Quantum of damages payable by the Defendant and the effect of contributory negligence.

[2019]GRC055

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Between: **ANDRZEJ RUTOWICZ** **Plaintiff**

-and-

CHANNEL WELDERS LIMITED **Defendant**

Hearing dates: **17th, 19th, 22nd and 23rd July 2019**
Judgment handed down: **24th September 2019**

Before: **Richard James McMahon, Esq., Deputy Bailiff**
Jurats: **B.J. Bartie, D.A. Grut and S.M. Crisp**

The Plaintiff represented himself
Advocate for the Defendant: Advocate G S K Dawes

Cases, texts & legislation referred to:

The Royal Court (Reform) (Guernsey) Law, 2008
The Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009
The Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011
The Judicial College Guidelines for the assessment of general damages in personal injury cases (14th ed., 2017)
Kemp & Kemp, The Quantum of Damages
Sadler v Filipiak (unreported, 10 October 2011)
Simon v Helmot [2009-10] GLR 465 (CA) and [2012] UKPC 5 (JCPC)
Blamire v South Cumbria Health Authority [1992] EWCA Civ 20
Law Reform (Tort) (Guernsey) Law, 1979
Clerk & Lindsell on Torts (22nd ed.)
Sahib Foods Ltd v Paskin Kyriakides Sands (A Firm) [2003] EWCA Civ 1832
The Health and Safety at Work (General) (Guernsey) Ordinance, 1987
Stone v Hickman [2007-08] GLR Note 23 (23 April 2008)

Introduction

1. This action relates to an accident that occurred on 20 July 2006. On that morning, the Plaintiff, Andrzej Rutowicz, a Polish national, was working at the Intersurgical site in Pitronnerie Road on the roof of the building. At the time he was employed by David Greig, but contracted by Mr Greig to the Defendant, Channel Welders Limited, to undertake work on the roof of the building. He fell through the roof and sustained serious injuries. The Defendant admits liability for negligence and/or breach of statutory duty, but raises the

question of contributory negligence. There is also a dispute about the causal link to some of the damages claimed by the Plaintiff and so, in general, the quantum of damages payable by the Defendant to him.

2. Without descending fully into the rather protracted procedural history of this action, the Court notes that the main delays in bringing the action to trial were in 2011 to 2014, when the Plaintiff had left Guernsey due to his housing situation, and from 2015 to earlier this year as a consequence of the Plaintiff being in custody, first in England and then in Poland, before he was released towards the end of 2018. As the Defendant has pointed out, these delays were not occasioned by its own actions. The passage of time since the accident is one of the reasons, though, why this has not been a straightforward claim.

3. Although the Plaintiff has from time to time been represented by different Advocates, more recently he has been unable to obtain representation and so has had to represent himself. The Bâtonnier did attend some of the pre-trial hearings earlier this year and offered as much assistance as she could. The Plaintiff has, however, had the services of interpreters, to all whom the Court is grateful for their assistance, in what has been a difficult case to present.

4. This judgment has been prepared in accordance with the provisions of section 16(5) of the Royal Court (Reform) (Guernsey) Law, 2008:

> *"(5) A reasoned judgment in civil proceedings in which the Jurats (and not the Bailiff alone) are sitting shall contain –*
>
> *(a) the Jurats' findings and decisions,*
> *(b) any dissenting findings or decisions made by different Jurats,*
> *(c) the identity of the Jurats making dissenting findings or decisions,*
> *(d) the Bailiff's findings, decisions and directions of law and procedure, and*
> *(e) the application of his findings, decisions and directions of law and procedure to the facts.*
>
> *(6) In this section "the Bailiff" means the person presiding over the proceedings."*

The Deputy Bailiff did not sum up to the Jurats in open Court but instead indicated that the Court would reserve its judgment and retired with the Jurats, as he is permitted to do under section 14(2) of the 2008 Law.

5. In this judgment, a good number of the findings of fact are the unanimous findings of the Jurats, but there have been differences of opinion in relation to certain issues that affect both of the main issues in the case, being questions of causation and contributory negligence. As a result, the decision of the Court is that of Jurats Grut and Crisp, who form the majority view. Where Jurat Bartie has reached a different conclusion, in accordance with section 16(5), her reasons for doing so are set out in relation to the particular issue, rather than being included as an entirely separate dissenting judgment.

The witnesses

6. The only witness of fact who gave evidence for the Plaintiff was Mr Rutowicz himself. He came across as a self-confident person, who felt that he had been severely hard done by. However, some of his comments related to the way in which his Advocates had represented him and so the Jurats were directed that these aspects were irrelevant to the claim for damages arising from the accident. It was clear, though, that the Plaintiff had spent many years dwelling upon how different his life may have been had the accident not occurred. He is firmly of the belief that everything that has happened since July 2006 is directly attributable to the accident and so the Defendant should have to compensate him for this. His approach,

possibly as a result of not having his expectations tempered by someone else representing him, means that the Jurats have had to extract from the evidence and submissions of the Plaintiff what matters and what to disregard. Overall, he was generally a credible witness, although the Jurats found him less forthcoming than would have been helpful about his life before the accident and the consequences of his own choices at that time as they may have reflected what then happened to him. As will also become clear, the Jurats formed the impression that the Plaintiff would have worked hard, but that he would not have realised everything that he says he had in mind.

7. The witnesses of fact called by the Defendant were some of those who had worked with the Plaintiff in 2006. Robert Mann was an apprentice at the time and had been present at the Intersurgical site on the morning of the accident. David Greig was the Plaintiff's employer on the day in question and for a short time before and was able to provide some background to the Plaintiff's recent employment history at the time. Toni Clayton was, and still is, the managing director and owner of the Defendant. Andrew Davison was someone in respect of whom the Defendant had given a hearsay notice dated 27 June 2019 pursuant to section 2 of the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009 on the basis that "*he has not been able to be contacted due to the passage of time*". It was, therefore, rather a surprise to the Court when Mr Clayton explained that Mr Davison continues to be employed by the Defendant. Accordingly, he was able to attend and give oral evidence at the end of his working day. (A similar notice had been served in respect of Mr Greig, but the Plaintiff and the Court were informed that this was no longer being relied upon before the trial commenced because Mr Greig was able to attend in person. When the proceedings commenced, Mr Greig was the Second Defendant, but those proceedings against him had been resolved some years earlier and Mr Greig had ceased to be a party.) The only hearsay notice on which the Defendant relied was in respect of Jamie Robins, who had been the site supervisor on the day of the Plaintiff's accident. The Deputy Bailiff directed the Jurats in respect of the matters set out in section 4 of the 2009 Law as to how to approach the weight to be given to the evidence of Mr Robins.

8. In respect of each of the Defendant's witnesses who attended at trial and gave evidence, the Jurats do not find that any of them deliberately went out of his way to give false or misleading evidence. Each presented as someone who had no real recollection of what had taken place, which is not surprising given that the trial of the action was delayed so many years. There had been an investigation by Barrie Abel, on behalf of the Health and Safety Executive, during the course of which Mr Abel spoke with Mr Mann, Mr Robins, Mr Greig and Mr Clayton at around the time of the accident (as well as the Plaintiff a little later). Mr Abel also appended some materials from Guernsey Police, including the witness statements given by Mr Robins on the date of the accident and the Plaintiff on 20 December 2006. In relation to these materials relating to the accounts given by the Defendant's witnesses at around the time of the accident, acknowledging that each may have been keen to downplay any adverse criticism of himself or, as the case may be, his employer at that time, the Jurats have carefully considered whether the witness statements prepared approximately three and a half years or more later and any oral evidence was inconsistent with the basic versions of events relayed by those witnesses at the outset. Accordingly, the Jurats have concluded that all of the Defendant's witnesses have given broadly consistent accounts throughout but, where there are any differences, what was stated earlier on might be taken as being the more accurate account than a later recollection, although they recognise that, after a period of reflection, some things can be remembered which were not mentioned in the immediate aftermath of an event.

9. Given the passage of time, it had been agreed prior to the trial that none of the expert medical witnesses would be called to give evidence and that the Court would approach the written reports on the basis that, where there were any differences of opinion, they would be resolved without the benefit of cross-examination. This was a pragmatic solution also relating to the

Plaintiff representing himself. As a result, the Court has had regard to the evidence of Dr Neil Mackay on behalf of the Plaintiff in relation to orthopaedics and Dr Trevor Friedman in relation to psychiatry. A later report from Dr Freidman was provided during the course of the hearing because the only version in the bundle had been in Polish. The Plaintiff did not rely upon this report but, in accordance with rule 16 of the Evidence in Civil Proceedings (Guernsey and Alderney) Rules, 2011, the Defendant sought to rely on its content. On behalf of the Defendant, the Court has considered reports from Mr Andrew Jackson in relation to orthopaedics and Dr David Gill in relation to psychiatry. In the unusual circumstances of this case, the Court has done its best to extract from all this material its findings in relation to the levels of injuries sustained by the Plaintiff and their ongoing effect on his health, recognising that each of the reports is now somewhat historical.

General directions

10. The Deputy Bailiff reminded the Jurats of their respective roles: the Deputy Bailiff remains the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats were directed that they must accept his directions on the law and follow them.

11. The Deputy Bailiff directed the Jurats that the general burden of proof rests on the Plaintiff to establish the causal link to the damages he claims. The standard of proof is the civil standard of the balance of probabilities and the Deputy Bailiff explained that to establish something on the balance of probabilities means to prove that something is more likely so than not so. Insofar as the Defendant sought to establish any fact and this extended particularly to the allegation that the Plaintiff was contributorily negligent, the burden of proof rested on it to prove it to the same civil standard.

12. The Deputy Bailiff further directed the Jurats to have regard to the whole of the evidence presented to the Court, and to form their own judgments about the witnesses, and which evidence they treated as reliable, and which they considered was not. The Deputy Bailiff directed that the facts of the case are the Jurats' responsibility. They may take account of the arguments in the speeches they heard, but are not bound to accept them. Equally, if at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. The Deputy Bailiff summarised that position by clarifying that, when it comes to the facts of this case, it is the Jurats' judgment alone that counts.

13. As a general principle, the Deputy Bailiff reminded the Jurats that an award of damages in tort is to compensate a plaintiff for the losses, pecuniary and non-pecuniary, sustained as a result of a defendant's wrongdoing. The Court's aim, therefore, must be to award the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. As Advocate Dawes had put it in argument, there are two parallel universes to consider, contrasting what would have happened without the accident to what it has been as a result of the accident. However, a plaintiff is also under a duty to mitigate his losses, in the sense that damages are not recoverable for such losses as a plaintiff has avoided by taking action subsequent to the tort. For example, if a plaintiff has lost his pre-accident employment as a result of an actionable injury, damages for loss of earnings must take account of any earnings in an alternative employment and so an assessment of the Plaintiff's earning capacity at any point and the prospects of him fulfilling that capacity have to be made. These issues are questions of fact for the Jurats to determine. Overall, the Court's aim should be to make an award that is fair, reasonable and just in all the circumstances of the case.

Facts

14. The Plaintiff is a Polish national. He was born on 1 January 1957. He lived and worked in Poland until 2005. He described himself as an educated man, having a degree from university, but considered that his education would not help him, and had not helped him, since the accident. He had completed some military service and been a major in the special services. He worked in the construction industry in Poland, eventually running his own building company for 21 years. This company had employed up to 100 people in Warsaw. However, due to adverse economic circumstances, he became bankrupt in 2001.

15. The Plaintiff's main interest outside of work in Poland was boxing. He had had some success as a junior boxer and was friendly with some well-known prominent boxers from Poland. He had set up a foundation to help youngsters from deprived backgrounds, particularly those whose lives were affected by alcohol and drug addiction in the family. Among other things, he acted as a coach. His interest in boxing has continued in later life, but he has not played anything approaching the active involvement in boxing that he had in Poland since arriving in Guernsey or since the accident.

16. Following his bankruptcy in Poland, the Plaintiff had taken the decision to start a new life by seeking employment elsewhere. Immediately prior to leaving Poland, from a document termed a Social Contract and dated 7 April 2005, it appears that the Plaintiff was homeless and effectively without any resources. As a result of his search for work, he secured a job with 4site Recruitment Limited, a company based in Bournemouth, which led to him being deployed to Guernsey in May 2005 to work on the construction of Le Rondin. The sub-contractor for whom the Plaintiff was to work was Mr Greig, who had previously made use of labourers sourced from 4site Recruitment Limited. The Plaintiff lived at the Manor Hotel. There also appears to have been a short period of working for a Mr Priaulx. However, his work was interrupted in September 2005 when he sustained an injury arising from an accident at work. His employment through 4site Recruitment Limited ended, with that company entering voluntary liquidation at around this time. As a result of this first accident, the Plaintiff states that he was unable to work for approximately 11 weeks, although it appears from a time sheet relating to the first two weeks of November 2005 that the Plaintiff worked for Mr Greig, being paid £13 per hour. Thereafter, he secured employment with Dean Willis as a bricklayer. In February 2006, Mr Willis wrote that this work would continue "*for the foreseeable future*". From two pay slips produced by the Plaintiff, appearing to be from this period of employment, the hourly rate of gross pay was £13. According to the social security records produced, the period of employment with Mr Willis ran from 17 December 2005 to 8 July 2006 during which time the Plaintiff's total gross earnings were £17,154.

17. The Plaintiff was then offered work with Mr Greig at what he said was a higher rate of pay and his timesheet for this period refers to £16.50 per hour, even though Mr Greig had indicated he was paying only £13 per hour. He worked first on the Vazon Stores site, being sub-contracted by Mr Greig to the Defendant. Those who were aware of the work performed by the Plaintiff at this site agreed that there had been no issues with that work.

18. The Defendant had secured the contract to re-roof the Intersurgical site. Some work had already been done on the roof and the work was due to re-commence in July 2006. The Defendant took advice on health and safety issues relating to the site from Normandie Health and Safety. The Defendant needed to contract in labour to work on the site. Having previously sourced sub-contract only labour from Mr Greig, a similar oral arrangement was made with Mr Greig for the re-commencement of this work, and the Plaintiff and a co-worker, Igor Ozols, a Latvian national, were sent to the site on 19 July 2006. A copy of the methodology for working on the site was provided to Mr Greig.

19. Mr Davison was the site supervisor that day. He had worked with the Plaintiff at the Vazon Stores site and so knew him. Mr Davison explained the nature of the re-roofing work required. The project involved fixing sheeting over the existing asbestos roof, which Mr Davison explained was fragile. The three of them went to the roof for this explanation. Mr Davison explained that the roof was fragile and that the rooflights were particularly fragile. He explained that part of the area under the roof had safety netting fixed below it. Other parts of the roof were explained to be out of bounds. The Plaintiff was not, however, shown inside the building and so had not seen the location of the netting. There were no barriers or other markings on the roof that showed the areas that were explained to be out of bounds. At one point, the Plaintiff stepped on to one of the rooflights and Mr Davison heard a crack. He and Mr Ozols pulled the Plaintiff back. It is clear from the accounts of Mr Davison and the Plaintiff that the three men were standing on the asbestos roof in order for the Plaintiff to have been in a position to step on one of the rooflights that day. The Plaintiff did not carry out any work on the roof on 19 July 2006.

20. On 20 July 2006, the Plaintiff and Mr Ozols arrived on site at 7.30 am and began work. No one from the Defendant was present at that time. Mr Mann arrived around an hour later, and Mr Robins, who was the site supervisor that day, arrived approximately five minutes later. Further explanation was given by Mr Robins about the work that needed to be done and the areas of the roof on to which the Plaintiff, Mr Ozols and Mr Mann should not walk. Emphasis was placed on the very fragile state of the rooflights. On several occasions during the morning, Mr Robins rebuked the Plaintiff for straying on to parts of the roof he did not need to walk on and where he had been told he should not walk. Mr Robins explained that the route the Plaintiff was taking to get the sheets to fix on to the roof was the wrong route and there was no safety netting beneath the route he was taking. Mr Robins became concerned and so telephoned Mr Clayton, pointing out that in his view the Plaintiff was "*a liability*". Mr Clayton explained that he was already on his way to the Intersurgical site and that he would remove the Plaintiff from the job when he arrived.

21. However, before Mr Clayton arrived on site, the Plaintiff fell through a rooflight at approximately 11.35 am. He had stepped backwards on to it. This rooflight was at the very edge of the safety netting and initially the Plaintiff managed to grab the edge of the safety netting, which was about six feet below the roof itself. Mr Robins went off the roof to try to find a forklift with a pallet to assist with the recovery of the Plaintiff from the netting but, before that could happen, the Plaintiff lost his grip and fell to the floor approximately seven metres below the roof. The Plaintiff sustained serious injuries and was taken by ambulance to the hospital, arriving a little after 1 pm. Mr Greig travelled in the ambulance with the Plaintiff and during that ride and at the hospital, the Plaintiff said he was sorry to Mr Greig, apparently believing Mr Greig would get into trouble, but the Plaintiff also said that he had been stupid and that he thought he could fly like Superman. There had been no head injury and he had not lost consciousness. Mr Clayton was on site shortly after the accident and the police also attended, as did Mr Abel.

22. The position of the Plaintiff in relation to housing licences appears to be that he had never been granted a short-term housing licence, and had received temporary exemption certificates, covering his employment with Mr Greig, Mr Priaulx, Mr Willis and again with Mr Greig. The precise nature of the application made by Mr Greig in July 2006, relating to its timing and who has purported to sign it on behalf of the Plaintiff, remains a mystery, but resolving that question is not necessary for the purposes of this judgment. It suffices for the Court to note that the Plaintiff never held a housing licence associated to his employment and that, when he sought a compassionate licence after his accident, that application was also rejected because of the absence of sufficient ties to the Island to warrant him being granted a housing

licence. The Plaintiff may have wished to appeal that rejection, but events overtook him and no such appeal was apparently pursued.

23. Following surgery and release from the hospital in August 2006, the Plaintiff returned to live at the Manor Hotel. He ran up debts in unpaid rent with the proprietor, Colin Cozens, and so moved to Les Embruns Hotel. He carried out work to his premises there, quite possibly with assistance, and has produced numerous receipts for the costs of materials. His difficulties with the Housing Department led to him leaving Guernsey in 2011 and moving to Gravesend. He had not worked between the accident and his departure from Guernsey and had been reliant on benefits from the Social Security Department.

24. The Plaintiff's Cause was first tabled in September 2009. This was a little over three years after the accident, there having been a standstill agreement to enable the proceedings to be instituted by that time. However, these steps were taken towards the end of the limitation period. At this time, Mr Greig was a co-defendant, but the proceedings against him were withdrawn with no order as to costs by an order dated 5 June 2015. Before that time, the action had come close to being listed for trial in 2011, but for a number of reasons, including that the Plaintiff dispensed with the services of his original Advocates and had left Guernsey, the action was adjourned and matters did not really resume until 2014.

25. In England, the Plaintiff still did not find work. It appears that he did not look for work. He continued to be reliant on benefits. He also ran into trouble with the police and was prosecuted and eventually convicted of affray on 9 August 2016, following which he was sentenced to 16 months' imprisonment. The date of the offence was 7 August 2015. The jury at Maidstone Crown Court acquitted him in respect of a count of making a threat to kill. However, before that time, there had been extradition proceedings in relation to him, arising from the imposition in Poland of a sentence of imprisonment, originally suspended, but subsequently activated for what would be regarded as a dishonesty offence. The best explanation of the position is found in the decision of the judge at the City of Westminster Magistrates' Court dated 29 October 2013, which the Plaintiff attempted to appeal but that appeal was dismissed on 14 July 2014, with the period for extradition commencing on 21 August 2014. From the Magistrates' Court's judgment, it transpires that a sentence of two years' imprisonment was imposed on 27 May 2003, but at that time it was a suspended sentence, and that the sentence was then activated on 7 February 2005. The Court notes that this activation occurred before the Plaintiff left Poland to come to work in Guernsey. The Plaintiff's attempt to explain the position in relation to this matter in Poland as somehow affected by his inability following the accident in 2006 to repay approximately £3,000 appears to the Jurats to be unsatisfactory. So far as it is relevant, they reject that attempt at explaining that the Plaintiff's plight in being extradited to Poland and having to serve this sentence is a direct consequence of the accident.

26. Although the Plaintiff maintained before this Court that he was innocent of any offending and intended to appeal his conviction once in a position to do so, this Court can only deal with the situation that has arisen and the facts as they find them now. Much was made by the Plaintiff of the fact that the extradition order that crystallised in 2014 appears to have been ignored by the UK authorities. However, that issue had no bearing on the position of the Plaintiff subsequently or even at that time. What does matter is that he was a prisoner from 25 August 2015 until he was released from the Polish prison on 11 December 2018. As such, his inability to work during the entirety of that period was not a result of his accident but as a result of the action of the authorities in England and in Poland. Further, any alleged grievance that the Plaintiff has about the way he has been unfairly treated by the authorities dealing with him in England and Poland does not relate to the actions of the Defendant.

27. It was during this period of incarceration that the action before this Court had to be adjourned sine die until the Plaintiff was in a position to resume instructing his Advocate or, as the case turned out, to pursue matters himself. The Defendant had argued that the matter should not have been left hanging over it, but the Deputy Bailiff ruled that, because it was accepted by the Defendant that some damages were payable, the action should be permitted to be resumed once the Plaintiff was in a position to progress it. This happened earlier this year, when the Plaintiff arrived in Guernsey and sought leave to restore his action, following which the matter has progressed to the trial that took place in July.

The issues

28. Against that factual background, and where more detail will be added when dealing with certain aspects of the case, the Deputy Bailiff identified for the benefit of the Jurats that they were not concerned with the primary liability for the negligence and/or breach of statutory duty that had been pleaded on behalf of the Plaintiff in his Cause, because that liability was admitted, but rather that they should concentrate on the way in which the Plaintiff put his claim for damages in his revised schedule of loss. During the course of the hearing, the Plaintiff explained that a handwritten document dated 13 March 2014 had been superseded by the typed document headed as a fourth draft dated 18 May 2015, which purported to replace in its entirety the earlier Cause, and on to which he had, in 2019, added figures in manuscript. This was the basis on which he was advancing his case. That case was met by the Defendant's Counter-Schedule as at 18 June 2019. In addition, the Jurats would need to consider, once a figure for the Plaintiff's total loss was determined, whether, and if so by how much, to reduce that award by reference to the Defendant's plea of contributory negligence.

29. The first aspect to consider, therefore, was the award of damages for pain, suffering and loss of amenity. The Plaintiff had put a figure of £200,000 in place of what had originally been pleaded at £29,750. There was no explanation in his Schedule of Loss or anywhere else as to how the amount of £200,000 had been reached. In contrast, the Defendant's Counter-Schedule offers a detailed analysis of the injuries that were accepted were sustained as a result of the accident, reflecting the amounts given as guidance in the Judicial College Guidelines for the assessment of general damages in personal injury cases (14th ed., 2017) and, allowing for overlap, the Defendant suggests a total amount of £65,000. The Jurats were to consider whether either position should be adopted or whether some amount inbetween were to be found appropriate.

30. The second aspect related to loss of earnings between the accident and the trial. The Plaintiff's claim is for approximately £570,000. This is based on pre-accident earnings of £770 per week gross. The allowance for receipt of State benefits, though, has not been correctly calculated by him in his Schedule of Loss, and so the amount properly claimable, even on the basis advanced by the Plaintiff, would necessarily be lower. Further, the Plaintiff's calculation did not take into account the period during which he was in custody. In contrast, the Defendant suggests that loss of earnings should be restricted to three years only and that using a figure of £24,000 net per annum would be appropriate, making its total under this head of loss £72,000. The Jurats would, therefore, need to consider what amount of earnings the Plaintiff could have expected to achieve and over what period of time. This would also lead to consideration of whether the Plaintiff had failed to mitigate his losses by not seeking some other form of work of which he was capable and identifying what, if any, difference in earnings that would have meant.

31. On future loss of earnings, the Plaintiff claims £147,976, taking him to a retirement age of 65. The Defendant argues that there is no ongoing loss of future earnings. The Jurats would, therefore, have to decide whether this head of loss had been proved by the Plaintiff and, if so, on what ongoing basis.

32. The Plaintiff's case includes a claim for loss of opportunity relating to his plan to have set up a boxing club in Guernsey from which he would have derived profits. Although he revised the amount of this claim down to £600,000 during the hearing, the figure put in his revised Schedule of Loss was 20% of the projected total income of the club, which is stated to be £3,196,560, and so £799,140. In respect of this claim, the Jurats would need to consider whether the Plaintiff had demonstrated that this was a realistic project for him to undertake had he not suffered the accident and, if so, the value to be put on this loss of opportunity.

33. The Plaintiff makes a claim for domestic assistance in the sum of £20,000. This was explained by him to be an estimate of the value of the assistance he had received and which he intended to pay to those who had provided him with assistance. The Defendant argues that there is inadequate evidence that assistance was given or, if given, that there has been any promise to pay for services rendered. In those circumstances, the claim should be rejected. However, the Plaintiff's claim for £50 for damage to his clothing arising from the accident is agreed.

34. The Plaintiff's revised Schedule of Loss also includes claims for loss of property occasioned when he was forced to move, first from Guernsey and then when he left his accommodation in Gravesend, in the amounts of £1,786 and £9,500 respectively. The Defendant argues that this has nothing to do with the accident and so there is no causal link established by the Plaintiff. There is also a claim for £68,896, but without it being particularised, although the Plaintiff explained that this was the aggregate of all the amounts he had provided documents in relation to out-of-pocket expenses he had incurred, including paying rent, since the accident, and in response the Defendant proposes a notional award of £1,000.

35. There is a discrete claim by the Plaintiff for £48,000 as the cost of future hip replacement surgery. The Defendant's position on that issue is that the prospect of needing it associated with the accident, as opposed to the degenerative condition of the Plaintiff's hip, is 20% and the costs of the surgery would be much lower than claimed by the Plaintiff at just under £10,000 and so proposes an award of just £2,000.

36. Interest on the general and special damages is claimed by the Plaintiff. The amounts are put at £24,900, using 2% per annum, and £65,192, by reference to half the special account rate, respectively. In each case, the Defendant's Counter-Schedule rejects those claims on the basis of the delay in bringing the proceedings and in pursuing them. In relation to interest on general damages, it proposes just one year at 2% on the award it suggests is appropriate, being £1,300 and, in respect of special damages, suggests a token amount of £1,500.

37. The Deputy Bailiff directed the Jurats on each aspect of the claim as follows and invited them to reach their conclusions on any aspect where there were differences between the parties, reminding them that the burden of proof rested on the Plaintiff.

General comments

38. Before turning to each of these heads of loss and then the issue of contributory negligence, the Court makes the following general comments to explain some of the difficulties it has faced and its overall general approach.

39. It was clear that the Plaintiff was struggling to present his case in anything approaching how an Advocate would have done this. It was most unfortunate that he had been refused ongoing legal aid by way of assistance. The Court has, therefore, done its best to give the Plaintiff as much latitude as it could. A lot of what he wished to air was not strictly relevant to his claim

for damages against this Defendant. It is understandable that he is unable to be objective about what has happened to him. He presented his case as if it was self-evident that everything he claims would have been open to him but has been denied him as a result of his injuries is attributable to the accident and so something for which this Defendant is liable. By way of example, a complaint about how he feels let down by the approach taken by any of his previous Advocates is simply not relevant to what fault lies with the Defendant, yet the Plaintiff seemed genuinely unable to grasp this concept. Although it would have been possible to interrupt him when he gave evidence and made his submissions with a view to trying to bring him back to the issues that mattered, the Court chose not to do so for fear of distracting him from putting his case as he wished. One consequence has been that a lot of what he said is not dealt with in the judgment simply because it has no bearing on the issues that arise from the pleaded cases.

40. The Plaintiff was not as forthcoming about his past as the Court considers he should have been. The onus was on him to establish what it was that he had done and whether it was realistic that he would have been able to achieve his goals in the future. By way of example, the Plaintiff was reluctant to acknowledge that he has any family members alive, yet eventually referred to the existence of a son in Poland, from whom he is estranged. Whilst the Court understands that certain aspects of the Plaintiff's personal history may have been painful for him to speak about, the Plaintiff should have understood the importance of providing as much detail as was relevant about his circumstances to enable the Court to compare what his prospects would have been but for the accident with what the reality was following it. As already mentioned, the Court has formed the view that the Plaintiff earlier good fortune when running his own business in Poland had deteriorated to such an extent by 2005 that he was in a dire personal position. That is a relevant factor when considering what his prospects really were thereafter.

41. The Plaintiff referred to Polish compatriots who had arrived to work in Guernsey at around the same time as him and who had managed to remain in Guernsey, working and living in open market accommodation. Ideally, he would have called one or more of them as a witness, rather than relying on his own second-hand assertions as to their positions. However, the Court has generally recognised that it can take as much as it can at face value without requiring any formal proof of such a person's circumstances. To that extent, it has granted a high degree of latitude to the Plaintiff, whilst ultimately recognising that there is a formal burden of proof on him. That said, the overall picture of what the Plaintiff could have expected to have achieved but for the accident has been less clear than it really should have been and it is not for the Court to attempt to fill all the gaps because to do so would be unfair to the Defendant. Although the Plaintiff's approach to the case has suffered from a degree of incoherence, the Court has endeavoured to extract from his wide-ranging submissions and comments the core of his claim, whilst at the same time acknowledging that the summary of a claim for around £2 million is a wild exaggeration of what it is really worth. Further, what the Plaintiff says he intends to do with his damages, however laudable, is of no relevance to how much they should properly be assessed to be.

42. At its heart, the Court broadly agrees with the conclusions found in Mr Abel's report, which the Jurats find consistent with the tenor of the evidence they have heard and read. The conclusion (on page 40 of the report) states:

> "*Andrzej RUTOWICZ, a Polish national, was employed by Elite Carpentry and sub-contracted on a labour only basis to Channel Welders Ltd. Whilst working on a contract to over-clad a fragile asbestos cement roof at the premises of Intersurgical (Guernsey) Ltd in Pitronnerie Road, he stepped on a fragile roof light and fell approximately seven metres to the concrete floor below, sustaining serious injuries to*

his left wrist and left upper leg. He was fortunate not to have sustained fatal injuries. The accident was avoidable.

It was established that the overriding responsibility for the safety of employees and sub-contractors on site rested with the Principal Contractor – Channel Welders Ltd.

The planning of the work to be undertaken was clearly inadequate. The risk assessment itself was not suitable or sufficient. It failed to address the issues properly, and consequently, the resulting method statement and system of work were seriously lacking. There should have been a job specific method statement in writing, agreed and understood by all parties before work started. This simply did not materialise.

There were no crawling boards / Youngmans boards present on site at the time of the accident. There was no demarcation or zoning on the roof using simple barriers. Fragile roof lights were not covered. The safety nets which were in place underneath the roof did not provide total coverage and failed to protect the injured party.

Where migrant workers are employed in the construction industry, but especially when working at heights, good communication and strict supervision are critical. Andrzej RUTOWICZ was engaged as a roof worker by Channel Welders Ltd who had no knowledge of his previous training, experience and qualifications. In addition, his knowledge of the English language was very basic and in my opinion, insufficient to grasp the necessary instruction. There was however, no site specific safety instruction and there was confusion on the part of the Site Supervisor concerning his powers and responsibilities. A high degree of supervision is required whilst carrying out roofwork, to ensure that the agreed method is followed in practice and that safety is not compromised. Indeed on the morning of the accident it was noted that both the injured party and his Latvian colleague had worked on the roof completely unsupervised for over an hour.

Whereas the report has been critical of the Principal Contractor – Channel Welders Ltd, in this incident, the employer of the injured party, Elite Carpentry, must shoulder some of the blame. By directing workers to jobs where their training, experience and qualifications were inadequate or non-existent, was totally irresponsible.

Both companies involved have failed to discharge their duties under Health and Safety Law. The accident happened, however, because Channel Welders Ltd failed to adopt a safe system of work.

This incident could easily have been avoided by proper planning and by using a suitably experienced and trained workforce. Roof work is high risk. It requires the closest attention to detail at all stages if accidents are to be avoided."

Pain, suffering and loss of amenity

43. The Deputy Bailiff directed the Jurats to adopt the approach suggested by Advocate Dawes, which involved having regard to the Judicial College Guidelines when considering each injury that the Plaintiff proved had been suffered. They were to have regard to the medical evidence adduced on behalf of both parties and, in the event that they identified differences of opinion, they were to do their best to resolve them as to which opinion they preferred, recognising that the Court had not had the benefit of hearing any of those views being tested through cross-examination. The Plaintiff had not sought to advance any different approach

and so the Jurats might look at the way in which each injury had been categorised in the Defendant's Counter-Schedule to see how closely that accorded to their own views.

44. In relation to the subsequent approach once each individual injury had been assessed, the Deputy Bailiff directed the Jurats that it was proper to have regard to what was set out in *Kemp & Kemp, The Quantum of Damages* on the question of overlap or duplication of damages. Paragraph 3-024 explains:

> "*There will be many cases in which the claimant has suffered multiple injuries. The overall award does not depend on itemising each separate injury, placing a value upon it and calculating the overall award on the basis of the sum of those parts. Almost inevitably, such a process would produce too high an overall figure. Instead, what should be decisive is the overall disability and impact upon the claimant. So, if one is using the JSB Guidelines, a useful exercise will always be to compare the level of award for the type of injury/consequential disability for conditions which are both slightly more and slightly less serious than the one in question. That should provide a touchstone for the accuracy or otherwise of the award contended for in the instant case.*"

Further clarification of the correct approach was given in para. 3-024.2 by reference to what the English Court of Appeal had indicated in <u>*Sadler v Filipiak*</u> (unreported, 10 October 2011). Having identified the particular injuries and fixed awards of damages in respect of each, the Court was required "*to stand back and compare the aggregate with what seems appropriate for the totality of the injury and consequential disability.*" The work then quotes two passages from the judgments in that case, of which that from Pitchford LJ reads:

> "*It is in my judgment always necessary to stand back from the compilation of individual figures, whether assistance has been derived from comparable cases or from the JSB guideline advice, to consider whether the award for pain suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary.*"

45. The expert reports relating to psychiatric injury broadly agreed that the Plaintiff had suffered an adjustment disorder. By way of example, Dr Gill, on behalf of the Defendant, concludes that "*Broadly speaking I would say that the mental state of the Plaintiff is largely a reflection of the ongoing physical health problems and the restrictions associated with those. … I would say that the gentleman had suffered from a period of a diagnosable psychiatric injury, namely an adjustment disorder, which has probably fluctuated, that is now probably in remission on appropriate maintenance treatment.*" He appreciated that the accident had been a life-threatening one, but he did not agree that the Plaintiff had a diagnosis of post-traumatic stress disorder, although there was a possibility that this is what had happened initially. Dr Gill was of the view that the Plaintiff was fit to resume work. Dr Gill interviewed the Plaintiff on 25 March 2011.

46. Dr Friedman saw the Plaintiff on 26 March 2014. This was some two weeks after he had taken a large number of tablets and cut his wrists in an impulsive act. He had been drinking heavily. Although he described it as "*a difficult assessment*" because the Plaintiff had been drinking, Dr Friedman agreed with the conclusion of Dr Gill. He concluded that the

Plaintiff's "*major problems relate to his difficulty in adjusting to his level of disability and pain. He continues to describe feelings of anger and frustration and loss of self esteem due to his physical problems.*" Dr Friedman considered that the events of March 2014 amounted to "*another episode of acute adjustment distress associated with coming to terms with his disability*". Avoiding alcohol would potentially assist. Further, it would be helpful if the Plaintiff were "*to find useful employment or activity during the day*".

47. Mr Jackson, on behalf of the Defendant, saw the Plaintiff on 22 March 2011. He refers to a Garden Type II subcapital fracture of the neck of the left femur, a compound left Colles fracture which was very comminuted and which had intra-articular extension, fractures of the left superior and inferior pubic rami and there may have been fractures of some ribs, with pulmonary contusion given as the main reason why the Plaintiff had been admitted to the intensive care unit following surgery. Although mention had been made of fractures of T9 and T11 vertebrae, this had not been established. The main injuries were dealt with by surgery later on the day of the accident. The hip was reduced and fixed with three cannulated screws. The wrist was more complicated. It was fixed but still unstable so further supported by a dorsal Pennig external fixator. Mr Jackson referred to the post-operative reviews and the way the injuries resolved themselves, including further surgery on the left wrist in August 2007 to remove the metal plate and screws from the radius, ulnar shortening and bone grafting. He noted that further surgery could have been contemplated in 2008 but that the Plaintiff had lost confidence in his treatment. Mr Jackson expressed surprise that the Plaintiff did not regard the wrist injury as the most significant, but noted that the Plaintiff was "*a difficult individual to assess due to the obvious psychological problems*". In relation to the hip, although the screws remained in place, it had done well to date and he assessed the chances of osteoarthritic changes attributable to the accident and requiring surgery at 20% during the Plaintiff's lifetime. As regards the Plaintiff's back, noting some pre-existing degenerative changes, given the height of the fall and the impact, he considered that five years acceleration of back symptoms was reasonable. He indicated that (para. 6.3):

> "*From an orthopaedic perspective and even if the left wrist injury were the only injury, it is clear that the Claimant was never going to return to heavy manual work as a labourer following this accident. He would also be limited in his ability to undertake light bimanual work. He is, from an orthopaedic point of view, capable of sedentary or semi-sedentary work with his wrist stabilised either by surgery or supported in a splint. He could probably drive a car or light van for short distances. He could theoretically do security work but in all these roles that are less physically demanding, he would have a greater need to speak English than when labouring.*"

48. Mr Mackay's report relating to the Plaintiff's physical injuries was prepared following a meeting on 26 April 2014. He recounted a similar history to that described by Mr Jackson, albeit slightly updated. He had seen Mr Jackson's report and expressly disagreed with two of the assessments made. He regarded the acceleration in back symptoms as unsustainable by reference to world literature on the topic because there is no linear state between degenerative change in the spine and clinical state; these are purely findings of the ageing process. He also disagreed with Mr Jackson's assessment in relation to the left hip, offering his opinion that this was the development of a classical post-traumatic osteoarthrosis of the hip joint which would almost certainly require replacement arthroplasty in the future as a necessity of the accident rather than being constitutional. As a left-handed man, the Plaintiff's wrist injury was significantly compounded. As regards employment, Mr Mackay states:

> "*11.15 Mr Rutowicz is disabled and in my opinion since the index accident he is not in a position to work and will not be able to do so now and he is incapacitated to work in the long-term.*

11.16 It is of course entirely feasible he might obtain a job in a sedentary situation if that could be found but I note that he is now 57 years of age. On balance I think it is unlikely he will return to a gainful occupation in the long-term.

11.17 This must also be taken into concept with the psychological damage he suffered as a consequence of the index accident but this is outside my interpretation and must be dealt with by experts within that discipline."

49. Mr Jackson prepared a follow-up report after a further meeting with the Plaintiff on 18 June 2015. He refers to the removal of the metalwork in the Plaintiff's wrist and hip on 30 April 2013, where only one of the three hip screws could be removed because the other two were firmly embedded in bone. The failure to remove these two screws had upset the Plaintiff. Mr Jackson noted a "*very serious deterioration in the Claimant's overall condition*" but this was "*not due to orthopaedic factors, which I believe are eclipsed by the Claimant's psychological state.*" He had no reason to change the orthopaedic opinion he had originally given. Mr Jackson comments on the question of whether the Plaintiff is left-handed, right-handed or ambidextrous, because Mr Mackay had been told the Plaintiff is adamant he is left-handed. Mr Jackson notes that this is possible but does not accord with what he was initially told and observed. He agrees that there has been a 1 cm shortening of the left leg.

50. The first thing noted by the Jurats in relation to this medical evidence is its comparative antiquity. It is not ideal to have to reach conclusions based on material dating back this number of years. However, as explained to them by the Deputy Bailiff, a pragmatic solution had been agreed by the parties in order to enable the Plaintiff's action to be resolved within the shortest possible time once he had restored it earlier this year.

51. Having regard to the way that Advocate Dawes on behalf of the Defendant approached each of the injuries that were accepted as having occurred (and disregarding any other injuries that had been raised on behalf of the Plaintiff and which they were satisfied were no longer being pursued, which was consistent with the agreement between the experts as to the injuries about which they offered their opinions), the Jurats find that the injuries the Plaintiff sustained were a fracture of the left proximal femur, a grade 1 Colles fracture of the left wrist, complications of DVT and pulmonary embolism causally linked to the accident, a back injury, extensive bruising and an adjustment disorder. By reference to the Judicial College Guidelines, the Defendant suggested that the back injury be regarded as within the moderate bracket, the pelvis and hip injuries be regarded as being within the lowest of the severe bracket, the wrist injury in the bracket of there still being some use, the chest injuries being in the lowest bracket and the psychiatric injury in the bracket of moderate. Save for the last categorisation in relation to psychiatric injury, the Jurats agree with these assessments of where guidance can be found in the Judicial College Guidelines.

52. In para. 10.1(b)(ii) of the Judicial College Guidelines, in respect of which a range from £9,970 to £22,130 is given, the injuries covered are described as:

"*Many frequently encountered injuries to the back such as disturbance of ligaments and muscles giving rise to backache, soft tissue injuries resulting in a prolonged acceleration and/or exacerbation of a pre-existing back condition, usually by five years or more, or prolapsed discs necessitating laminectomy or resulting in repeated relapses. The precise figure will depend upon a number of factors including the severity of the original injury, the degree of pain experienced, the extent of any treatment required in the past or in the future, the impact of the symptoms on the*

> *person's ability to function in everyday life and engage in social/recreational activities and the prognosis for the future.*"

Within this bracket, all the Jurats agree that the Plaintiff's injuries fall at around the mid-point and, if this had been the only injury, would have fixed the award of damages at £15,000. The pain suffered was ongoing at each of the examinations the expert witnesses undertook and the symptoms are unlikely ever to resolve. The Jurats further noted that the Plaintiff had largely withdrawn from the activities he had previously undertaken for enjoyment, be that boxing or socialising following the accident and they are satisfied that his ability to function in everyday life has been significantly impacted.

53. In para. 10.3(a)(iii) of the Judicial College Guidelines, in respect of which a range from £31,220 to £41,860 is given, the injuries covered are described as:

> "*Many injuries fall within this bracket: a fracture of the acetabulum leading to degenerative changes and leg instability requiring an osteotomy and the likelihood of hip replacement surgery in the future; the fracture of an arthritic femur or hip necessitating hip replacement; or a fracture resulting in a hip replacement which is only partially successful so that there is a clear risk of the need for revision surgery.*"

Within this bracket, all the Jurats agree that the Plaintiff's injuries fall at around the mid-point and, if this had been the only injury, would have fixed the award of damages at £35,000. The Jurats noted that the experts agree that the hip injury had repaired well but that there were ongoing problems due to the prominent screw heads that could not be removed without risking further damage to the bones. They took into account the permanent shortening of the left leg by 1 cm. They were also persuaded that there was a real risk that a hip replacement would be required during the Plaintiff's lifetime.

54. In para. 10.7(b) of the Judicial College Guidelines, in respect of which a range from £19,530 to £31,220 is given, the injuries covered are described as "*Injury resulting in severe disability, but where some useful movement remains*". The Jurats noted the more serious description in para. 10.7(a) ("*Injuries resulting in complete loss of function in the wrist*"), which they consider clearly goes further than the injury the Plaintiff sustained, and the less serious category in para. 10.7(c) ("*Less severe injuries where these still result in some permanent disability as, for example, a degree of persisting pain and stiffness*"), before concluding that it was appropriate to agree with the categorisation proposed on behalf of the Defendant. Within this bracket all the Jurats agree that the Plaintiff's injury falls a little above the mid-point and, if this had been the only injury, would have fixed the award of damages at £28,000. They noted that the experts regarded the wrist injury as the more serious of the injuries sustained by the Plaintiff and the ongoing effect that this has had on him and his ability to enjoy life. It was the main reason why he could not continue with heavy manual labouring, which had been the source of his livelihood throughout his life. The Plaintiff has limited movement in his fingers and wrist and his grip is weak, all of which will not change. The Jurats are not wholly persuaded that the Plaintiff was a left-handed man. They consider that the best assessment was that he has been ambidextrous. Had they concluded that he was left-handed, the amount of the award would have risen towards the top end of the range. Where previously the Plaintiff was able to use both hands, but his ability since the accident to use his left hand has been impacted as much as it has, they regard his ongoing disability as more severe than would have been the case had they found he was solely right-handed before and since the accident.

55. In para. 9.1(h) of the Judicial College Guidelines, in respect of which a range from £1,760 to £4,240 is given, the injuries covered are described as "*Temporary aggravation of bronchitis or other chest problems resolving within a very few months.*" The Jurats agree that the

complications suffered by the Plaintiff fall at the mid-point of this category and so attract an award of damages of £3,000, which would be on top of any of the individual awards for the other injuries sustained.

56. In relation to psychiatric damage generally, the Jurats are split in relation to how to categorise the injuries the damage the Plaintiff has suffered. Jurat Bartie agrees with the submission of Advocate Dawes that the Plaintiff falls into the moderate category, whereas Jurats Grut and Crisp find that the Plaintiff falls into the moderately severe category. Para. 7.1 of the Judicial College Guidelines opens with the factors to take into account:

> "*The factors to be taken into account in valuing claims of this nature are as follows:*
> *(i) the injured person's ability to cope with life, education and work;*
> *(ii) the effect on the injured person's relationships with family, friends and those with whom he or she comes into contact;*
> *(iii) the extent to which treatment would be successful;*
> *(iv) future vulnerability;*
> *(v) prognosis;*
> *(vi) whether medical help has been sought;*
> *(vii) claims relating to sexual and physical abuse usually include a significant aspect of psychiatric or psychological damage. ...*"

57. Para. 7.1(b), in respect of which a range from £15,200 to £43,710 is given, describes the moderately severe category as:

> "*In these cases there will be significant problems associated with factors (i) to (iv) above but the prognosis will be much more optimistic than in (a) above. While there are awards that support both extremes of this bracket, the majority are somewhere near the middle of the bracket. Cases of work-related stress resulting in a permanent or long-standing disability preventing a return to comparable employment would appear to come within this category.*"

The comparison to para. 7.1(a), the severe category, is that the description is of "*marked problems with respect to factors (i) to (iv) above and the prognosis will be very poor*". Para. 7.1(c), in respect of which a range from £4,670 to £15,200 is given, describes the moderate category as:

> "*While there may have been the sort of problems associated with factors (i) to (iv) above there will have been marked improvement by trial and the prognosis will be good.*"

58. The majority took into account that Dr Gill had referred to the possibility of initial post-traumatic stress disorder soon after the accident took place, but that this had resolved itself by the time of his examination in 2011 into an adjustment disorder. He accepted that the Plaintiff's condition would probably fluctuate. The Jurats noted in particular that the expert evidence adduced on behalf of the Defendant was now really quite ancient and that Dr Gill or someone else had not had the opportunity to consider, as Dr Friedman had, later developments. Dr Friedman saw the Plaintiff shortly after a deterioration in his mental state. He had self-harmed and been admitted to hospital. Taking into account the other stressors in the Plaintiff's life at the time, ie, his personal history, the extradition proceedings and his descent into alcohol abuse, the majority view is that Dr Friedman refers to ongoing psychiatric problems associated with the accident and its aftermath which cannot easily be separated into distinct phases. Accordingly, the majority view is that Dr Gill's prognosis has to be re-visited in the light of subsequent events. Accordingly, the majority view was that the

Plaintiff had significant psychiatric problems associated with the factors listed at (i) to (iv) in para. 7.1. It was apparent to them that the Plaintiff had been quite unable to adjust to the change in his prospects, and this was shown through his demeanour at the hearing. They also took into account the way in which the Plaintiff has found his situation so difficult that he had attempted to take his life on several occasions. Although other factors, such as the descent into alcohol abuse may have played some part in those acts, the majority view was that they could not be entirely separated from the effect that the consequences of the accident has had on the Plaintiff's mental state. However, they do accept that there have been times when the impact of his change of circumstances has been less severe. That said, their conclusion is that the disabilities had had a significant effect on the Plaintiff's mental health for long and reoccurring periods. Accordingly, they find that he fell within para. 7.1(b) of the Guidelines and towards the upper end of the range. If taken in isolation, they would have awarded damages of £35,000 in respect of psychiatric damage.

59. Jurat Bartie takes the view that both of the experts have opined that the Plaintiff had by the time they saw him emerged from the period of adjustment disorder. Accordingly, although this had taken quite a long time since the accident, the prognosis of them both could properly be regarded as being a good one and there has, in her view, been evidence of a marked improvement by the time of trial. In those circumstances, given the severity of the Plaintiff's state and its duration, she would have been minded to make an award at the uppermost end of the moderate bracket (which coincidentally is also the very bottom of the moderately severe bracket) of £15,200.

60. Having gone through this first stage of assessing the general damages to award to the Plaintiff for pain, suffering and loss of amenity, the aggregate of these individual awards for the majority view is £116,000 and for the minority view is £96,200.

61. Standing back from those aggregate figures and viewing the overall pain, suffering and loss of amenity, the majority disagreed with the submissions of Advocate Dawes that this was a case in which a substantial discount was warranted. They noted that the figure suggested on behalf of the Defendant of £65,000 was below the aggregate of the lowest amounts in each bracket proposed by it. In their opinions, this would produce an unreasonably low overall figure. In the Defendant's Counter-Schedule, particular attention had been drawn to the amount claimed by the Plaintiff at £200,000 and how that would equate under the Judicial College Guidelines to a claim for paraplegia or serious disabling brain injuries requiring constant care. The majority view agree that the overall effect on the Plaintiff of his injuries could not be equated to such serious conditions. However, the comparison needing to be drawn is not with an award of £200,000 but rather whether the aggregate amount of £116,000 should be adjusted downwards by reason of any overlap and so as to avoid double counting.

62. The majority conclude that this is not a case in which there is a significant degree of overlap between the injuries. The fall had led to left-side physical injuries. The main elements to those injuries are, in the majority's view, sufficiently distinct that the component parts can properly be aggregated to reflect the pain, suffering and loss of amenity suffered by the Plaintiff. Where they do accept that there is an aspect of overlap is with the psychiatric injury arising from coming to terms with those physical injuries. However, they take the view that the award of damages can only be reduced by a small discount, which they find to be 5% in respect of the notional award they have in mind in respect of general psychiatric damage. In doing so, they note that the guidance from *Kemp & Kemp* demonstrates that a reduction in the aggregate amount is not automatic in multiple injury cases and that it is even permissible, where appropriate, to increase the aggregate produced by the first stage of the process. Accordingly, the reduction they make for overlap or duplication is £1,750, making their final award in respect of pain, suffering and loss of amenity a total of £114,250.

63. In Jurat Bartie's case, she finds a greater degree of overlap between the various injuries for which damages fall to be awarded. In her view, the combination of the major physical injuries and the psychiatric damage flowing from adjusting to the Plaintiff's changed circumstances following the accident are such that the total amount of general damages to be awarded should be discounted by 15% so as to reach an amount of £81,770. In her opinion, this amount properly reflects the totality of the Plaintiff's pain, suffering and loss of amenity

Loss of earnings

64. The most significant element financially of the Plaintiff's claim relates to his loss of earnings (and the associated loss of opportunity, effectively being a component part of losses to income flowing from the accident, but which will be taken separately in this judgment). The Deputy Bailiff directed the Jurats that the fact that the Plaintiff had not worked for the 13 years between the accident and trial inevitably meant that the starting point was what income the Plaintiff would have earned during that time had he been fit for work. Because of the lengthy period involved, the projection of what he would earn between trial and retirement, so far as that became applicable, was less significant than the past loss of earnings. The Jurats needed to consider, from the information available to the Court, what a realistic rate of pay and pattern of working would have been in the months and years after the accident if the Plaintiff had continued to work. The weekly gross pay of £770 pleaded by the Plaintiff might reflect a couple of weeks when he had worked all seven days, but the Jurats had to assess whether a different approach, including that suggested by the Defendant to achieve a net pay of £24,000 per annum, was more appropriate. The Jurats might also wish to consider what the consequences for the Plaintiff were had Mr Clayton arrived on site before the accident and demanded that the Plaintiff leave that workplace immediately. The Jurats were further directed to consider whether there was a time at which the Plaintiff was fit to return to some form of work and, if so, the basis on which he would have done so. The Deputy Bailiff indicated that the Jurats may consider there had been a paucity of evidence as to what steps, if any, the Plaintiff had actually taken to look for work, so they should make the best assessment they could of what alternative work may have been feasible for him.

65. The Defendant had also raised the precarious housing situation (and so the right to work documentation associated with that status) of the Plaintiff. It had highlighted the responses from the then Housing Department to the Plaintiff's continued occupation of a controlled dwelling and the way in which, by 2011, that Department was insisting that the Plaintiff leave the Island. On the other hand, although there had been no direct evidence, save for what the Plaintiff had said, the Jurats might recognise that, but for the accident, the Plaintiff would have continued to want to live and work in Guernsey and so would have moved on to the open market to facilitate that life choice. If so, they should bear in mind how that may have affected his overall plans.

66. The Jurats were also directed that it was common ground that the Plaintiff had been in custody from 25 August 2015 until 11 December 2018. Initially, this was in relation to the criminal proceedings in England and then, following extradition, as a serving prisoner in Poland. The effect of this period in custody was that the Plaintiff was unable to engage in any economic activity during that time and so had no loss of earnings for which the Defendant might be liable to compensate him. Accordingly, if the Jurats were to find there was any ongoing loss of earnings up to the Plaintiff being taken into custody, they would stop at that point and only resume, if at all, once he was released.

67. In short, the Jurats were directed to assess what the Plaintiff's future working patterns would have been but for the accident, how much he would have earned and whether there was a time at which he should have taken steps to mitigate this ongoing loss and, if so, the effect that had

on this head of loss. They were to bear in mind the opinions given by the experts about what work could or could not be done and they were entitled to take into account the Plaintiff's age at various points if they were considering his ability to return to some form of work. It was common ground between the parties that the Plaintiff would have to give credit for half of any benefits received during the time that he would be claiming for loss of earnings.

68. The Jurats have done their best to make an assessment of a realistic rate of pay for the time after the accident based on the materials available reflecting what he was paid prior to the accident. They all agree that the pleaded amount of £770 per week appears to be based on two exceptional weeks and which do not reflect the general wages received by the Plaintiff during any period of his employment with his various employers. It is quite clear to them that, in other weeks, the Plaintiff was earning less than that amount. During his longest period of employment with Mr Willis, the tax and social security records refer to him earning £17,154 gross. In those circumstances, they broadly adopt the approach suggested by Advocate Dawes on behalf of the Defendant. They have concluded that the average weekly wage from the amounts earned should be taken to be £476 as the basis for assessing future loss of earnings. This is slightly higher than the figure used by the Defendant because it does not disregard two weeks of holiday or absences but reflects what the Jurats regard as being a blended figure for all the hours the Plaintiff would have wished to work and on the basis that those hours would have been made available to him. Their calculation uses the same gross weekly wage of £601.14 extracted from the amount paid to the Plaintiff in 2006, less income tax and social insurance contributions payable. In adopting this approach, the Jurats accept the Plaintiff's evidence that he was willing to work for however long each day his employer would permit him to work and the need to recognise that, having moved from employment with Mr Willis to Mr Greig, the hourly rate of pay had risen, which had not been factored into the Defendant's calculation. This base figure of £476 per week as it was in 2006 to be used for the loss of earnings calculations in respect of periods following the accident is agreed by all the Jurats.

69. The majority view is that the Plaintiff has adequately demonstrated his wish to remain in Guernsey from 2006 onwards. They accept he wanted to make a fresh start and that he had begun to put down roots in the Island. If he had not felt some connection to Guernsey, they consider he would have moved away to somewhere else once he had sufficiently recovered from the accident. He only left Guernsey when his housing situation was such that he could no longer remain here. Although they understand that the Plaintiff may have been removed from the Intersurgical site by Mr Clayton on the day of the accident, the Plaintiff would potentially have remained working for Mr Greig under the terms of the oral agreement he had with him and so been deployed to whatever other work became available. Alternatively, just as the Plaintiff had shown by leaving employment with Mr Willis to work for Mr Greig, he would, they think, have been able to find an alternative employer within the construction sector quite easily. They find there is no suggestion that the Plaintiff would become completely unemployable. There may have been a short-term impact on his earning potential, but this is reflected in using the amount of £476 per week for loss of earnings, because the Jurats are satisfied that the Plaintiff would have found some form of work in the construction industry here in Guernsey and so earned at that level for the foreseeable future.

70. The majority note that the Plaintiff had not been granted any form of short-term housing licence and further that the application made on his behalf in July 2006 was rejected by the Housing Department in November 2006 on the basis that the post of roofer with Mr Greig was not regarded as sufficiently essential to justify granting the licence sought. Considering the position of the Plaintiff as if the accident had not occurred, all the Jurats are persuaded that the Plaintiff would have done what he explained a number of his fellow workers have done and so moved into open market accommodation to be able to continue to live and work

in Guernsey. They are satisfied that he would have been able to afford to make that choice. They further consider that he would potentially have been able to offer his services to building projects directly as a self-employed person or even to have become a small employer in his own right. However, the majority view is that in doing so his overall income would not have changed from the amount he could earn as an employee. In summary, the majority view is that the Plaintiff would have stayed working in Guernsey and so has lost the ability to earn the wages he would otherwise have earned but for the accident.

71. The majority view is that, since the accident, the Plaintiff has been, and still remains, incapable of work. They note that the experts were agreed that returning to heavy manual work of the type the Plaintiff had done all his life was impossible. In relation to the question as to whether the Plaintiff could have found some alternative work of a sedentary or semi-sedentary nature, they prefer the view of Mr Mackay to that of Mr Jackson. In their opinion, taking the physical and mental state of the Plaintiff in the round, the combination of his injuries and the fact that the Plaintiff did not have a good command of English (which is an aspect of the case that will be covered in more detail when turning to contributory negligence) were such that they find it is more likely than not that he was incapable of securing employment following the accident. As noted in Mr Mackay's report in 2014 ("*On balance I think it is unlikely that he will return to gainful occupation in the long-term*"), a further difficulty faced by the Plaintiff at that time as that he was in his late 50s, which they have also borne in mind.

72. The experts deal with their particular areas of expertise when commenting on the prospect of the Plaintiff returning to work and the Jurats have, therefore, sought to consider each view, given at different times, in an holistic way. Whilst Dr Gill in 2011 had given the opinion that, from a psychiatric perspective, the Plaintiff was fit to resume work, and Mr Jackson in 2011 considered that the Plaintiff was capable of sedentary or semi-sedentary work, the benefit of later assessments satisfies the Jurats that those opinions were unlikely to have resulted in any positive outcome for the Plaintiff in 2011 or indeed thereafter. Once he moved from Guernsey to England, it appears that his focus was not on securing some any form of employment and, having regard to the later expert evidence, they find that the Plaintiff remained wholly incapable of resuming any form of work. As noted by Dr Friedman, there was a further episode of adjustment disorder in 2014. The majority regard that as being illustrative of the overall incapacity of the Plaintiff for any form of employment and so accept Mr Mackay's opinion as to the Plaintiff's employment prospects given in 2014. As a result, the majority view is that the Plaintiff has not failed to mitigate his losses in this regard through not looking for any form of sedentary or semi-sedentary work because the combination of all his injuries flowing from the accident, given his age, have rendered him totally incapable of performing any form of paid employment.

73. The majority view has also considered what the position would have been if there had been no accident and the Plaintiff had subsequently been unable to stay in Guernsey. They accept his assertion that he would not have returned to Poland because he had cut his ties with his country of birth and so have had to take into account his linguistic competence in assessing what his ongoing employment prospects were. They find it more likely than not that the Plaintiff would have re-located to the United Kingdom, which is consistent with what actually happened anyway, with the result that he would have followed a similar path to that which he planned to follow in Guernsey but for the accident. This means that, following the accident, he would have faced the same limitations on his employment prospects. In other words, wherever he was living, the combination of his injuries and the inevitable language barrier plus his advancing years would have resulted in him being totally incapable of securing any form of alternative employment.

74. The approach pleaded in the Plaintiff's Schedule of Loss is to use a flat line annual increase of 2% per annum in wages. If that approach were to be taken, the total amount of loss of earnings from the date of the accident to the date of judgment would be £263,309 (where the overall figure if the Plaintiff had not been in custody for 3¼ years reaches £373,746). However, the Jurats have noted that annual increases of 2% when compounded result in an overall increase of just 26.8%, whereas the cumulative rates of inflation by reference to Guernsey's retail price index, as shown in the resources available on the States of Guernsey website, for the period between the end of the month preceding the accident and 13 years later is 36.7%. A very similar overall percentage figure, though, is produced by using a straight line annual increase of 2.4% (which when compounded comes to 36.1%). Equally, the Jurats note that the RPI increase fluctuates quite significantly from year to year. By way of example, in the two years following the accident, inflation was running at 4.7% and 5.5% respectively, before there was a period of deflation, prior to reasonably positive recovery thereafter. No evidence was adduced by the Plaintiff as to the way in which hourly rates in the construction industry have varied over this period of 13 years. The figures available for median earnings in the construction industry as at March 2018 show a figure of £32,788, with the upper quartile at £40,319 and the lower quartile at £25,208. By increasing the Plaintiff's notional net pay by 2.4% each year, this would translate to a net weekly wage of £648 by 2019, which equates to a gross annual income of almost £43,000. The implication is that increases in earnings in the construction industry have not been as large as in other sectors and this needs to be reflected in the approach to be taken to what the Plaintiff could have earned but for the accident.

75. In circumstances where there has been little by way of assistance from the Plaintiff in this regard, the majority view is that the simplest solution, which is also the most just, is to use a straight line annual increase rather than attempt to reflect such annual changes as they arose. They consider that it was unlikely that the hourly rate would reduce at any time, but that, until the cost of living picked up, wages may well have stagnated, but that this fluctuating arrangement is compensated by using a figure lower than the real figure in some years. On the basis that the Plaintiff's case would have evolved (as shown in the reference in a footnote in the Plaintiff's Schedule of Loss to adjusting the approach once there were more details), had the publicly available resources mentioned been viewed and considered, through looking at the increases in earning and RPI, the majority view is that the annual rate of increase to use in inflating the wages position should be 2.25% (which when compounded comes to 33.5%) rather than the 2% provisionally mentioned in the Plaintiff's Schedule of Loss. As a result, the amount to be awarded for past loss of earnings is £266,807, before deducting the amount of half the benefits received.

76. The information produced about the Plaintiff's benefit payments show that between 20 July 2006 and 15 January 2007 he received £2,682.59 as industrial injuries benefit. Thereafter, he received both invalidity benefit (now known as incapacity benefit) and industrial disablement benefit. It is apparent that the Plaintiff continued to receive some of these benefits after the time he went into custody, which are now being recovered from him, but the payments to which he was entitled before August 2015 were £71,031.34 as invalidity benefit and £22,246.55 as industrial disablement benefit. In addition, between 18 August 2006 and 14 July 2011, the Plaintiff received £12,305.75 as supplementary benefit. In total, therefore, between the accident and being taken into custody, at which point his entitlement to benefits ceased, the Plaintiff received £108,266.23. The position since the Plaintiff was released from prison in Poland in December 2018 is not entirely clear. In principle, his entitlement to receive incapacity benefit and industrial disablement benefit revived, in which case, at the weekly rates prevailing, he would have received approximately £717.18 in 2018 and £9,546.03 so far in 2019. (He has not been receiving these benefits because his entitlement is being set off against overpayments made when it was not known he had been taken into custody, which is why the amounts are being calculated in this way.) Accordingly, the

majority view is that the Plaintiff must give credit for £59,264.72. This means that, omitting the odd pence, the award of damages for past losses of earnings ends up being £207,543.

77. The majority view is that the Plaintiff will remain unfit to resume any form of work before he reaches his retirement age. The retirement age could be 65, although if he had remained living and working in Guernsey his retirement age would rise to 65 years and 8 months as a result of the incremental annual increases in retirement age that have now been introduced. In that case, he would be retiring in approximately 3 years' time and so using his age at 62 with retirement at 65 effectively equates to the same period. As noted by the Privy Council in *Simon v Helmot* [2012] UKPC 5, unlike in England, there is no statutory discount rate and no statutory framework for how to approach compensating a plaintiff under this head of loss. (Lord Hope's wish that there be a statutory scheme applicable domestically in future has yet to bear fruit.) The decision of the Court of Appeal ([2009-10] GLR 465) and the reasoning therein on the discount rate in respect of future losses of earnings still binds this Court. Although it looks like a typographic error, that is why there is reference to a negative discount rate in the Plaintiff's Schedule of Loss. The rate mentioned in *Simon v Helmot* is minus 1.5%. However, that decision was based on a good deal of expert evidence which has not been replicated in this present action.

78. By reference to the Ogden tables and the way this is put by the Plaintiff in his Schedule of Loss, taking a 62-year-old man at trial with three years left until retirement, the multiplier to use is 3.02. The reference to Table A in the Schedule of Loss as a downwards adjustment for educational attainment and employment status is, in the majority's view, no longer applicable because, as set out at para. 42 of the commentary, for a plaintiff who is older than 54 "*it is anticipated that the likely future course of employment status will be particularly dependant on individual circumstances, so that the use of factors based on averages would not be appropriate*". Accordingly, the majority find no reason to reduce the usual multiplier applicable. This means that the original weekly net wage of £476, increased by 33.5% to £635, and so £33,020 per annum, gets multiplied up to an award of £99,720 in respect of future loss of earnings.

79. Jurat Bartie disagrees with the majority finding that the Plaintiff has been rendered wholly incapable of working as a result of the accident. She finds that there was a period of total incapacity, but she finds that Dr Friedman broadly agreed with Dr Gill that there came a time when there was no psychiatric reason why the Plaintiff could not resume work. Indeed, Dr Freidman considered that it would assist the Plaintiff if he were to find some useful employment. The orthopaedic experts had indicated that some form of work could be undertaken by the Plaintiff. In those circumstances, Jurat Bartie is satisfied that the Plaintiff could have resumed work and she considers that April 2014, being the month following the preparation of Dr Friedman's report, is the very latest at which this should have happened. She considers that the Plaintiff would most likely have needed to improve his English language, possibly by taking classes, and may have benefited from undertaking unpaid, ie, voluntary, work before seeking gainful employment. She recognises that securing employment would potentially have been difficult for the Plaintiff, given his physical ailments, the adjustment order issues and the language barrier, but she is satisfied that the Plaintiff should have regarded himself as sufficiently well recovered from the accident by April 2014 at the very latest to have resumed employment.

80. Jurat Bartie further finds that, if the Plaintiff had addressed his mind to it, as she finds he should have, his educational background and earlier entrepreneurial skills would have been adequate for his to have secured some form of sedentary or semi-sedentary work. She notes that some types of work of this nature can be as lucrative as the Plaintiff's ongoing earnings in the construction industry would have been. At the very least, from that time (and arguably

earlier) the Plaintiff should have mitigated his ongoing losses by finding gainful employment. His damages must, therefore, be reduced by whatever he was capable of earning. In the absence of any evidence as to what work might have been available for the Plaintiff, whether in Guernsey or England, at a bare minimum the Plaintiff would have been earning the minimum wage for a full working week.

81. Jurat Bartie agrees that when the Plaintiff was in custody he was unable to earn anything through employment and so no damages for past loss of earnings are payable for those 3¼ years. Accordingly, she would have awarded the Plaintiff his full loss of earnings from the date of accident to the end of March 2014, followed by a reduced award from April 2014 until August 2015 and from December 2018 to now. Against whatever amount that calculation produces, the Plaintiff would have to give credit for half of the benefits received. As regards future loss of earnings, again the award she would make would be reduced as a result of the Plaintiff not having looked for, and secured, paid work when he should have, but the multiplier to use would be 3.02 and the annual amount (grossed up from an appropriate weekly amount being the difference between £635 and whatever could have been earned, being no less than the minimum wage amount) is what would be awarded in respect of future loss of earnings.

Loss of opportunity

82. Another significant part of the Plaintiff's claim relates to his intention to have established a boxing club in Guernsey. His evidence was rather patchy on this subject, but the core of it was that when he arrived in Guernsey he intended to work hard and build up enough money to enable this to happen, as well as setting up his own construction business. He considered that it would take him three years to reach this position. At the time of the accident, he was, therefore, only about one-third of the way towards his goal. The principal material in support of this assertion and what financial rewards he may have been able to reap is found in a business plan for a boxing club dated June 2010 prepared by Cesko-Accounting. (The Deputy Bailiff directed the Jurats not to treat this report in the same way that they might approach expert evidence on the basis that no permission to adduce as a form of expert evidence had been given. Instead, the Jurats could consider the content of the report as if they were factual assertions made in support of the Plaintiff's stated plan to establish such a boxing club.) He explained that he had managed to set up the Junior-Boxing Foundation in Poland and that this would be a similar, though not identical, venture. The concept was to sell monthly passes to regular users, and charge for training, whether individual or in groups. There would also be the opportunity to sell drinks, food, clothing and equipment. The plan refers to premises at Les Frieteaux, St Martins. The club would start in July 2008. The financial projections indicated that in excess of £250,000 of net income per annum would be achieved by 2013.

83. By reference to the case cited in support of this aspect of the Plaintiff's Schedule of Loss, *Blamire v South Cumbria Health Authority* [1992] EWCA Civ 20, the Deputy Bailiff directed the Jurats that they needed to consider whether there was a viable prospect of this venture happening and, if so, to assess the likelihood of it being achieved and what, therefore, the Plaintiff could be said to have lost. Ultimately, it was a balancing exercise to ascertain whether there was any prospect of the venture being undertaken and then to put a value on what it was that the Plaintiff had, as a result of the accident, lost.

84. The Jurats unanimously agree that this venture had no realistic prospect of coming to fruition. Although it is possible that the Plaintiff had arrived in Guernsey with this idea in mind, they note that there was no mention of this head of loss in the Plaintiff's original Cause, settled in 2009. It was raised without any particularisation in the draft replacement pleading in 2015 and the business plan was not something that had been prepared before the accident. The Jurats have considered the timing of the business plan and find it surprising that it was only

prepared after this action had been commenced. As such, it appears to them to have been a late invention from the Plaintiff designed to bolster his claim. Moreover, as already mentioned, when considering the parallel universes of what the Plaintiff would have done if not injured in the accident with what has actually happened, the Jurats are not persuaded that the Plaintiff has discharged his burden in relation to this boxing club. As already mentioned, they find that he would probably have stayed in Guernsey but moved on to the open market. In those circumstances, his living costs would have risen and the opportunity to save sufficient capital to start any such project would have reduced correspondingly, and reduced to an extent that this project, they find, even if the Plaintiff had really had it in mind, would no longer have been viable. In summary, in order to give effect to his wish to remain in Guernsey, the Plaintiff would, in their opinion, have had to devote himself to working long hours and so would not have managed to put into place any of the more lucrative projects he mentioned in his evidence. Accordingly, the Jurats agree with the Defendant's submissions and unanimously dismiss this head of loss.

Other losses claimed

85. The Jurats first note that the Defendant has agreed that the Plaintiff's claim for £50 in respect of clothing damaged in the accident should be granted. Unanimously, they award £50 damages under this head.

86. The Jurats note that the Plaintiff has sought to claim monies in respect of the value of personal belongings he says he was forced to leave at Les Embruns Hotel and in Gravesend when he left both premises. The amounts pleaded are £1,786 and £9,500 respectively. The Plaintiff was unable to say much about how these figures had been reached. The Defendant submitted that there was no causal link between the accident and any such losses anyway.

87. The Jurats unanimously agree with the Defendant on this head of loss. It strikes them that the Plaintiff's approach has been to try to lay the blame for everything that has happened in his life since the accident on the Defendant. However, in the light of the directions given to them about causation, they are satisfied that, if anyone is to blame for keeping the Plaintiff's property when he has vacated premises he has previously occupied, it is the person into whose hands those items then fall. The Plaintiff may have had an action against the landlord in both places, but it is clear that the Defendant cannot be found liable for these losses. The Jurats accept that they are quite separate from the consequences of the accident for which the Defendant can be held liable. Accordingly, they dismiss these parts of the Plaintiff's claim.

88. The Plaintiff has claimed £20,000 for domestic assistance. He accepted during the hearing that this was no more than an estimate of the value of the services he says were rendered to him by others. Apart from one person, in respect of whom a letter dated 19 May 2015 was produced, the Plaintiff failed to identify any person who had rendered some assistance to him. The Jurats accept that the Plaintiff will have benefited from help and other support from his friends, but the Plaintiff has not persuaded them that there had been any promise to anyone to pay them for those services. In the absence of proof that there had been payment to those who cared for the Plaintiff, or that there is an continuing obligation on the part of the Plaintiff to pay them once he is in funds to do so, the Jurats are not satisfied that the Defendant can be made liable to pay damages in respect of domestic assistance and so they also dismiss this aspect of the Plaintiff's claim.

89. There is a section in the trial bundle which contains a large number of documents from the Plaintiff showing things for which he says he has made some payment. This includes invoices in respect of his rent at various locations. It includes proofs of posting and fees paid for the interpretation of documents. It includes a lot of receipts for purchases made at B&Q. The Plaintiff explained that these related to the materials he bought to renovate the

accommodation he occupied at Les Embruns Hotel. There were some boarding passes and rail tickets, but the Plaintiff was unable to explain exactly what they relate to. There were two claims made in the Plaintiff's Schedule of Loss arising from all these documents. The first was £1,350 in respect of travel costs and the second £68,896 in respect of other costs.

90. The difficulty that the Jurats have faced is that there has been a real lack of clarity from the Plaintiff as to the basis for how these aspects of his claim have been included by him. The Defendant suggests that the travel costs may have been incurred in order to visit the various experts who have examined the Plaintiff for the purposes of his claim. If so, they cannot be claimed as damages, but may be claimable as costs when that stage of the proceedings is reached. The Jurats unanimously agree that the Plaintiff has failed to persuade them that he has incurred travel costs that can properly be assessed as part of his claim for damages from the Defendant and so reject that element of his claim.

91. In relation to all the other expenses in respect of which the Plaintiff now claims, he acknowledged during the course of the hearing that he may well have misunderstood the guidance given to him. He explained that what he had attempted to do was to set out everything he had spent over the years for which he had retained some paper record. He conceded that if he were to be compensated for loss of earnings, where those earnings would have enabled him to pay for his rent (and other matters), then he could not make a separate claim for amounts that would otherwise have been payable out of the damages awarded. He accepted that to order both damages for loss of earnings as well as these expenses would amount to double recovery. However, he was unable to re-cast his claim so that it covers only those matters that could properly be considered under the heading of damages, as distinct from what might in due course be claimable if he obtains a costs order. The Deputy Bailiff further directed the Jurats that any interpretation costs associated with this action would be capable of being claimed in the context of a costs application and so should not be considered as part of the Plaintiff's damages claim.

92. Given the way in which the Plaintiff simply invited the Court to work its own way through the various receipts he had included and extract from that information some award of costs that properly reflects the additional expenses to which he has been put as a result of the accident, the Jurats find themselves agreeing with the position adopted on behalf of the Defendant by Advocate Dawes. As just indicated, they reject any claim for matters that could still be pursued in relation to costs. Similarly, they reject any recovery by the Plaintiff of the costs of paying rent, because that is not a separate loss but covered within the award of damages in respect of loss of earnings, from which the Plaintiff's living expenses will have been met in the same way as if he had actually earned those amounts through employment. They also disregard the expenditure that the Plaintiff had made on improving his living accommodation, particularly at Les Embruns Hotel, for the same reason. They note that some of the material produced by the Plaintiff is in Polish, with no English translation, and so cannot regard any of those receipts as showing a loss flowing from the accident. They do, however, agree with the Defendant that there must have been some additional expenses to which the Plaintiff has been put as a result of the accident. He has produced a number of receipts about the costs incurred in seeing medical personnel. Some of those costs do not appear to relate to the accident, whereas others are more likely than not to have done so. In these circumstances, the Jurats have been unable to alight on a precise figure for such losses. Accordingly, they are persuaded that the Defendant's suggestion of a notional amount of £1,000 is the best that they can properly award under this head.

93. The final issue that has been raised by the Plaintiff relates to the likelihood that, as a result of the accident, he will require a replacement left hip at some point during his lifetime. He claims £48,000, which he explained was a figure mentioned by a Polish doctor whom he

consulted, but in respect of which there has been no documentary evidence adduced. His case is that it is inevitable that he will require this surgery so the full amount should be awarded. In contrast, the Defendant refers to the opinion given by Mr Jackson that the likelihood of requiring this surgery is only 20% and the Defendant estimates that the cost of such an operation at £10,000, suggesting that the Plaintiff should, therefore, recover just £2,000.

94. The Jurats have noted the difference of opinion between Mr Jackson and Mr Mackay on this question. Mr Jackson originally gave his opinion that there was a 20% chance that the Plaintiff would come to total hip replacement in March 2011 and saw no reason to change his opinion in June 2015, although he did note the overall deterioration in the Plaintiff's presentation at this second review. Mr Mackay reported on the Plaintiff in April 2014 and referred to it being almost certain that the Plaintiff would require replacement arthroplasty in the future as a consequence of the accident and rejected Mr Jackson's view that some of the need for such surgery arose from constitutional changes in the Plaintiff's hip. All the Jurats prefer the view of Mr Mackay to that of Mr Jackson. They find that there is a greater likelihood of the Plaintiff needing a full hip replacement during his lifetime than the assessment of Mr Jackson. However, recognising that this is an area where a more up-to-date view of the Plaintiff's prognosis would have been preferable and that the way this matter has been conducted means they have not had the opportunity of the experts' differing views on this issue being tested before the Court, they note that the likelihood of the Plaintiff requiring surgery during his lifetime may well be lower than the almost certainty to which Mr Mackay refers because of the overall changes in the Plaintiff as a result of his time in custody and his age. Accordingly, although it is not a particularly exact assessment, they have decided that the likelihood of the Plaintiff requiring this surgery should be fixed at 60%. Further, they consider, by reference to published BMI health costs, that the figures for the costs of the surgery advanced by both parties should be adjusted slightly from what the Defendant estimates, and considerably from the figure stated by the Plaintiff, and so assess the cost to the Plaintiff of the hip replacement at £12,000. As a result, they unanimously make an award of £7,200 in respect of this head of loss.

Contributory negligence

95. The Defendant has placed considerable weight on its case that there should be a significant reduction in the damages to be awarded to the Plaintiff as a result of him being partially to blame for the accident. The percentage of contribution suggested by Advocate Dawes is 50%. The particulars of negligence pleaded against the Plaintiff are set out in para. 12 of the Amended Defences as follows:

> "*The Plaintiff was negligence in that he:*
>
> *12.1 Ignored the instructions as to safe practices and unsafe areas of the roof that were provided by Andrew Davison on 19 July 2006 prior to the Plaintiff commencing work.*
>
> *12.2 Ignored the instructions as to safe practices and unsafe areas of the roof that were provided by Jamie Robins on 20 July 2006.*
>
> *12.3 Failed to take heed of the areas that were identified by Andrew Davison and Jamie Robins as out of bounds and which were not to be walked upon under any circumstances.*
>
> *12.4 Failed to take heed of warnings and instructions about the areas of the roof that were not protected by the safety netting and which should not be walked on under any circumstances.*

12.5 Failed to take heed of instructions not to step on the fragile roof lights under any circumstances.

12.6 Walked beyond the area that was protected by safety netting and on to an area that he had been instructed was out of bounds.

12.7 Walked on to an out of bounds area when there was no need to do this in the performance of his work.

12.8 Walked on to a roof light without regard to the repeated instructions and warnings that this should be done.

12.9 Walked on to a roof light when there was no need to do this in the performance of his work.

12.10 Failed, in all the circumstances, to take any or any sufficient care for his own safety.

12.11 Failed to take reasonable care for the health and safety of himself and to co-operate with the […] Defendant as to health and safety matters, in breach of s.6 of the said Ordinance."

In summary, the Defendant's case is that the Plaintiff was given and understood the instructions as to where on the roof at the Intersurgical site he was not meant to walk and the consequences of doing so, with particular emphasis being placed on the fragility of the roof lights and that, contrary to those instructions, he was went on to an area that was out of bounds where he fell through the roof light and so has to bear some of the blame for the accident. The Defendant accepts that it must also show that there was a causal link between the Plaintiff's fault and the damage caused.

96. In respect of the legal issues, the Deputy Bailiff drew the Jurats' attentions to section 1 of the Law Reform (Tort) (Guernsey) Law, 1979, subsection (1) of which provides:

> "*Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage.*
>
> *Provided that –*
>
> *(a) this subsection shall not operate to defeat any defence arising under a contract,*
>
> *(b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.*"

The Deputy Bailiff pointed out that the proviso to this subsection is not engaged in the present case. Subsection (2) then continues:

"*Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.*"

97. The Deputy Bailiff also referred to the passages from *Clerk & Lindsell on Torts* (22nd ed.), highlighted by Advocate Dawes as containing principles that have been accepted as applying in Guernsey. At para. 3-97, it is explained that:

> "*The burden of proving contributory negligence by the claimant rests on the defendant, but this may be inferred from the claimant's own evidence, or on a balance of probabilities from the facts. As Tasker Watkins J said: "In such cases, as in every other case where contributory negligence is alleged, the burden of proving on the balance of probabilities that a [claimant] has contributed to the cause of damage suffered lies on him who alleged it, namely the defendant." The claimant's knowledge of a danger is not of itself evidence of contributory negligence, though it may be relevant in other ways. If the defendant does plead contributory negligence the court is under no obligation to take it into account.*"

In the body of para. 3-98, it is further stated that: "*The court cannot refuse to reduce the award because it is just and equitable to do so, but where one of the parties is less than 10 per cent responsible no apportionment should normally be made.*" The corresponding footnote gives an unreported decision in 1954 as the source and questions whether this principle is accurate, but then adds the observation of the English Court of Appeal in *Sahib Foods Ltd v Paskin Kyriakides Sands (A Firm)* [2003] EWCA Civ 1832 that "*it is open to the court to conclude that the share of a claimant's responsibility is so small by reference to that of the defendant that it would not be just and equitable to reduce the damages at all.*" The Deputy Bailiff directed the Jurats that a similar principle operates in Guernsey law. Para. 3-99 offers further guidance as follows:

> "*The discretion implicit in a test based on what is "just and equitable" allows the court to take an ad hoc approach to apportionment, treating the issue as essentially a question of fact. The court's disapproval of the claimant's conduct may be reflected in a large reduction for contributory negligence. … In assessing the respective responsibilities of the parties the court should take into account the scope of the defendant's duty and the extent to which that duty involved taking precautions against the claimant's own negligence. That should then be weighed against the question of whether the claimant's fault was causative of the damage and "if it was, what the relative blameworthiness and causative potency of the parties' respective faults were".*"

98. The reference in para. 12.11 of the Amended Defences to section 6 refers to the Health and Safety at Work (General) (Guernsey) Ordinance, 1987, which provides:

> "*It shall be the duty of every employee while at work –*
>
> *(a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work, and*
>
> *(b) as regards any duty or requirement imposed on his employer or any other person by or under any of the relevant statutory provisions, to co-operate with him so far as is necessary to enable that duty or requirement to be performed or complied with.*"

99. In *Stone v Hickman* [2007-08] GLR Note 23 (23 April 2008), the Court of Appeal approved the direction given at trial by Deputy Bailiff Collas (as he then was) on the issue of contributory negligence, and the Deputy Bailiff directed the Jurats in the present case to have regard to the full direction as set out in para. 18 of the judgment of the Court of Appeal. In doing so, he emphasised that it is very much a factual assessment for them to undertake in the light of the whole of the evidence. He noted that there had been no criticism of a direction that included reference to "*a degree of carelessness on the employee's part may be overlooked by the Court.*" By reference to the statutory duties both employer and employee owes, if the Jurats were to find that they had breached their respective duties, it became possible to share between them the responsibility for the whole damage. He further highlighted that, if the Jurats found the Plaintiff negligent as to his own care, then they should look at the events surrounding the accident generally and decide in what proportions responsibility was to be shared between the Plaintiff and the Defendant, which usually results in a reduction expressed in a percentage. He pointed out that Advocate Dawes' suggestion of a reduction in damages of 50% equated to a finding that the Plaintiff and the Defendant were equally to blame.

100. During the course of his submissions, the Plaintiff was adamant that he shouldered no responsibility for the accident at all. He complained particularly that he had not been provided with any methodology about how the work was to be carried out. In relation to previous jobs, he had been provided with a document setting out the ground rules under which he was to perform his work, but this had not happened when he went to the Intersurgical site. He invited the Court to dismiss the defence of contributory negligence.

101. One of the principal issues for the Jurats to resolve in relation to this defence has been the level of understanding the Plaintiff had of English back in 2006. Although the Defendant's witnesses sought to portray the Plaintiff as having a reasonable command of English when they were dealing with him in July 2006, the Jurats find that the Plaintiff's ability to understand English was not sufficient for him to appreciate fully all that was being said to him by Mr Davison and Mr Robins. They accept the evidence given by Mr Mann that, during the course of the morning of 20 July 2006, the Plaintiff was warned about where he was walking on the roof, but they are not persuaded that these warnings were adequately comprehended by the Plaintiff. There were conflicting accounts as to whether Mr Ozols or the Plaintiff had the better command of English. This is an issue on which neither contention has been established to the Jurats' satisfaction and they confine their findings to the view that the Plaintiff's ability to understand and communicate in English was not as great as has been suggested on behalf of the Defendant. In particular, they note that Mr Abel, who was one of those involved who was most independent from the parties at the time, records that the Plaintiff's "*knowledge of the English language was very basic*". In his opinion, it was "*insufficient to grasp the necessary instruction*". Mr Abel's comment accords with the Jurats' findings on this issue on the evidence they have heard and read.

102. In addition, the Jurats consider that there is more evidence pointing towards Mr Robins lacking experience as a site supervisor and, in particular, a supervisor of migrant workers. As Mr Clayton conceded, Mr Robins should have known that he had the authority to remove the Plaintiff from the site if the Plaintiff were not responding appropriately to Mr Robins' instructions. This absence of knowledge about the authority available to him on the part of Mr Robins is, in their opinion, a further factor to take into account when assessing how well the Plaintiff understood the instructions he was being given. There is a difference between simply saying something (and what Mr Robins actually said could not be tested because he did not give oral evidence and Mr Mann's incomplete recollection of the detail did not overcome that problem) and saying it in such a manner that the person being instructed is also seen by the person giving the instruction to have received that message loud and clear.

103. As Mr Abel noted in his report, this was an accident that was avoidable because there should have been better planning. The basic fact that those who instructed the Plaintiff in July 2006 spoke to him and Mr Ozols in English with no interpreter being used is a material factor for the Jurats. Further, they accept that there was no document made available to the Plaintiff to read, which ideally would have been translated into Polish for him, but even if provided in English would have been better than nothing. Had there been something more readily understandable by the Plaintiff, the outcome on the question of contributory negligence would probably be different.

104. The Jurats also take into account that Mr Davison clearly did not think it was wrong to walk on the asbestos roof itself because he, Mr Ozols and the Plaintiff had clearly been stood on the roof itself, otherwise the Plaintiff would not have been close enough to step on to a roof light on 19 July 2006. There may well have been a difference in approach between walking on the roof in areas where there was safety netting beneath and going further afield, but that distinction may not have been sufficiently understood by the Plaintiff, especially when he had not been shown the location of the netting and where there were no physical markings on the roof demarcating the areas that were out of bounds.

105. The view of the majority is that, having regard to the photographs of the roof taken shortly after the accident had occurred found in Mr Abel's report, the Plaintiff had collected a piece of sheeting preparatory to returning to where it would be fixed on the roof, had strayed to the edge of the area under which the safety netting was affixed and inadvertently stepped backwards and gone through the roof light, in the process dropping the sheet of cladding. In particular, they do not find that the Plaintiff deliberately walked on to a roof light. They find that the Plaintiff had been told by Mr Davison and Mr Robins that the roof lights were fragile and they accept that the incident relayed by Mr Davison about the Plaintiff being pulled back by him and Mr Ozols after hearing a crack from a roof light on 19 July 2006 happened in the way Mr Davison stated in his evidence. It is this fact that there had been a prior encounter with a roof light involving the Plaintiff just the previous day that leads them to conclude that there was some fault on the part of the Plaintiff causing his accident, because he should have acted so as to take care for his own safety by avoiding being anywhere close to a roof light in case there were to be a repetition of stepping on to one of them.

106. However, when it comes to balancing the relative blameworthiness of the parties for the accident, they are not persuaded that the extent of fault on the part of the Plaintiff is anything other than minimal and would not have resulted in a reduction by them of even 10% of the damages otherwise to be awarded. They reach that conclusion by taking into account what they consider to be the very serious failings on the part of the Defendant. Working on a roof is inherently dangerous and the standard of safety measures, drawing from Mr Abel's report, put in place by the Defendant was low. When considering why the Plaintiff ended up falling through the roof light that he did, they find that the absence of any markings on the roof to show where workers could and could not go was particularly blameworthy. Had there been markings, and especially if there had been some physical barrier, they are satisfied that the Plaintiff would have realised that he must not go into areas that were marked as out of bounds. Had he then done so, his fault for the accident would be considerable. However, in the absence of markings and the absence of getting proper confirmation that the Plaintiff really understood that there were areas of the roof where he must not go at all, the majority view is that the balancing exercise will always result in there being no more than minimal responsibility on the part of the Plaintiff. As a result, they make a finding that the Defendant has failed to satisfy them that this is a case of contributory negligence and so the full amount of damages that they have found the Defendant liable to pay forms their judgment of the proper award of damages.

107. Jurats Bartie's approach is similar but notably different when it comes to the conclusion. In her view, she agrees that the Plaintiff did not deliberately step on to the roof light through which he fell. She makes findings similar to the majority as to how the accident came to pass. She is equally critical of safety shortcomings on the part of the Defendant and agrees that this was an accident that was an avoidable one. However, she has taken into account that the Plaintiff stated in evidence that he was a very experienced construction worker, from which she infers that he must have appreciated the risks associated with certain types of work, including the risks inherent in working on quite a high roof. She has formed the impression that the Plaintiff acted in a manner as if he knew better than those persons, who were obviously younger than him and less experienced than he considered himself to be, and that, as a result, he paid less attention to the warnings given than he should have done, despite her agreeing that his command of the English language was not as great as the Defendant's witnesses have sought to say it was. Accordingly, she is satisfied that the Plaintiff's unduly confident approach to the work he was carrying out meant that he did not take as much care for his own safety as he should have done and that he is partially to blame for the accident. That said, she disagrees with Advocate Dawes' suggestion that the parties were equally to blame, because the part the Plaintiff played in his accident was, in her view, considerably lower than the serious shortcomings for which the Defendant bears the responsibility. Balancing all the factors in the round, she is satisfied that the damages otherwise payable by the Defendant to the Plaintiff should be reduced by 15% due to his contributory negligence.

Interest

108. On the basis that the Court's judgment is formed by the majority view, having concluded that there should be no reduction in the damages to be awarded to the Plaintiff in respect of the alleged contributory negligence, the final aspect to consider is the incidence of interest on the general and special damages awarded. This was not covered in any great detail by the Plaintiff. His Schedule of Loss refers to seeking interest at 2% per annum on general damages and at half the special account rate in respect of special damages, where the rate claimed is 3% from the date of commencing the action until the end of January 2009, 1.5% for four months, 0.75% for one month and then 0.25% since. The actual calculations he has made are, however, not fully consistent with that approach.

109. The Defendant's Counter-Schedule notes that the action was commenced on 11 September 2009 and that the trial could have taken place within a year. Accordingly, it proposes that interest on general damages should be limited to a period of one year because the subsequent delays have been through no fault of the Defendant, which should not be held responsible for the Plaintiff being kept out of his damages for the length of time that he has been. As regards interest on special damages, the Defendant points out that the Plaintiff was slow to commence his proceedings and that interim payments totalling £21,050 have been made on account of the damages to be awarded to assist the Plaintiff since his return to Guernsey earlier this year, for which reason it proposes a token sum of interest of just £1,500.

110. The provisional view of the majority is that the Plaintiff is entitled to receive more by way of interest than the amounts proposed on behalf of the Defendant. They first note that there is no disagreement that the rate of interest applicable in respect of general damages is 2% per annum. Their award for general damages is £114,250. Had the trial taken place earlier than it has, they are satisfied that there would have been no dispute that the Plaintiff should receive this interest on this award. Having regard to the procedural history, as set out in the Defendant's chronology, they are not attracted by the submission that the action could have come to trial within a year from proceedings commencing. They note in particular the various steps being taken in 2011, which demonstrates that the case was continuing to progress at that time in what might be regarded as a normal fashion. They do, however, acknowledge that the

most significant delay in bringing the matter to trial arose because the Plaintiff was in custody. Although there was an attempt to have the trial heard during that time it was unsuccessful. In that regard, they accept that this delay was not the fault of the Defendant and they further take the view that the running of interest should be suspended for the 3¼ years that the Plaintiff was held in custody. The other lengthy period where there was little progress towards a trial came between late 2011 and the beginning of 2014. Although it can be said that this was not the fault of the Defendant, the majority view is that what happened at this time is not as directly attributable to the Plaintiff's own wrongdoing as the time he spent in custody and so they distinguish between these two periods. Because the purpose of awarding damages is to provide a fair, reasonable and just award to compensate the Plaintiff, they are satisfied that he should not be deprived of interest in respect of what is just over two years. The matter was resurrected at that time without question as to the procedural propriety of doing so on the part of the Defendant, no doubt because the Defendant acknowledged that there was some entitlement on the part of the Plaintiff to some award of damages in respect of the accident. Accordingly, they take the view that his award of £114,250 as general damages should carry interest at 2% per annum from September 2009 until now, but not in respect of the 3¼ years he was in custody, when its running is to be suspended. Accordingly, the amount of interest to be awarded is £15,550.

111. The amount awarded as special damages is £208,593 (comprising past loss of earnings, damaged clothing and a notional amount for the other expenses incurred by the Plaintiff). The interest on these amounts should, in the view of the majority, reflect so far as possible that the Plaintiff has already received some interim payments to help him meet his living costs since his return to Guernsey earlier this year. Similarly, they take the view that, although the Plaintiff has been kept out of receipt of his damages for a long period of time, some of that time was solely attributable to his actions, and so the running of interest should similarly be suspended for the time he was in custody. Accordingly, and taking a fairly broadbrush approach, the provisional interest calculation arises from reducing the amount the Plaintiff will receive by approximately the amount paid by way of interim payments, resulting in a base figure of £190,000 (rounded to such a figure to make the calculation easier but still reflecting what the Plaintiff has lost through the time taken to make an award of these damages), which attracts the variable rates for the periods previously indicated. Accordingly, the overall amount of interest to be awarded is £18,781.

112. Because little thought was given to methodology to apply to these calculations during the hearing on the part of the Plaintiff and the approach the Court is taking is quite different from that proposed on behalf of the Defendant, if the parties wish to agree alternative interest calculations or wish to make further submissions in respect thereof, these figures can be modified accordingly. However, they amount to the best effort that the Jurats can make as to the appropriate amounts to award the Plaintiff by way of interest on his damages, which is why they are set out in this way in this judgment because the Court recognises the difficulty the Plaintiff has had in formulating certain aspects of his claim so that, if a pragmatic outcome can be agreed, which the Jurats think their calculations are, that will probably assist both parties and save further expense.

Conclusions

113. For all the reasons given, the Court's award of damages payable by the Defendant to the Plaintiff, reached as a result of the majority judgment of Jurats Grut and Crisp, is comprised of:

General Damages	£114,250
Past losses	£208,593

Future losses	£106,920
Interest	£ 34,331

The Plaintiff will, of course, have to give credit for the interim payments already received by him, ie, the £21,050 to which reference has been made plus anything received since that time by way of any further interim payment.

114. In relation to costs, these will normally follow the event. Given the nature of this dispute, if the appropriate costs order is capable of being agreed between the parties, that order can then be put before the Court in the form of a Consent Order. However, if there is any dispute about the costs order that should follow from this judgment, either party will be able to seek an appointment through the Greffe for a hearing before the Deputy Bailiff, possibly at a suitable Interlocutory Court, to address the proper incidence of costs.

115. By way of a final postscript, despite all the difficulties that the Plaintiff has had in presenting his case and the need to use interpreters, the Court has considerable sympathy for the plight in which he has found himself. The Jurats appreciate that the Plaintiff has been the author of his own misfortune in recent years, but from the date of the accident and for a long period, he was simply seeking fair compensation for what they consider was a very nasty accident for which the Defendant has accepted its responsibility. They recognise that, at least in 2019, some interim payments have been made to the Plaintiff by the Defendant. Given the very long time that the Plaintiff has been waiting to receive his compensation, whatever else might happen on the handing down of this judgment, the Court wishes to encourage the Defendant to make an immediate further payment on account of the totality of the damages awarded and suggests that an amount of at least £100,000 might be considered to be appropriate, before paying whatever balance is found to be owing at the conclusion of the proceedings.