINICO 'Challenger' Policy is CI$53,403.00 (CI$196 per month x 12 plus CI$12 grant = CI$2,364.00 x 22.59 multiplier).

177. The Defendants concede that the whole of the cost of the CINICO insurance would be recoverable if claims under the policy served to reduce future treatment costs (I have already decided that the policy need not be used for that purpose).

The alternative, the Defendants argue, is that the insurance premium should be reduced by 50% to take into account the fact that had the Plaintiff not been injured he would have been required to meet 50% of the costs of his health insurance with the employer meeting the other 50%. My attention has been drawn to section 7 of the Health Insurance Law (2013 Revision) which provides as follows:

> *"An employer shall be liable to pay under section 5(2)-*
> *(a) The total cost of the standard premium payable under any standard health insurance contract effected in respect of an employee who is not a high risk insurance person; and*
> *(b) ... (not applicable)*
> *but shall be entitled to recover directly from the employee or to deduct from the salary, wage or other remuneration of each employee-*
> *(i) In the case of an employee specified in paragraph (a), an amount not exceeding fifty per cent of the premium so paid in respect of the employee.'*
> *(ii) ... (not applicable)"*

178. Therefore the Defendants agree that CI$28,096.00 is payable and should be awarded.

179. The Plaintiff agrees that this argument is correct, but contends that, since the Plaintiff's claim is based on his brother's earnings and because his brother works for the government, his health insurance is paid in full. Accordingly, the whole cost should be allowed. In any event, according to the evidence of the Plaintiff's mother and sister, private sector employers will often pay 100% of the policy premium.

180. In the alternative, the Plaintiff claims the base cost of 50% of the insurance premium plus 50% of the difference to reflect the chance that he may have obtained employment where all of his health insurance would have been paid; i.e. 75% of the total claim. That would result in claim for:

Multiplicand	CI$2,364.00
Multiplier	22.59
Loss of a chance	75%
Total	CI$40,052.00

181. I consider that the alternative approach put forward by the Plaintiff is the correct approach. It cannot be known whether the Plaintiff's career would have taken him into the private or the public sector and the application of the chance is the proper way to resolve the impasse. I therefore award under this head of damage the sum of **CI$40,052.00**.

DAMAGES ADMINISTRATION COSTS

182. It is agreed that I should determine in principle whether the cost of a professional trustee is properly to be awarded and, if so, the appropriate applicable heads of charge. The parties will then seek to agree the costs of a professional trustee and in the event of dispute, the matter can be resolved at a further hearing.

183. There is no Court of Protection in the Cayman Islands. The Grand Court is given the responsibility of administering awards made to patients and children under Order 80 Grand Court Rules:

a. Rule 12 provides for moneys to be dealt with in accordance with the court's directions which may provide for payment into court to be dealt with there by investment or otherwise and may direct how the money is to be applied for the patient's benefit;

b. Rule 22 (2) states:

> *"Where a receiver is appointed for a patient, the Court may allow the receiver remuneration for his services at such amount or at such rate as the Court considers reasonable and proper and any remuneration so allowed shall constitute a debt due to the receiver from the patient and the estate."*

c. Rule 22 also states that an Order for the appointment of a receiver shall contain directions as the Court thinks fit including directions as to investment, management and maintenance, provides for annual filing of accounts and allows the costs of the receiver of passing the accounts to be paid out of the patient's estate.

184. Ms. Tabitha Philander, Clerk of the Court, has been appointed as interim receiver pursuant to an Order dated 4th May 2015 to assist the parties in the post-settlement/judgment phase, concluding matters and dealing with the costs issue and holding and release of funds in the short term and to assist with handing over the case to any firm of occupational therapists/life care planning firm instructed by the Plaintiff's attorneys.

185. In the course of the evidence the question of whether the Guardian ad Litem was equipped to perform the receiver/trustee's role was briefly explored. The result was that such an option is not feasible.

186. In order to provide for the long-term management of the award, the Plaintiff submits that, pursuant to Order 80, the costs of a receiver are deducted from the award of damages so that these costs should be paid by the Defendants as special damages. Such costs are routinely claimed in the English courts (*Kemp & Kemp*, chapter 28 at para 28-034 and *Facts & Figures* 2015/2016 at page 280).

187. The Plaintiff proposes the setting up of a trust to invest and administer the award of damages to meet his needs. The cost of such a trust has been provided by Piers Stradling who has extensive experience of advising on how best to set up and manage funds to provide a secure stream of income for people incapable of managing their affairs. The parties are in agreement that a discretionary investment service is inappropriate in this case as any investment will be low risk. The Plaintiff accepts that in principle the cost of investment advice cannot be claimed and so claims the cost of advisory/custody service which is the minimum required and cannot be avoided. This would not be required if the Plaintiff was of sound mind able to make investment decisions for himself.

188. The Plaintiff contends that the Defendants' suggestion that the Plaintiff only requires a degree of assistance with his personal affairs and that any award of damages can be managed by his father and his case manager is unrealistic and unworkable and that this award must be supervised by the court and managed by a professional receiver/trustee.

189. The Plaintiff's arguments are as follows. There was no challenge to the evidence of Mr Stradling on how the trust would be run and of the costs involved (see Plaintiff's Supplementary Bundle of Documents at Divider 5). Mr Stradling also gave evidence of the additional costs of (i) winding up the trust, (ii) preparing a will and, in answer to a question from me, (iii) contingency costs. When the Plaintiff dies, the Trust will need to be wound up. This will incur legal and management fees estimated between CI$3,000.00 to CI$4,000.00 (with a deduction for early receipt of 47 yrs). The Plaintiff will be required to make a will at a cost of CI$5,000.00 to CI$10,000.00. The Plaintiff says it would be reasonable to allow 3 Wills to be made and that such costs are routinely allowed in the UK (see Facts & Figures 2015/2016 at 284). Finally, there are likely to be intense periods of management and legal fees if a crisis occurs, for example, the death of a family member. In addition, there may be challenges to the Trust instrument or claims against the Trust. These costs will all have been incurred as a result of the accident and of the award of damages. Contingency sums are often allowed in the UK (see Facts & Figures 2015/2016 at page 283 and 284). A reasonable sum, says the Plaintiff, would be CI$100,000.00.

190. I am quite satisfied that the Plaintiff's family members are not equipped to perform the role. Nor do I think it is desirable in the best interests of the Plaintiff or of his family members that they should assume the role. Acting as a trustee of such a fund is an onerous responsibility. The trustee of the fund must deal with the Plaintiff and his needs independently and without being subjected to undue pressure from the Plaintiff or from anyone else. The Plaintiff must be protected from himself.

191. The Defendants submit that, if I agree to the appointment of a receiver/trustee (and the Defendants do not agree that a trustee is needed), the amounts to be included should be limited to the set up fees, the annual trustee fees, custody fees, legal fees and other expenses. There should be no award for discretionary management (this is agreed by the Plaintiff), for making a will or for unknown, unspecified contingencies. Where based on a percentage of the amount, the administration fees should not be included in the award. The percentage costs should also be based on the amounts actually placed with the administrator and should not include any part of any interim payments already spent. I agree with the latter submission. The Defendants indicated that they would object to the admissibility of the evidence relating to the cost of making a will, winding up the trust and providing a contingency fund but I agreed, subject to resolution, if necessary, at a later stage of the admissibility argument, to hear the evidence called by the Plaintiff and any evidence the Defendants might wish to adduce. In brief, the Defendants' position was that the claim for these items was too late and they had not had time to deal fully with them. The Defendants called no evidence on this topic.

192. I have also read the report of Mr Needham which was helpful but adds little to the issues under consideration.

193. Mr Stradling gave me examples of the sort of tasks to be performed by a trustee including maintaining trust files, keeping a record of events and of decisions and resolutions, day to day administration issues of managing the portfolio, producing investment reports, reviewing expenses, making bank transfers, dealing with requests for distributions, meeting with agents concerning repairs to property, maintaining insurance and many other tasks. I would also include dealing with the Plaintiff's Care Case Manager on a regular basis so ensuring that the Plaintiff's day-to-day needs are met. The onerous nature of the task (done properly) became very clear.

194. I listened carefully to Mr Stradling's examples of other trusts set up in broadly similar circumstances or purposes and to his description of the sort of anticipated possible contingencies facing a trustee (which would also face any alternative person appointed to administer the funds) including dealing with difficult family members, spurious claims against the trust, and other claims. He said the trust might anticipate legal fees for each 'ugly event' of between CI$30,000.00 to CI$50,000.00. In fact, Mr Stradling said, '*I can imagine a host of potential issues*' and '*a trustee would be concerned if (a contingency allowance) was not in place*'.

195. I have no hesitation in deciding that the appointment of a professional trustee is essential. The appointment must include the following items of expenditure which I regard as appropriate:-

(i) Trustee set-up costs;

(ii) Trust drafting – legal costs;

(iii) Annual trustee fees;

(iv) Annual legal fees;

(v) Annual investment management fees (custodial only);

and, subject to the following paragraph,

(vi) Drafting a will (3 per lifetime);

(vii) Cost of winding up the trust;

(viii) Creation of a contingency fund;

(ix) Other expenses.

196. Although I am not at present called upon to assess the costs involved in the above tasks and liabilities, if it assists the parties in agreeing the costs relating to the above tasks and responsibilities of the trustee, I found Mr Stradling's suggested charges reasonable and note that he himself described them as '*conservative*'. As to items (vi) to (ix) in the foregoing paragraph, I am prepared (as already indicated in the course of the hearing) to hear arguments on admissibility at a future hearing. However I would encourage the parties to seek a mutually agreeable solution in order to avoid disproportionate additional costs. Although I heard evidence from Mr Stradling alone on items (vi) to (ix), I found his evidence on the need for those items to be sensible and convincing.

197. Therefore I award damages to the Plaintiff in accordance with the findings set out in the foregoing judgment and further summarised in the Schedule of Damages which follows. To be added to the total sums in the Schedule are the costs associated with the administration of the award of damages.

Schedule of Damages

Item of Loss	**Plaintiff**	**Defendants**	**Court**
	KYD $	KYD $	KYD $
General Damages			
Pain, Suffering and Loss of Amenity	$260,000.00	$190,400.00	$238,500.00
Interest	$78,804.00	$57,735.66	$72,329.00
Past Losses			
Earnings	$413,966.00	$296,929.00	$413,966.00
Care and Assistance	$224,286.00	$164,082.00	$164,082.00
Childcare (P's figure agreed)	$59,903.00	$56,065.00	$44,927.00
Cleaning Costs (agreed)	$26,820.00	$26,820.00	$26,820.00
Overseas Expenditure (agreed)	$54,906.00	$54,906.00	$54,906.00
Miscellaneous (agreed)	$126,002.00	$126,002.00	$126,002.00
Interest	$340,250.00		$178,772.00
Future losses			
Earnings	$1,002,055.00	$740,218.74	$1,002,055.00
Loss of Pension	$50,067.00	$34,713.00	$50,508.00
Care and Case Management	$2,606,973.00	$1,460,518.00	$2,579,975.56
Childcare	$128,932.00	$96,699.00	$96,699.00
Travel	$312,283.00	$3,086.00	$3,086.00
Treatment	$680,895.00	$132,769.00	$690,786.00
Aids and Equipment (agreed)	$27,982.00	$27,982.00	$27,982.00
Domestic Assistance (agreed)[2]	$83,741.00	$83,741.00	$83,741.00
Home Maintenance (agreed)	$51,700.00	$51,700.00	$51,700.00
Private Health Insurance	$53,403.00	$26,701.50	$40,052.00
Cost of administering the award	TBA	TBA	TBA
TOTAL	**$6,582,968.00**	**$3,658,769.40**	**$5,946,889.00**
Outstanding claims	**+ TBA amounts**	**+ TBA amounts**	**+ TBA amounts**

[2] $83,741.00 is the correct figure although the Plaintiff states that it should be $83,714.00

198. Costs will follow the event. The Defendants have raised an issue in relation to costs which may require a future hearing and, if the issue cannot be agreed, I will entertain an application for a further hearing.

199. Liberty to Apply.

Dated this the 29th day of July 2016

Honourable Mr. Justice Malcolm Swift Q.C. (Actg.)
Acting Judge of the Grand Court