Case No: F90MA233

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Before HHJ Sephton KC, sitting as a Judge of the High Court

Between :

Matthew Shaw — Claimant

- and –

Gillian Wilde — Defendant

Mr David Knifton KC and Mr Christian Taylor instructed by Thompsons Law, Manchester for the Claimants

Mr Christopher Kennedy KC and Mr Matthew Snarr instructed by Keoghs LLP, Manchester for the Defendant

Judgment on ancillary issues

Introduction

1. On 30 June 2018 Matthew Shaw was riding a motorcycle along Offerton Lane, Stockport, when the defendant drove from a minor road into his path, causing Mr Shaw to collide with the defendant's car and inflicting serious injury upon him.

2. The defendant admitted liability after proceedings were commenced. She subsequently obtained permission to raise the issue of contributory negligence. By order of DJ Moss dated 2 November 2020, the issue of contributory negligence was tried as a preliminary issue. Mr David Allan KC, sitting as a Deputy High Court Judge, heard the trial of the preliminary issue and found that Mr Shaw was not guilty of contributory negligence. He reserved the costs of that hearing because, by then, the defendant had raised the question whether the claimant was guilty of fundamental dishonesty, so that his claim should be dismissed pursuant to section 57 of the Criminal Justice and Courts Act 2015 ("the Act").

3. I heard the trial on the issues of quantum and whether Mr Shaw has been fundamentally dishonest in relation to the claim. I decided that the value of his claim was £1,212,389.94 plus interest but that, since he had been fundamentally dishonest in relation to the claim, his claim should be dismissed. I was not persuaded that the claimant would suffer substantial injustice if his claim were dismissed. I have circulated a confidential draft of my judgment pursuant to CPR PD40E and invited the parties' submissions on ancillary matters.

4. The parties have agreed that they should make written submissions and, consequent on that agreement, I received (in the following order) submissions from the claimant, submissions from the defendant and submissions in reply from the claimant.

5. This is my judgment on those ancillary matters.

Interim payment

6. Mr Shaw received interim payments in the aggregate of £150,000. The defendant invites me to order repayment of this sum pursuant to CPR 25.8(2)(a). The defendant makes clear that she does not invite me to order Mr Shaw to pay interest pursuant to CPR 25.8(5).

7. CPR 25.8 provides, so far as relevant:

(1) Where a defendant has been ordered to make an interim payment, or has in fact made an interim payment (whether voluntarily or under an order), the court may make an order to adjust the interim payment.

(2) The court may in particular—

(a) order all or part of the interim payment to be repaid;

...

It is clear, in my view, that CPR 25.8(2)(a) gives the court a power, but not a duty, to order repayment of interim payments.

8. Practice direction 25B provides, so far as relevant:

5.4 In a final judgment where an interim payment has previously been made which is more than the total amount awarded by the judge, the order should set out in a preamble:

(1) the total amount awarded by the judge, and

(2) the amounts and dates of the interim payment(s).

5.5 An order should then be made for repayment, reimbursement, variation or discharge under rule 25.8(2) and for interest on an overpayment under rule 25.8(5).

In my view, these provisions make clear that the court is expected to make an order for reimbursement of any overpayment.

9. The result of the decision I made in the trial is that the claimant is not entitled to any damages from the defendant because his claim has been dismissed. In particular, he has no right to claim the sum of £150,000 which he has received by way of interim payment. However, the defendant is unable to recover the money unless I order it to be repaid.

10. In my opinion, the guidance provided by the Practice Direction about how my discretion should be exercised together with the fact that the defendant is deprived of the money to which the claimant has no right mean that, save for exceptionally good reason, I should order the claimant to repay the money.

11. The claimant submits that the interim payments were made well before any suggestion of fundamental dishonesty had been raised; that he total amount paid was only a very small proportion of the damages of over £1.2m to which the Court has held the claimant would have been legitimately entitled, absent any dishonesty that the Defendant has enjoyed very substantial windfall, so that there is no question of the

claimant having been unjustly enriched by retaining the interim payments; that the total interim payments made are less than the past losses which the Court has accepted were sustained by the claimant as a consequence of his injuries and that the claimant will be unable to repay.

12. I reject the submission that the claimant has not been unjustly enriched. He was entitled to nothing because of his dishonesty, but holds £150,000 of the defendant's money.

13. I reject the submission that I ought not to make an order because the claimant cannot afford to repay. I do not accept that Mr Shaw cannot repay the sum, given his residual earning capacity. In any event, I am not persuaded that, in this case, the inability to repay should affect the decision whether or not to make an order.

14. The other arguments advanced on Mr Shaw's behalf do not in my judgment amount to a good reason, much less a very good reason, not to make the order sought.

15. Accordingly, I shall make an order that Mr Shaw repay the interim payments of £50,000 made on 18 September 2019 and £100,000 made on 28 May 2020.

Costs

16. I deal first with the costs of the trial of the preliminary issue.

17. In my judgment, the relevant features in relation to the preliminary issue are as follows:

(1) The defendant admitted liability for the accident.

(2) The defendant did not raise the issue of contributory negligence until May 2020 and did not apply to amend her defence to plead contributory negligence until 6 July 2020. When DJ Moss gave permission to amend the defence, he ordered that the costs of and occasioned by the late application to amend the defence be costs in the preliminary issue.

(3) Mr David Allan KC rejected the allegations of contributory negligence at the trial of preliminary issue.

(4) Mr Shaw made a number of offers to settle the preliminary issue. In my judgment, the offers dated 24 May 2021, 17 June 2021 and 20 September 2021 were not offers that complied with CPR Part 36 but which nevertheless were admissible offers of the kind identified in CPR 44.2(4)(c). The result achieved by the claimant was more favourable to him than the offers he made.

18. Notwithstanding this, the final result of the case has been that the defendant has succeeded because the claimant's claim has been dismissed.

19. The defendant submits that costs should follow the event and "the event" is the final result in the litigation. She submits that the court should adopt the same approach whether liability and quantum are to be heard together or separately. She submits that it is not apposite to describe claimant as the successful party on the issue of liability. She points out that section 57 of the Act does not distinguish between the costs of liability and quantum. She submits that I should not pay any heed to guidance given by the Court of Appeal in *McKeown v Langer* [2021] EWCA Civ 1792 which concerned neither a claim for personal injuries (to which the QOCS provisions apply) nor one to which section 57 applied. As I understand the submission, the defendant seeks her costs on the issue of contributory negligence (even though she lost a separate trial on that issue) on the basis that she has won the case overall.

20. I start my analysis by observing that CPR 44 Part II (the QOCS rules) does not affect the order a court makes about costs: the QOCS rules regulate whether a costs order can be enforced. Section 57(5) of the Act does not affect the principles to be applied in making a costs order: it requires the court to reduce the amount which it would otherwise order the claimant to pay. In my view, nothing in either of these provisions derogates from the principles set out in CPR 44.2.

21. I note that CPR 44.2(2) provides that the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but specifically reserves the court's right to make another order. Amongst "all the circumstances of the case" which the court must take into account are: whether a party has succeeded on part of its case (see CPR 44.2(4)(b)), whether a party made admissible offers to settle that did not amount to Part 36 offers (see CPR 44.2(4)(c)); and whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue (see CPR 44.2(5)(b)). I note that CPR 44.2(6)(e) reserves to the court the right to make an order for costs relating to particular steps taken in the proceedings. In my judgment, it is plain that the court has power to order a party to pay the costs on a preliminary issue notwithstanding that the party is successful in the final result.

22. The claimant referred me to *McKeown v Langer* [2021] EWCA Civ 1792 in which the Court of Appeal addressed the question of costs of a preliminary issue where the court

was aware of the existence of a *Calderbank* offer that applied to the whole of the action. Green LJ said this:

> 36. I turn now to issues of policy. The courts have identified a number of policy considerations which underpin decisions on costs. These shed light on "the circumstances" which a court is required to have regard to under CPR r 44.2 . Without intending to set out a definitive list the following have been identified as having potential relevance.
>
> 37. First, there is a general "salutary" rule that costs follow the issue rather than the "event". This is because an overly robust application of a principle that costs should follow the final event discourages litigants from being selective as to the points they take in litigation and encourages an approach whereby no stone or pebble, howsoever insignificant or unmeritorious, remains unturned: *Phonographic Performance* [1999] 1 WLR 1507 , 1523A; *Mean Fiddler Holdings Ltd* [2003] EWCA Civ 1058 at [30] ; and *Merck KGaA v Merck Sharp & Dohme Corpn* [2014] EWHC 3920 (Ch) ("*Merck*") where Nugee J (as he then was) stated (at para 6) that it was "in general a salutary principle that those who lose discrete aspects of complex litigation should pay for the discrete applications or hearings which they lose, and should do so when they lose them rather than leaving the costs to be swept up at trial". In the present case the merits were overwhelmingly in favour of the respondent and the judge recorded his displeasure at the taking of unmeritorious points by the appellant.
>
> 38. Secondly, the making of discrete issue-based costs orders encourages professionalism in the conduct of litigation, which is an objective sought to be achieved by the overriding objective in CPR r 1.1 and 1.2 and which parties are under a duty to facilitate pursuant to CPR r 1.3 . Parties do this by being required to "help the court"... Interim costs orders therefore serve the good administration of justice by incentivising parties to conduct litigation professionally...

23 The defendant submitted that the comments in *McKeown* were not applicable because that case concerned an action by a minority shareholder, to which the provisions of section 57 and the QOCS provisions did not apply. In my view, that point is unsound because, as I pointed out earlier in this judgment, section 57 and QOCS do not affect the principles to be applied in making an order for costs; they simply regulate respectively the amount and the enforcement of any order for costs.

24 The defendant further submitted that by making issue-based costs orders, the court would encourage legal representatives acting for claimants "to seek to split off and run as many issues as they can find in the litigation which could not be described as being fundamentally dishonest in the knowledge that they could recover those costs irrespective of whether dishonesty went to the heart of the claim." This argument assumes, unrealistically in my view, that the court will willingly make orders for the trial of preliminary issues at the behest of unprofessional claimants' representatives. It

also depends on the proposition that claimants have many issues that they can win but which the defendant unreasonably opposes. I am not persuaded by the argument.

25. In relation to the issue of contributory negligence (not, be it noted, the issue of liability) it seems to me that the defendant raised, late, a meritless defence and persisted in the defence despite offers to settle which, as events have proved, ought to have been accepted. As a result, there has been considerable expenditure of costs and of the court's resources.

26. I have come to the firm conclusion that the costs of the issue of contributory negligence should be paid by the defendant to the claimant. In my view, this order best reflects the merits of the case and furthers the Overriding Objective.

27. I consider next the costs of the issue of quantum and fundamental dishonesty.

28. In my judgment, the defendant was the successful party. There is no reason why I should not apply the general rule that the unsuccessful party should pay the successful party's costs.

29. The claimant invites me to make a modest reduction on the grounds that he made a number of offers to settle and sought mediation. In the light of my decision in the action, I take the view that the claimant's offers fell well short so that the defendant cannot be criticised for failing to engage with them or with the prospect of mediation. The only offer that appears to me to have been attractive was the defendant's offer to permit the claimant to discontinue while retaining his interim payments, which I note the claimant did not accept. I am not minded to make any reduction. Accordingly, I order that the claimant pay the defendant's costs of the issues of quantum and fundamental dishonesty.

30. The claimant has been found to be fundamentally dishonest. He concedes, I think, that costs orders against him fall to be enforced notwithstanding the QOCS provisions. For the avoidance of doubt, pursuant to CPR 44.16(1), I grant permission for orders for costs against the claimant to be enforced to the full extent of such orders.

31. I am told that the defendant's costs are likely to be around £823,318.69. Since this figure is much less than the amount that the court would have awarded but for the dismissal of the claim, the effect of section 57(5) of the Act is that the claimant will not be ordered to pay any sum on account of costs.

32. I am asked to consider whether to order that the monies due from the claimant to the defendant should be set off against costs due from the defendant to the claimant. Because the claimant will probably not be liable for costs (see the preceding paragraph) the money due from the claimant to the defendant will likely be the repayment of the interim payments in the aggregate sum of £150,000.

33. I have the jurisdiction to make the order to set off: see Senior Courts Act 1981 section 51 and *R(Sonia Burkett) v London Borough of Hammersmith and Fulham* [2004] EWCA Civ 1342. In *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492, 497 Scott LJ said this:

> "The broad criterion for the application of set-off is that the plaintiff's claim and the defendant's claim are so closely connected that it would be inequitable to allow the plaintiff's claim without taking into account the defendant's claim. As it has sometimes been put, the defendant's claim must, in equity, impeach the plaintiff's claim."

34. The claimant in the present action is required to repay interim payments made in the case of £150,000. It was submitted on his behalf that he may not be able to repay the money (though I have already said that I am not convinced that this is the case). In my opinion, it would be very unfair if the defendant were required to pay the claimant's costs of the preliminary issue in full whilst not receiving the money she is due under the order for repayment of the interim payments. I direct that the money due from the claimant to the defendant may be set off against the defendant's liability for the costs of the preliminary issue.

Permission to appeal

35. I am asked to grant permission to appeal against my conclusion that the claimant would not suffer substantial injustice if his claim were dismissed.

36. The relevant provision is CPR 52.6(1), which provides:

> (1) Except where rule 52.7 or rule 52.7A applies, permission to appeal may be given only where—
>
> (a) the court considers that the appeal would have a real prospect of success; or
>
> (b) there is some other compelling reason for the appeal to be heard.

37. It is submitted that that I was wrong to conclude that, because of the words of s.57(3) of the Act, substantial injustice must mean more than the mere fact that the Claimant will

lose his damages for those heads of claim that are not tainted with dishonesty. In my view, the success of this argument depends on the court accepting the submission that s 57(3) is otiose. I note that I took into account the effect upon the claimant of dismissing his claim: see paragraph 181 of the judgment. In my view, this argument does not have real prospects of success. I note that my construction of the Act is the same as several other judges in this jurisdiction.

38. It is submitted that I was wrong to exclude consideration of the ministerial statement as an aid to construction of the statute. It is unfortunate that I was not addressed in the course of argument about the admissibility of such material as an aid to construction. I have now re-considered my view and have taken the ministerial statement into account, although this has not affected my conclusion.

39. It is submitted that the exercise of my discretion was flawed. In my view, the claimant has no realistic prospect of demonstrating that my decision fell outwith the wide bounds within which reasonable disagreement is possible. I was required to make an evaluative assessment of whether the claimant would suffer substantial injustice and the claimant has no real prospect of demonstrating that my assessment of what is essentially a jury question was wrong.

40. I have concluded that the claimant has no real prospects of success in the proposed appeal, in particular as to the construction and application of section 57 of the Act. I am not persuaded that there is any compelling reason for the appeal to be heard.

41. The claimant should therefore make an application to the Court of Appeal for permission to appeal, if so advised.

42. I invite the parties to agree a form of order that reflects the decisions I have made.

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JUDGMENT

1. On 30 June 2018 Matthew Shaw was riding a motorcycle along Offerton Lane, Stockport, when the defendant drove from a minor road into his path, causing Mr Shaw to collide with the defendant's car and inflicting serious injury upon him. The issue of liability for the collision has previously been resolved in Mr Shaw's favour. This trial dealt with two principal issues: the value of Mr Shaw's claim and whether Mr Shaw has been fundamentally dishonest in relation to the claim.

Background

2. Mr Shaw was born on 26 July 1991. He was 26 at the time of the accident and is now 32 years old. He has two brothers, Mark Howarth and Scott Shaw. Mark runs an electrical business with the name Alfie's Electrical Services Limited.

3. As a result of the collision on 30 June 2018, Mr Shaw suffered serious injuries to both legs and both arms. He was taken to Manchester Royal Infirmary where he underwent treatment to which I shall refer later in this judgment. He was discharged home on 2 August 2018. At the time of the accident he lived at 15, Betnor Avenue, Stockport with his two large dogs. This is a small end-terrace property on 2 floors.

4. Mr Shaw was in a relationship with Courtney Williams before the accident. Ms Williams told me that they drifted apart, but got back together after the accident. Their son, Oliver, was born on 29 August 2019. Ms Williams stayed with Mr Shaw and Oliver for about 6 weeks, but then left, so that Mr Shaw was Oliver's principal carer. The couple subsequently reached an agreement that each parent would look after Oliver for 4 days in one week and 3 days the next..

5. This claim was commenced by Claim Form dated 31 July 2019. The defendant admitted liability for the accident, though she later obtained permission to make allegations of contributory negligence against Mr Shaw. Those allegations were dismissed by Mr David Allan KC, sitting as a judge of the High Court, in February 2022.

6. The defendant's insurers agreed to make interim payments totalling £150,000. However, the defendant refused to make a further voluntary interim payment. She alleged that the claimant had lied about the extent of his injuries and was guilty of fundamental dishonesty. The claimant's application for an interim payment was dismissed by Turner, J. on 8 February 2021. The defendant obtained permission to re-

amend her defence to allege that the claim ought to be dismissed because the claimant had been fundamentally dishonest in relation to the claim. During the trial and in closing submissions, Mr Kennedy KC, who appeared for the defendant, broadened his attack and now relies on other aspects of the case in support of his submission that the claimant has been fundamentally dishonest in relation to the claim. Mr Knifton KC who represented Mr Shaw, properly conceded that since the claimant was on notice that it would be alleged that he had been fundamentally dishonest, he would not object to the matters being relied upon that did not appear in the Re-Amended Defence.

7 The issues around the accuracy and honesty of the evidence relied upon by the claimant pervaded the trial. They are obviously relevant to the question of fundamental dishonesty. The alleged unreliability of the evidence has also made the task of evaluating the claim much more difficult. Uncertainty about the underlying facts has had a significant effect upon the expert evidence.

8 I mention at this stage that on 1 June 2020, Mr Shaw moved to 3, Thirlmere Close, Alderley Edge, which is a bungalow. After the application for an interim payment was dismissed, Mr Shaw could no longer afford to live in Alderley Edge and so in May 2021 he moved to 9, Napier Street, Hazel Grove which is a terraced house. On 10 October 2022, he moved to 14, Gloucester Road, Poynton which is a bungalow situated quite close to his mother's home.

The undisputed medical evidence

9 During the trial, the accuracy of the evidence about Mr Shaw's condition and function was hotly disputed. In seeking to find where the truth lies, I am assisted by the objective findings contained in the extensive medical records, which in my judgment generally provide reliable evidence about Mr Shaw's injuries and treatment at the time of the accident and in the subsequent years. The records also provide an undisputed chronology of the operations Mr Shaw has undergone. It is convenient to summarise the medical evidence at this stage.

10 It is common ground that Mr Shaw sustained the following injuries in the accident:

(1) A compound fracture of the left wrist involving the distal radius and ulna and disruption of the radio-ulnar joint.

(2) An open laceration of the left wrist with division of the extensor tendons of all five fingers and both extensor carpi radialis tendons.

(3) Fracture of the second metacarpal of the left hand.

(4) Fracture of the right scaphoid.

(5) Fracture of the left femoral shaft.

(6) Fracture of the left tibial plateau.

(7) Open fracture of the right femur with disruption of the femoral artery.

(8) Fracture of the right ankle.

(9) Fractures to both patellae.

11. Mr Shaw remained in hospital until 2 August 2018. Whilst he was in hospital, the following procedures were undertaken:

(1) On 30 June 2018, debridement of the right femur together with the insertion of bilateral femoral nails, debridement of the left wrist and application of an external fixator.

(2) On 3 July 2018, the surgeons had a second look at the right thigh and left forearm.

(3) On 8 July 2018, there was a wash out and further debridement of the left wrist.

(4) On 11 July 2018, Miss Hajipour (a consultant hand surgeon) removed the external fixator and undertook open reduction and internal fixation of the left wrist, a reconstruction of the left distal radio-ulnar joint ("DRUJ") and repair of the extensor carpi radialis longus. Mr Bedford (a consultant plastic surgeon) took a free anterolateral thigh ("ALT") flap and attempted reconstruction of the left forearm and hand.

(5) On 1 August 2018, a screw fixation of the fracture of the right ankle was undertaken and the distal locking bolt in his right femur was removed.

12. After Mr Shaw left hospital he underwent the following procedures:

(1) On 2 October 2018, Miss Hajipour undertook bone grafting and plating of the right scaphoid, which had not proceeded to union.

(2) On 14 February 2019, biopsy of the ununited fracture to right femur and removal of a broken screw from the right femoral nail.

(3) On 20 February 2019, Miss Hajipour performed the first part of a two-stage extensor tendon reconstruction procedure.

(4) On 24 February 2019, a haematoma of the left thigh was evacuated.

(5) On 2 May 2019, an exchange right femoral nailing together with removal of distal locking screws from the left femur and bone grafting.

(6) On 6 February 2020, Miss Hajipour undertook the second part of the extensor tendon reconstruction procedure.

(7) On 27 July 2020, the plate in the right scaphoid was removed.

(8) On 10 August 2020, a further exchange femoral nailing on the right side and bone grafting.

(9) On 19 December 2020, the locking bolts were removed from the right femoral nail.

(10) On 25 August 2021, Miss Hajipour explored the left extensor carpi ulnaris and revised the ALT flap on the left wrist.

(11) On 6 May 2022, Mr Shaw was complaining of left wrist pain. The radiographs showed arthritic change in the radio-carpal joint and DRUJ. Mis Hajipour applied a plaster cast onto Mr Shaw's left wrist. When he was reviewed on 27 May 2022, his symptoms had settled and the pain was managed. Miss Hajipour listed him for removal of plates, fusion of the left wrist and Darrach's procedure.

(12) On 12 August 2022, Mr Shaw had a corticosteroid injection to address pain in the left wrist.

(13) On 17 January 2023, Mr Shaw underwent removal of the intramedullary nail in the right femur and application of an Ilizarov external fixator.

(14) Following an incident in April 2023, X rays taken on 5 April 2023 revealed that there was fracture of the callus of the midshaft of the right femur.

(15) On 12 July 2023, the Ilizarov frame was removed.

(16) On 27 December 2023, metalwork was removed from the left wrist.

(17) On 14 February 2024, during the trial, Mr Shaw underwent fusion of the left wrist. I was shown a terse email dated 14 February 2024 from Ms Hajipour in

which she stated that she had "removed 0.5 cm distal ulna and the loose body in the joint."

13. I heard evidence from consultant hand surgeons, Mr Hayton and Mr Muir. They agree on the following issues, so far as relevant to my decision:

(1) The surgical procedures undertaken by Ms Hajipour and her team were reasonably indicated.

(2) The left wrist fusion undertaken on 14 February 2024 is likely to improve Mr Shaw's pain and function. This improvement has been obtained at the cost of a loss of movement in the wrist.

(3) The left DRUJ is a separate problem. Ms Hajipour, having undertaken the excision of the distal ulna referred to above, says, "If he develops instability after excision [of the] distal ulna he will need DRUJ replacement." I deal later in this judgment with the expert evidence about what might happen to Mr Shaw's DRUJ.

(4) A healed fracture of the scaphoid brings with it a risk of long term pain estimated at up to 7 – 10% in the literature and an increase in risk of late degenerative change estimated at some 5% lifetime risk.

14. I heard evidence from consultant lower-limb surgeons, Mr Clayson and Professor Harris. They agree on the following issues, so far as relevant to my decision:

(1) The fractures to Mr Shaw's left femur, left tibial plateau and right ankle have now healed.

(2) The fracture of the right femur remained ununited for some years, but was sufficiently healed to justify the removal of the Ilizarov frame in July 2023. There is no longer any real risk that Mr Shaw will require amputation. Bony union has largely been achieved.

(3) Mr Shaw has weakness and wasting of his right thigh muscles which will be permanent.

(4) Mr Shaw's right leg is now permanently shorter. It is not clear whether the leg length discrepancy is 31mm or 42mm. The experts agree that attempting surgery to lengthen the right femur would be unwise, though it appears that Mr Shaw's treating surgeons are considering attempting the operation. I intend to proceed on

the assumption that no attempt will be made either to extend Mr Shaw's right leg or to shorten his left.

15. Mr Shaw has extensive scarring.

The early presentation of the claimant's case

16. The Particulars of Claim were accompanied by a preliminary schedule of loss which Mr Shaw verified with a statement of truth on 18 November 2019. The following features of the schedule appear to me to be relevant:

(1) The schedule was served at an early stage in proceedings when it was clear that further surgery upon Mr Shaw would have to be carried out. Although it was a preliminary schedule, several allegations of fact were made in it.

(2) In relation to transport expenses, it was alleged:

> "The claimant is unable to walk more than a short distance using a mobility aid. He uses a mobility scooter."

(3) It was alleged that Mr Shaw "had been advised by his doctors that he will be unable to parachute in the future." There was a claim for the costs of learning to be a skydiving instructor thrown away in the sum of £40,000.

17. Mr Shaw made a witness statement verified by a statement of truth on 31 July 2020. In it:

(1) He explained that prior to his accident he worked as a self-employed person in the construction industry undertaking various jobs. He set out the money he had received although "some of the payments were for materials." He said that the main purpose of earning money at the time was to fund his interest in BASE jumping trips abroad. During the trial, I learned that a BASE jump involves jumping off Buildings, Aerials, (bridge) Spans or Earth (usually cliffs) and then deploying a parachute before hitting the ground.

(2) He stated that his walking distance had increased to 100 to 200 metres without using a stick; he said that he used a stick beyond that but it was difficult because of the pain it caused to his hands. He said that for longer periods of mobility such as visiting a shopping centre he used the mobility scooter. He said that he had bought an electric bicycle which he had used a couple of times. He said that he could not use the bikes off road properly.

(3) He said that he could manage the stairs at Betnor Avenue only with difficulty and needed two handrails.

(4) He said that he had difficulty standing for more than 10 minutes.

(5) He said that he had gone south to meet friends (he did not say when). He continued:

> "A couple of them were over in Italy jumping and I went over to see them. I watched them doing their jumps and even did a bit of ground crewing. The trip involved me taking a flight from Stansted airport. I had to book extra leg room and luckily the seat next to me was vacant so I could put my leg on it..."

18. By letter dated 11 September 2020, Mr Tollitt, the solicitor instructed by the claimant, invited the defendant's insurers to make a further interim payment of £1,500,000. Mr Tollitt set out a list of the expenditure he had been instructed the claimant would need in the following 24 months.

19. On 4 November 2020, the claimant made an application for an interim payment of £300,000. The evidence in support of the application consisted of witness statements from Valerie Sparkes, the claimant's case manager, dated 1 December 2020, from Matthew Tollitt dated 1 December 2020 and from the claimant dated 9 December 2020. Ms Sparkes's witness statement exhibited a report dated 22 July 2020 on the claimant's transport needs by Bill Kiely. Mr Tollitt's witness statement exhibited medical reports from Professor Harris and Mr Hayton and a provisional Schedule of Loss dated 26 May 2020. Mr Shaw verified the Schedule of Loss with a statement of truth.

20. On 4 December 2020, the defendant's solicitor sent an email to the claimant's solicitors which stated, amongst other things:

> "We assume from the fact that you have served it that you have your client's instructions that it is a fair representation of his symptoms and disability. Our understanding is that that is not so. Your client is materially less restricted and less in need of support or equipment than his May schedule and the other evidence you have adduced suggests. Clearly it would be inappropriate for him to put a misleading account of his disability before the court in support of his application for further funds. If, on reflection, he considers the evidence before the court is misleading, then we invite him by 12 noon on 8 December 2020 to withdraw his application for an interim payment."

21. The following features of the interim payment application appear to me to be relevant:

(1) In his report dated 9 November 2019, Professor Harris recorded that: "[Mr Shaw] walks with a stick and his walking distance is restricted to 100-200 metres without stopping." He also records that "At the time of the accident he enjoyed hiking, climbing, skydiving and base jumping. He has not resumed any of these activities."

(2) In his report dated 15 October 2020, Professor Harris stated that he had examined Mr Shaw on 3 October 2020. Mr Shaw told Professor Harris that his walking distance was restricted to 50-100 yards without crutches and that he could only stand for 10-15 minutes.

(3) In his letter dated 4 November 2020, Professor Harris stated that Mr Shaw required a vehicle capable of transporting his pavement scooter and "use of a quadbike to allow him access to areas when he goes to sporting events when the pavement scooter is not suitable".

(4) In paragraph 4.2 of the Schedule of Loss, it was alleged that the claimant had required 30 hours per week of care between July 2019 and May 2020. The claim for future care was 30 hours per week for life with additional costs for the provision of a nanny, cleaning, gardening DIY and the like. The aggregate claim for future assistance was about £2.3 million.

(5) In paragraph 4.4 of the Schedule of Loss it was alleged that "The Claimant is unable to walk more than a short distance using a mobility aid. He uses a mobility scooter."

(6) In paragraph 4.5 of the Schedule of Loss it was alleged that Mr Shaw "had been advised by his doctors that he will be unable to parachute in the future."

(7) In paragraph 6.4 of the Schedule of loss it was alleged that "He will probably need a specifically adapted automatic vehicle. He is likely to need a Lodgeson's control steering ball with electronic fingertip control attached to the steering wheel and which will allow the operation of lights and indicators and wipers..." The vehicle proposed was a Mercedes GLC. A quad bike was suggested. The aggregate claim for future transport costs was £500,624.

(8) In paragraph 6.6 of the Schedule of Loss it was alleged that "The Claimant has difficulty in his current multi-storey accommodation. The Claimant is able to manage stairs with great difficulty, using two banisters for support and in great

pain. This is neither safe nor reasonable, currently or in the longer term. The Claimant reasonably requires specifically adapted single-storey living accommodation. Evidence from an Occupational Therapist and from an Accommodation Expert are reasonably required."

(9) Paragraph 6.9 of the Schedule of Loss made a claim for the cost of holidays. It was alleged that Mr Shaw would need to travel in business class. He would require a companion, who also needed to travel business class and would require separate holiday accommodation. The aggregate claim for additional holiday expenses was £513,266.62.

(10) The provisional total claim advanced in the schedule was £6,465,578 plus the cost of aids and equipment that was to be advised.

(11) When Mr Shaw spoke to Mr Kiely by remote link on 14 July 2020, Mr Kiely recorded: "At present Matthew uses a walking stick for support when mobilising which is limited to 100-200 meters... "

(12) Mr Kiely stated "I understand that Matthew uses a pavement scooter for journeys close to home; he needs to be able to transport this in a vehicle so he has access to it to support his mobility." Mr Kiely also referred to the possible need for a manual wheelchair.

(13) Mr Kiely recommended a vehicle with automatic transmission, sufficient boot space to accommodate his mobility scooter and an automatic tailgate (because Mr Shaw could not both use crutches or a stick whilst coping with the tailgate). He stated that the vehicle would require controls that could be deployed using the right hand. It would have to have a towbar so that the quad bike could be carried on a trailer.

(14) Ms Sparkes's witness statement explained that Mr Shaw had been admitted for exchange femoral nailing on 10 August 2020. Afterwards, she said, "He needed bed rest for one week, to use a wheelchair for the next two weeks and crutches for [a] further two weeks."

(15) In his witness statement dated 9 December 2020, Mr Shaw said this:

> "Following the surgery on my right leg I can now walk a hundred yards without a crutch. I can walk a greater distance but the further I go the more pain I experience and the more I need to use a stick."

He continued,

> "It depends on a daily basis [what] I can do. For example, I pushed [a] shopping trolley round Tesco's but was in agony for the rest of the night."

(16) In the same statement, Mr Shaw said that he needed a quad bike to allow him to access the outdoors; "For example I could attend skydiving or base jumping events with my friends and travel around independently. "

22. Mr Shaw disclosed a video recorded by Timothy Zoltie entitled "Activities of Daily Living Video" and dated 27 February 2021. As the title suggests, the recording was intended to represent how Mr Shaw managed the activities of daily living. The salient features of the recording are as follows:

(1) Mr Shaw's left arm is held practically immobile throughout most of the recording. He deploys it more normally when he is dealing with Oliver.

(2) Mr Shaw limps. He is wearing sliders with a raise on the right foot.

(3) He is seen entering the bath using an inflatable cushion to lower himself into and raise himself out of the water.

(4) He drives to the shop. He steers using only his right hand. He deploys the indicator (which is on the left hand side of the steering wheel) awkwardly using his right hand. He operates the brake and accelerator using his left leg (the car has automatic transmission). He uses a detachable handle on the door frame to get into and out of the car.

(5) He goes to the supermarket with his mother. He uses a stick in the right hand to get to his car and in walking around the shop.

(6) His mother explains how she is required to help with the housework. She changes the bedlinen.

(7) Mr Shaw performs chin-ups using a finger board fixed above a doorway. His weight is partly supported by a Theraband under his left knee. A climber's chalk bag is hanging from the finger board.

(8) Mr Shaw performs press-ups; his weight is supported by the knuckles of his hands.

(9) Mr Shaw peels vegetables by fixing them on a bed of spikes and then using his right hand to use a peeler.

(10) Mr Shaw changes Oliver's nappy, dresses him and puts him to bed.

23. Mr Shaw gave an account of his problems to various experts instructed by the defendant, as follows:

(1) In the course of an examination by Mr Clayson, a lower limb consultant, on 26 November 2019, Mr Clayson recorded this: "Mr Shaw describes his leisure pursuits prior to this accident as being skydiving, 'BASE' jumping, climbing and numerous other outdoor activities. He reports that he has not been able to pursue any of these activities since the accident occurred."

(2) In the course of an examination by Mr Muir, an upper limb consultant on 27 January 2020, Mr Muir recorded the following: "Mr Shaw used to enjoy skydiving, hiking, motorcycling and base jumping. He has not tried any of these. He is able to walk 200 yards with his dogs but no more than this."

(3) In the course of an examination by Dr Vincenti, a consultant psychiatrist on 3 November 2020, Dr Vincenti recorded the following: "Mr Shaw told me that currently he can walk about 100 metres unaided with no walking stick but, thereafter, he is in such pain that he has to stop. He can go further with crutches."

(4) In the course of an examination by Ms Obeten, a physiotherapist on 3 December 2020, Ms Obeten recorded this: "Mr Shaw told me that he can walk up to 200 meters with no support and then has to use a walking stick. After that he can walk at least half a mile with the stick. On walks further than that he tends to use his mobility scooter or a car."

The defendant's response to the interim payment application

24. The defendant opposed the application for an interim payment on the grounds that notwithstanding Mr Shaw's admittedly serious injuries, he had been fundamentally dishonest in relation to the claim. The vanguard of the defendant's attack upon Mr Shaw's honesty came from a number of covert video recordings of him, the authenticity of which was not in issue in the trial before me. It is necessary to describe the recordings in some detail:

25. On 26 September 2019, Mr Shaw is seen walking with his friend, Savash Aksu, to the Co-op shop which was about 450 metres from 15, Betnor Road. Mr Shaw is carrying Oliver in a papoose. He walks with a limp, but at a reasonable pace. He has his hands in

his pockets. He is in the shop for about 6 minutes and then leaves the shop. He crosses the road, not by using the nearby pelican crossing, but instead he steps off the kerb into the traffic holding a bag of shopping in his left hand and still carrying Oliver in the papoose. He returns home, crossing a patch of grass on the way. Although Mr Shaw is seen to use his left hand in this recording, his fingers appeared to be clawed and did not move naturally.

26 On 14 October 2019, Mr Shaw is seen outside his home holding Oliver in a small car seat using his right hand and with another bag slung over his right arm. He is smoking a hand-rolled cigarette. He opens the door using his left hand. He leans into a vehicle to put Oliver into the car. He lifts the car boot up with his right hand. About 20 minutes later Mr Shaw had reached Awesome Walls Climbing Centre. He is seen carrying a climbing harness in both hands, and later on, a hot drink. He is seen walking down the stairs. He leaves the climbing centre about an hour after he arrived.

27 On 17 December 2019, Mr Shaw is seen stepping out of the house with a backpack. He bends to ground to pick something off the floor. He is carrying Oliver in a car seat in his right hand. He bends into the rear of the car to put Oliver into the car seat and then sits in the front passenger seat without apparent difficulty. About 20 minutes later, he is seen taking Oliver's car seat from the rear and walking into the house, holding the car seat in his left hand. Some time later, he is seen leaning into the rear of a car, apparently trying to adjust something on the rear nearside seat. He then gets into the front passenger seat without apparent difficulty. About 25 minutes later, he gets out of the car and puts on his backpack, adjusting the straps with both hands. He closes the car door with his left hand. He then leans through the rear nearside door and retrieves a bag (which he holds with his left hand) and Oliver in his car seat. He then walks to his house with the bag in the left hand, and Oliver (in his car seat) in the right.

28 On 18 December 2019, Mr Shaw enjoys a cigarette and a mug of coffee outside his house. He gets into the car, the door of which he closes using a single finger of his left hand. 20 minutes later he is seen getting out of the car at Wythenshawe Hospital, using a stick in the right hand as he approaches the door of the hospital. He limps awkwardly. Upon his return home, he gets out of the nearside, holding a carton of milk in his left hand. He leans into the rear to extract Oliver. He holds Oliver in his car seat in his right hand. In order to free up his left hand to close the car door, he puts his walking stick in his mouth. He walks to his front door and opens it.

29 On 23 and 24 July 2020, Mr Shaw is seen shopping. On 23 July, he holds a tube of Pringles in his left hand and other purchases between his body and his left arm whilst using his right arm to wave. On 24 July, he arrives at the shop on his mountain bike, ramping the pavement. He is seen with a shopping basket looped over his left arm; at the till the purchases are sufficient to fill a small back pack and a plastic shopping bag. He is wearing socks and sliders on his feet. He rides home on his mountain bike with the plastic shopping bag swinging from the left handlebar.

30 On 13 November 2020, Mr Shaw is seen driving a Land Rover Discovery. Two mountain bikes are carried on a tow-hitch mounted bike rack. Mr Shaw parks the car outside a house (We learned during the evidence that it was the home of his friend, Jozef). He uses an upright bike pump in an attempt to inflate a tyre on one of the mountain bikes, at first using only his right hand to press the piston but later using both hands. Mr Shaw drives Jozef to Harpur Hill. Jozef unloads one of the bikes from the bike rack and Mr Shaw unloads the other one. Mr Shaw then shoulders a large rucksack. The claimant rides off, carrying the rucksack. About 90 minutes later, he is seen putting his bike onto the bike rack. In order to open the boot of the vehicle to let his dogs into the car, he has to tilt his bike downwards, which he does, bearing the weight of the bike in his left hand. Jozef arrives a little later, puts his bike onto the bike rack and checks the fastenings for both bikes.

31 On 4 December 2020, the claimant is seen driving a Land Rover Discovery to a garage, where he walks to the kiosk and makes a purchase. He is seen in Tesco's, shopping. He carries a bottle in his left hand and other items between his left wrist and his body.

32 I was told that none of the surveillance recordings made on the defendant's behalf showed Mr Shaw using a mobility scooter. Apart from the recording on 18th December 2019, Mr Shaw is not seen to use a walking stick or other walking aid. In all of the recordings, Mr Shaw walks with a pronounced limp. There were 8 days when the surveillance team engaged by the defendant did not see Mr Shaw at all.

33 A second strand in the defendant's attack upon the claimant was a series of posts on social media. The posts were associated with 50 Cal Base Academy. We learned in the course of the trial that 50 Cal Base Academy is a business run by Oliver Gibbs and his partner that trains people to undertake a BASE jump. I was told (and readily accept) that this sport requires physical fitness and co-ordination in order to reach the exit point

and to escape from the landing point and in order timeously to deploy the canopy. Mr Shaw features in some posts made in April 2019 (before his accident). He features in a photo posted to Instagram on 31 July 2019 entitled "Supporting one of our own after a serious motorcycle incident." I shall refer to this image as "the Terrace Group photo." He is sitting in a large group wearing only shorts. There is no sign of any walking aid in the image. The picture is accompanied by the following hashtags:

> "#support #50calbaseacademy #basejumping #paragliding #skydive #parachute #waterjump #roadtorecovery #basejumpers #family #extremesports #lakegarda #italy #stoicmindset #explore #extreme #adventure #life #stoicphilosophy #keepmoving #travellife #nomadlife #healing #instagramhub #picoftheday #primalnature #gopro #goodtimes #goodlife"

Mr Shaw features in an image in a post made in 2022 ("the BASE Group photo"). He is standing with 7 other men. They are standing in long grass. He is carrying an enormous backpack on his back and a helmet.

34 An image taken from one of Mr Shaw's social media accounts posted on 8 November 2020 shows him with Oliver in a rural location.

Subsequent developments in the case

35 The defendant obtained permission to re-amend her defence to allege that Mr Shaw had been fundamentally dishonest in relation to the claim and that the court ought therefore to dismiss the claim. The allegations of fundamental dishonesty appear in paragraphs 21 – 30 of the Re-Amended Defence. I need not repeat them in this judgment.

36 Mr Shaw responded to the allegations of dishonesty in his Amended Reply and in a Re-Amended Reply, both of which he verified with a statement of truth. The following features of these Statements of Case strike me as important:

(1) Mr Shaw stated that the scooter had stopped working in May or June 2020. He bought a new scooter on 9 November 2020, and said that he used it for getting around a children's theme park or the Trafford Centre.

(2) Mr Shaw stated that he had bought an electric bike on 6 July 2020. He said:

> "This new bike was unsuitable for transporting the Claimant's son Oliver and therefore the Claimant retained both the original bike for transporting Oliver and the new bike for off-road use."

(3) Mr Shaw admitted that he had "miscalculated the distances involved" when asked how far he could walk. He said that he had not thought carefully about the

distances he could walk. In his amended reply, he insisted that "The Claimant continues to have significantly limited walking distance and standing time."

(4) In relation to the recording taken on 26 September 2019 (when he walked to the Co-op with Savash Aksu) Mr Shaw said that was the only time he had made the journey without a stick or any other mobility aid. He returned exhausted and in great pain.

(5) Mr Shaw said that 24 July 2020 was the only time he had ever used his mountain bike to go to the shops.

(6) Mr Shaw said that the photograph posted on 8 November 2020 was taken at Harpur Hill on a visit with his friend Jozef. There was about 1 hour of riding on the electric mountain bike.

(7) Mr Shaw said that on 13 November 2020, the reason for the visit was so that his friend Jozef could climb at a nearby quarry. The total amount of time spent on the mountain bike was 6 minutes. Mr Shaw said that he sheltered under an overhang and engaged in a pre-arranged video consultation with his psychologist.

(8) Mr Shaw insisted that his claim for single storey accommodation was justified. He said that he had several falls on stairs at 9 Napier Street.

(9) In response to the criticism that the care claim was grossly overstated, he indicated that he had been guided by his care expert, Maggie Sargent, who had been accurately instructed. The Reply states:

> "At the time the Claimant was surprised by the figures, but they were explained by Maggie Sargent and she had factored in matters such as the travel time of the Claimant's mother from her home to his and pointed out that the level of care would increase post-surgery. The Claimant considered that if that was how the care claim was calculated then that seemed reasonable."

(10) In response to the suggestion that the travel claim was overstated, he accepted that he had travelled on budget flights since the accident but nevertheless believed that his claims for business class travel and a companion were justified. He alleged that when he had travelled budget class, he had sometimes had an empty seat next to him so that he could stretch out and, if not, he was very uncomfortable.

(11) Paragraph 20(c) of the Re-Amended Reply must be quoted in full, for reasons that will become apparent later in this judgment:

> "The suggestion of a quad bike arose from the discussion the Claimant had with Mr Kiely. Mr Kiely suggested it in relation to helping the Claimant get back to pre-accident activities and attending sporting events. Attending events such as the World Rally Championship in Wales, or the TT motorbike event in the Isle of Man, as well as activities relating to skydiving or base jumping might be accessible on an electric bike, but would require the Claimant to go up a mountain, ~~which he has never done on a bike since his accident, because that would be far beyond his ability~~ would leave him very fatigued. Furthermore, ~~the Claimant cannot access off-road locations on his electric bike~~ the Claimant would have difficulty in accessing many off-road locations. A quad bike would enable the Claimant to access and to traverse difficult, off-road and mountainous territory, which otherwise he will ~~be unable~~ struggle to do. The Defendant seems to be implying that the Claimant has full access to the outdoors because the Claimant can ride for ~~a very limited time~~ limited periods, albeit with discomfort, on an electric mountain bike, which is inaccurate."

37. In a witness statement dated 6 April 2021, Mr Shaw responded to the defendant's allegations consistently with the Amended Reply. He accepted that he had not always been accurate in some of the information he had provided but said that this had been due to mistakes rather than a lack of honesty. He said, "Various people have said things in reports and I have gone along with their recommendations."

38. Mr Shaw made a further witness statement on 25 June 2021, which is largely repetitive of his previous statement. He explained that he had spoken to Mr Kiely whilst he was on holiday in Italy and speculated that Mr Kiely may have received the information about his condition "from other sources". In relation to his mountain bike, he said this:

> "I purchased the electric bike on 6 July 2020 and I used it the following day on 7 July 2020. I used again and rode it off road. I decided I would prefer a different model which would be more suitable for recreation use off-road use as it had suspension at the front and back. However, as I would be unable to take my son Oliver on a bike with double suspension I kept the original bike and purchased a model with double suspension."

39. In July 2021, Mr Shaw made a witness statement in which he said that he was able to get up and down stairs but often went on all fours. He stated to Ms Dawson and Mrs Sargent that he had to go up and down stairs on all fours.

40. Mr Shaw served an updated Schedule of Loss verified by a Statement of Truth dated 29 October 2021. Of note are the following:

(1) The claims for transport and holidays were no longer pursued (though there is a very modest claim for a steering ball).

(2) Mr Shaw said that in relation to the claim for past care, he relied on the opinion of Maggie Sargent. The claim for care for the period from July 2020 states, "The Claimant's mother was being paid for 18 hours a week, plus one overnight stay per week… 26 hours per week."

(3) The total value of the schedule was about £3.75 million.

41. The defendant served an updated counter schedule dated 17 December 2021. This added further allegations against Mr Shaw:

> "He has been mountain biking both locally and cycled up and down Snowdon (activities he concealed from the Defendant and the court). He has used a climbing wall on several occasions. He has accessed the community by bicycle (at a time when he said that he was dependent on a mobility scooter to do that). He has been abroad to Italy twice, Amsterdam, and Poland."

42. In a witness statement dated 31 January 2022, Mr Shaw described his current condition. He said that his left wrist gave pain and that the right leg was the most serious problem. He said that he took medical cannabis to address the pain. In relation to his mobility, he said that he continued to use a walking stick. He had been forced to sell his scooter. He had been driving his mother's Land Rover Discovery, but she had sold it. He said that he had had a number of falls. In connection with his rehabilitation, he said that he had explained that he returned to climbing. He said that he had undertaken a number of mountain bike trips to Macclesfield Forest with his friend Jozef in preparation for an attempt to cycle up Snowdon. On 16 October 2020, the two men attempted the ascent of Snowdon by the Llanberis path using his electric mountain bike. He says that he was heavily medicated for pain. He only reached about 2/3 of the way up the mountain. When he returned home he was incredibly fatigued and in pain. He explained that he had not read the Amended Reply carefully enough and "must have just assumed… that the contents of the Reply were correct". He pointed out that the trip up Snowdon appears in his physiotherapy notes; he says that he made no attempt to conceal this expedition. The Reply was re-amended to reflect the claimant's case on 18 January 2024. He stated that he had answered questions put by examining expert witnesses honestly.

43. In a witness statement dated 20 November 2023, Mr Shaw described his condition. He said that following his operation in January 2023, he had been wheelchair bound for 5 weeks and used crutches and a walking stick after that. He said that his surgeon proposed an operation to lengthen his right femur to address the difference in length between his right and left legs. He described the large number of medications he took. He stated that he had ceased taking cannabis. He has bought a VW Tiguan which is good but not ideal. He said that he continued to have falls as a result of his knee collapsing. He described the help he received from his mother and friends. He described the holidays he has taken.

44. In a witness statement dated 22 January 2024, Mr Shaw explained that in the Terrace Group Photo he had been out on a boat on the lake "with the people in the lifeboats for the paraglides". He had become wet and so took off his clothes to dry off. He said that the BASE Group Photo was taken in the landing area at Monte Brento in May 2022. It was 50m from the café. He said that his friend (who wished to remain anonymous) had a hard landing, so he offered to carry his gear back to the cafe for him.

45. Mr Shaw served a further schedule verified by a statement of truth on 4 February 2024. In it (amongst other things):

(1) In relation to care during the period 1 July 2020 – 31 December 2021, the claim states, "Maggie Sargent estimated 28 hours per week care for this period."

(2) The total value of the claim is said to be about £2.5 million.

The oral evidence

46. I have carefully considered all of the witness statements of witnesses of fact and I heard oral evidence from many of them. In view of the serious allegations in this case, I have commented on some of the evidence at some length. It is unnecessary, in my judgment, to deal with all of the evidence in detail. In particular, a significant amount of evidence related to the issue of the care delivered to Mr Shaw before trial. As appears later in this judgment, the parties' care experts considered the transcript of the evidence of the factual witnesses and arrived at an agreement as to an appropriate award for past care. In my view, the care experts' view represents a fair estimate of the value of the care delivered. It is therefore unnecessary for me to deal with the factual witnesses' evidence about past care, though it may be relevant to mention their evidence for other reasons. In a similar vein, the employment experts reached agreement about what Mr Shaw's

earnings probably would have been, an agreement which fairly reflects the evidence. I have not found it necessary to deal with the factual evidence on this issue.

47. Mr Kennedy KC submitted that, having regard to the serious allegations about Mr Shaw's honesty, the witnesses who had not yet given their evidence should not be sitting in court whilst evidence was given by another witness. Mr Knifton KC did not object to this course, and I acceded to the application.

48. Mr Shaw gave evidence for over two days. He was able to manage the huge volume of documentation confidently and without apparent difficulty. He was able to select the lever-arch file under discussion and manipulate it with some dexterity, given the injury to his left wrist. He appeared to have little difficulty in following questions, reading passages in the bundles and forming coherent answers. I was satisfied that he was able to give his best evidence.

49. Mr Knifton KC drew my attention to images of Mr Shaw riding a mobility scooter. I think that the purpose of doing so was to counter the defendant's suggestion that Mr Shaw hardly ever used the scooter. In cross-examination, Mr Shaw accepted that the dates upon which the photographs were taken were all shortly after he had undergone operations on his right leg.

50. Mr Shaw was cross-examined about his claim for loss of earnings. He gave an unconvincing explanation about whether he in fact held the NVQ qualifications relied upon in his Schedule of Loss. I found his explanation of what employments he had prior to the accident was vague and unpersuasive, though I accept that he had worked for his brother's firm immediately before the accident. Mr Shaw conceded that he had not declared his earnings as a self-employed contractor to HMRC, although it emerged in re-examination that he was making a belated declaration of his earnings with his mother's help.

51. Mr Shaw was cross-examined about his mobility. He has given different estimates of how far he could walk to medical staff, to the DWP (for benefits purposes), to the expert witnesses in the case and in his witness statements. He told me that his ability to walk fluctuated, but he could not give a credible explanation why he had not explained to the authorities or the medical experts that his ability varied. When asked about the recording of him walking to the shop with Oliver on 26 September 2019, he said that it was the only occasion he had walked to the shop without a walking aid. In the

following day's evidence, Mr Shaw had considered his answer and volunteered the suggestion that Savash Aksu was his walking aid.

52. Mr Shaw was asked about a consultation with his General Practitioner on 22 July 2019. The doctor's clinical note states that Mr Shaw intended to undertake a tandem skydive at the weekend for his birthday and needed a form to be signed for the BPA (which I take to mean the British Parachute Association). The doctor records that he or she signed the form noting that Mr Shaw's condition posed an additional but acceptable risk. Mr Shaw's explanation for this consultation was that he was simply seeing if he could get permission lest he wish to attempt a jump in the future. I did not find his explanation credible. Mr Shaw accepted that he had made payments of the order of £2,000 to Oliver Gibbs in December 2019 and January 2020. He thought that this was probably for his parachute.

53. It transpired that Mr Shaw took a number of holidays abroad after his accident. He went: to Amsterdam with his brother Scott in about October 2018; to Italy and Croatia with his BASE jumping friends in April 2019; to Poland and Amsterdam with Jozef Barnaby in January 2020; to Gran Canaria in August 2021; to Italy in September 2021; to Madrid in November 2021; to Poland in December 2021; to Italy (twice) in May and June 2022; to Lanzarote in January 2023; to Benidorm in April 2023 and to Ireland in June 2023. In addition, Mr Shaw visited Mr van der Merwe in London in December 2018.

54. Ms Val Sparkes became Mr Shaw's case manager in May 2020. She prepared a document identifying Mr Shaw's presentation and problems. Mr Kennedy KC pointed out to Mr Shaw that Ms Sparkes's document stated that Mr Shaw had very limited mobility, but made no reference to the holidays that he had enjoyed since his accident. Mr Shaw insisted that he had told Ms Sparkes about his holidays when he first met her. Mr Kennedy drew my attention to a passage in the same document that read:

> "Mr. Shaw had a holiday booked to Norway, which was cancelled due COVID-19. This holiday was designed as a 'test' to see how much help needed to be able to travel abroad."

Mr Kennedy invited Mr Shaw to explain Ms Sparkes's reference to "a 'test' to see how much help needed to be able to travel abroad." Mr Shaw's response was that fjords are more remote with a lot of extreme terrain. He denied that he wanted to give Ms Sparkes the impression that he was less capable than he was or that he was seeking to give the

impression that he had not been on holiday previously. I found this part of Mr Shaw's evidence to be unconvincing.

55. Mr Kennedy drew Mr Shaw's attention to the very heavy claim for holiday expenses contained in the schedule of May 2020. He suggested that the claim was inconsistent with Mr Shaw having undertaken several trips to Europe on budget flights. Mr Shaw insisted that he had a reasonable belief, after speaking with experts, that the claim in the schedule was true. He said that the claim had been taken out of an expert's report – he identified the expert as Mrs Maggie Sargent. Mr Shaw did not have any satisfactory explanation when Mr Kennedy pointed out to him that Mr Shaw had not yet seen Mrs Sargent at the time he made the statement of truth on the schedule. Mr Shaw could not explain satisfactorily why his claim for voluntary care took no account of the periods when he was away on holiday.

56. Mr Kennedy asked Mr Shaw about his conversation with Mr Kiely. The interview was conducted using FaceTime on 8 July 2020 when Mr Shaw was in Italy. Mr Shaw says he told Mr Kiely he was in Italy. He says that he explained to Mr Kiely that his scooter had stopped working. He said that he was sure that he would have told Mr Kiely that he had acquired a mountain bike. Mr Shaw could offer no explanation why none of these points appeared in Mr Kiely's report.

57. Mr Kennedy pointed out that on 22 July 2020, Professor Shokrollahi examined Mr Shaw, who told him that his activities including mountain biking and travelling had all ceased; this contrasted with Mr Shaw's appearance in the surveillance recordings made on 23 and 24 July 2020. Mr Shaw responded that he did not know he could go to the shops on his bike until he tried it, which was after he had seen the Professor.

58. Mr Shaw told me that when he had alleged in his amended Reply that he could not go up a mountain on a mountain bike, he interpreted the words as referring to mountains such as Mont Blanc and Monte Rosa and not Snowdon, which he described in evidence as a hill. He also said that he had not read the document carefully enough because he was under time pressure. He accepted that it was inaccurate to say that he could only ride for a very limited time on a mountain bike. He told me that the expedition up Snowdon had lasted 9 hours.

59. Mr Kennedy asked Mr Shaw whether he told Professor Harris about his mountain biking when he saw him on 3 October 2020. Mr Shaw replied "quite possibly". Mr

Shaw said that he specifically recalls telling Professor Harris about his climbing. The climbing Mr Shaw was referring to was indoor climbing using a top rope at a very modest grade, whereas before the accident, he would climb at grade 6a or 6c. I note that these grades describe the difficulty of a sport climb. Mr Shaw accepted that it could be accurate that he had undertaken indoor climbing on 8 occasions during September 2020, as his case management notes record.

60 Mr Shaw was asked about climbing outdoors. He said that on the expedition to Harpur Hill on 13 November 2019, he intended only to watch his friend Jozef climbing. He pointed out that he had a video consultation with his psychologist, Ms Mead. He said that Ms Mead had misunderstood him when she recorded in her clinical note, "He reported that he was planning to do a short bit of climbing after the session finished." He was merely belaying Jozef. In re-examination, Mr Shaw told me that he had always intended to return to climbing if possible. He had been encouraged to return to climbing by Rosie, his physiotherapist. He told me that the only equipment he used when climbing was a top rope. He sought to give the impression that the top rope sustained all, or at least most, of his weight. He said that if Jozef (who belayed him) had let go of the rope, he would have hit the floor. He told me that he had been obliged to stop attending Awesome Walls climbing centre when his application for an interim payment was refused and he ran out of money.

61 Mr Kennedy asked Mr Shaw about the BASE Group photo. Mr Shaw accepted that he was carrying all the equipment necessary to undertake a BASE jump. He accepted that the friend who wished to remain anonymous did not appear in the image. He insisted that he had not undertaken a BASE jump since his accident.

62 In re-examination, Mr Shaw repeated that his right knee gave way. He was referred to various entries in Ms Sparkes's notes when Mr Shaw complained of falls.

63 I heard from Christine Shaw, the claimant's mother. Mrs Shaw is a retired nurse. She told me about the help she had given to Mr Shaw whilst he was in hospital. She helped Mr Aksu when her son was discharged from hospital. She described doing the housework both in her witness statement and in the "Activities of Daily Living" video. She was very much engaged in looking after Oliver. I formed the impression that Mrs Shaw was a devoted mother and grandmother.

64. Unfortunately, there were in my judgment some serious issues with Mrs Shaw's evidence, as appear below.

65. In her first witness statement, Mrs Shaw omitted to mention when describing how Mr Shaw required a wheelchair around Christmas 2018 that he had gone to Amsterdam with his brother. She said that he could no longer undertake BASE jumping, but did not mention that he had been to Croatia and Italy to watch his friends BASE jumping in April 2019 and that he had only just returned from another similar trip in July 2020. During cross-examination, Mr Snarr put to Mrs Shaw that her evidence did not paint a fair picture of Mr Shaw's condition or else would have referred to these holidays. She gave no convincing reply.

66. I learned that in about May 2020, Mr Shaw and Ms Sparkes agreed that Mrs Shaw should be paid for the care and support she was giving to Mr Shaw and Oliver. Ms Sparkes asked Mrs Shaw to render invoices. I was shown invoices dated 30 June 2020 and 31 July 2020 in which Mrs Shaw claims each week in respect of "Child Care for Oliver, Domiciliary Care for Matthew 56 hours Overnight stay 6 hours." Mrs Shaw kept a care diary for a period, in which she recorded what help she had given. The invoices and the care diaries are remarkable because:

(1) The amount of care claimed for prior to May 2020 had been significantly less than 62 hours a week. Cogent grounds would be required to justify the significant increase sought.

(2) The case management records indicate that it was Sarah, Mr Shaw's sister-in-law, and not Mrs Shaw who was looking after Oliver until late June.

(3) No account is taken of the fact that in July 2020, Mr Shaw went on holiday to Italy, so that Mrs Shaw could not have been delivering any care to Mr Shaw and would have been baby-sitting Oliver in any event.

(4) As Mrs Shaw conceded in cross-examination, at least part of the time she spent with Oliver was time she would spend on any of her grandchildren.

In cross-examination, Mrs Shaw's explanation was that Mrs Sargent, Mr Shaw's Care expert had asked her to keep a diary and had indicated that her estimate of care requirements was 56 hours a week. When it was pointed out to her that Mr Shaw was abroad so that Mrs Shaw could not have been caring for him, Mrs Shaw insisted that he needed 56 hours a week; this answer wholly failed to engage with the question. I was

troubled by the fact that Mrs Shaw had produced invoices that were plainly inaccurate and that when the inaccuracy was pointed out, she failed to acknowledge it.

67 Mrs Shaw's second witness statement was served in response to the disclosure of surveillance evidence. I formed the view that in parts of this statement and in her oral evidence, Mrs Shaw was acting as an advocate rather than a witness. For example, she explained that electric bikes can significantly assist the rider and that a climbing harness can take the climber's full weight, matters about which she has no personal knowledge. The fact that she acts as an advocate in my view diminishes the force of her evidence, for it seems to me that Mrs Shaw was inclined to turn a blind eye to any facts that might weaken Mr Shaw's case.

68 Valerie Sparkes made witness statements dated 6 August 2020, 1 December 2020 (in support of the application for an interim payment) and 31 March 2021 (in response to the defendant's allegations of fundamental dishonesty).

69 I found Ms Sparkes was defensive and appeared very reluctant to accept obvious conclusions. For example, the account Mr Shaw gave her when she was preparing her initial case management plan described significant mobility issues, but made no mention of his holidays in Amsterdam, Croatia, Italy and Poland. She was extremely reluctant to accept that Mr Shaw had not revealed to her that he had taken these trips and that the fact of his having done so was significant. In her second witness statement she volunteered the opinion that people who are dishonest do not engage with therapy and rehabilitation. She said that Mr Shaw was probably the most motivated client she had ever had; thus, the inference was that he could not be untruthful. I was helped neither by her opinion nor by her advocacy of her client. Her answers were frequently argumentative, to the extent that I felt that I had to intervene during her oral evidence to remind her that she was in court to give evidence and not to put the best gloss on her evidence from Mr Shaw's point of view.

70 In cross-examination, Ms Sparkes was asked about Mrs Shaw's invoices for care. Ms Sparkes said that she had paid out those invoices in good faith. Mr Kennedy pointed out that the invoice for July 2020 included a period during which Mr Shaw was on holiday in Italy. Mr Kennedy suggested to Ms Sparkes that she had not scrutinised the invoices with sufficient care, for she did not raise the query that Mr Shaw was abroad for some of the time during which Mrs Shaw was claiming to have looked after him. Ms Sparkes

struck me as being very evasive in her answers, before she eventually accepted that she had not raised this query.

71. I was very concerned about Ms Sparkes's evidence relating to Mr Shaw's transport needs. In her witness statements she explained that she had commissioned the report from Mr Kiely, which was dated 22 July 2020 and was exhibited to Ms Sparkes's witness statement dated 1 December 2020. Her witness statements present Mr Kiely's reports as accurately portraying Mr Shaw's transport needs. However, in her case notes Ms Sparkes recorded on 29 July 2020 that she had received an email from Mr Shaw's driving instructor. Her note reads, "Matthew is perfectly fine to drive a car without any adaptations. He has not done driving with me more than 3 hours per lesson. Steering ball is not required." When she was asked about this in cross-examination, she argued that the driving instructor had only driven with Mr Shaw for a maximum of three hours (with the implication that if Mr Shaw drove for a longer period, there would have been a different result). She had no answer to the question why she had not drawn the instructor's remarks to Mr Kiely's attention. I do not understand why her witness statements did not refer to the instructor's remarks, since they were plainly relevant to the controversial issue whether Mr Shaw required provision for transport that was likely to cost the defendant half a million pounds.

72. I treat Ms Sparkes's evidence with caution.

73. Mr Savash Aksu gave evidence by videolink from New South Wales, Australia. He told me that he had taken the call on his mobile phone. It was a poor connection, such that I could not see Mr Aksu's face clearly at any time and sometimes not at all. I formed the impression that Mr Aksu did not address the serious business of giving evidence with appropriate care either in his witness statements or when he was called as a witness. He had apparently made two witness statements, but had neglected to sign one of them. He did not appear to have any documents in front of him. In particular, his own witness statements were not before him when he gave evidence. He could not remember when he had last seen his witness statements, but thought it was "about a month ago". I did not feel able to place much weight on his evidence.

74. Mr Aksu was asked about the recording made on 26 September 2019. He said that he had accompanied Mr Shaw to the shops when Mr Shaw had no walking aids on several occasions but "not more than five".

75. I heard from Mr Aksu's former partner, Megan Eastwood. She told me that before the accident, Mr Shaw worked 50 hours a week. After the accident he was confined to a wheelchair for 6 months and then had to use a Zimmer frame for 6 months. In her witness statement, she told me that she accompanied Mr Shaw to the shop when he was using no walking aids. Under cross-examination, she told me that this had happened only twice.

76. I heard from Courtney Williams, one of Mr Shaw's former partners and the mother of Oliver. She told me, and I accept, that she had walked to the shops in both Offerton and Alderley Edge with Mr Shaw, when Mr Shaw had no stick or walking aid.

77 I heard from friends of Mr Shaw with whom he had previously undertaken adventure activities, in particular, BASE jumping and climbing.

78 I found Oliver Gibbs to be a generally convincing witness who I felt was doing his best to tell me the truth. He was asked about a number of payments that Mr Shaw made to him. He told me that the payment of £2,200 on 2 December 2019 was for a parachute. He thought that the payment of £600 on 4 January 2020 was for a rig. He said that Mr Shaw had decided to buy the kit after he had completed Mr Gibbs's introductory course in April 2018; he did not question Mr Shaw's motives for keeping the parachute after the accident. Mr Gibbs was shown the Terrace Group photo. He told me that Mr Shaw was wet because he had been on the rescue boat on Lake Garda. He recalls that Mr Shaw was quite badly disabled so that he could not manage a BASE jump. He told me that he had been away with Mr Shaw "just the once" since Mr Shaw's accident. He was shown the BASE Group photo and accepted that he was shown in the photograph. He thought that Mr Shaw had not jumped. He said that he did not recall Mr Shaw doing a BASE jump since his accident.

79 I heard from Sean Nolan by video link using his mobile telephone. Mr Nolan did not have his witness statement or any other documents before him. He said that he had made a few statements over the years and they were all 100% factual. His answers seemed vague to me. He expressed outrage that the defendant was accusing Mr Shaw of jumping after the accident, apparently referring to the allegations put to Mr Shaw about the Terrace Group photo. I had the very strong impression that before Mr Nolan gave evidence, Mr Shaw had told Mr Nolan about the allegations put to him in cross-examination. This was very disappointing, since (as recorded above) I had directed that

the witnesses of fact should give evidence without knowing what other witnesses had said. I do not feel able to place any weight on Mr Nolan's evidence.

80. Mr Snarr asked Jozef Barnaby about the recording on 26 September 2019 in which he said Mr Shaw went to the shop without walking aids. Mr Barnaby retorted that Mr Shaw had a walking aid "which was assistance, to catch him if anything happens." The unusual suggestion that a walking companion was a "walking aid" first surfaced when Mr Shaw was giving evidence. I had the strong impression that Mr Barnaby had been tipped off what to say by Mr Shaw. Mr Barnaby would not accept that Mr Shaw had been climbing after the accident. I was not convinced that Mr Barnaby's description of Mr Shaw's climbing activities was accurate or helpful to me. I was not convinced by Mr Barnaby's denial that he and Mr Shaw intended to climb when they went to Harpur Hill on 13 November 2020. I treat his evidence with considerable caution.

81. I heard from Peter Worsley and Karen Young (who were Mr Shaw's neighbours at Betnor Avenue) and from Mr and Mrs Barrett-Bee (who were Mr Shaw's neighbours in Alderley Edge). I am confident that they all did their best to give their recollection of their interactions with Mr Shaw. I am not confident that their relatively brief encounters with Mr Shaw gave them a complete picture of his condition, something which in fairness I think all of them accepted.

The expert evidence

82. The upper limb experts, Mr Hayton and Mr Muir, substantially agreed on the majority of issues, as I have explained earlier in this judgment. The consensus was that

    (1) The fracture of the right scaphoid has substantially healed. A small proportion of patients with healed scaphoid fractures complain of persisting pain. It follows that Mr Shaw's complaints of pain in the right wrist are not inconsistent with his condition. There is a small risk that he will later develop degenerative change in the right wrist.

    (2) The arthrodesis of the left wrist should achieve abolition of pain in the radiocarpal joint at the cost of having an immobile wrist.

    (3) There is uncertainty about the future of Mr Shaw's DRUJ.

83. Unfortunately, Mr Hayton and Mr Muir had already given evidence by the time Ms Hajipour undertook the operation on 14 February 2024, so that I did not have the

benefit of opinion focussed on the situation in the DRUJ as it presently stands. I proceed on the basis that Ms Hajipour performed what was in essence a Darrach's procedure, which I understand to be a resection of the distal ulnar head.

84 The experts referred to a paper by Grawe *et al*, which concluded that the Darrach procedure provides reliably good long-term subjective and objective results for the treatment of a symptomatic DRUJ after a distal radius fracture. Mr Hayton pointed out that a number of Grawe's cohort developed radio-ulnar impingement; he emphasised that Mr Shaw was young and active. For this reason, he was more pessimistic about Mr Shaw's prospects of avoiding further surgery. Subject to this difference in emphasis, both experts agreed that there is a risk that Mr Shaw may suffer from radio-ulnar impingement which might necessitate further surgery. Such surgery would probably be radio-ulnar joint replacement. If the surgery were successful, the ball and socket may need to be replaced. There is, however, a risk that the surgery would not be successful. In that event, a "one-bone forearm" might be attempted: this involves an attempt to fuse the radius and the ulna, which would abolish pain but also abolish rotation in the forearm. The surgery to achieve a one bone forearm has a significant complication rate.

85 I have found that Mr Shaw continues to participate in adventure sports, despite his many injuries. I find that the demands upon his wrist will be such that he will, in time, develop pain caused by radio-ulnar impingement of such intensity that Mr Shaw will elect to undergo joint replacement. Although there is a risk that the joint replacement operation may not succeed, thus requiring a further, possibly unsuccessful operation, I consider that the risk of failure is insufficiently great to be taken into account.

86 I have recorded earlier in this judgment the issues upon which the lower-limb surgeons, Professor Harris and Mr Clayson, agreed. In their oral evidence, the disagreements between the experts were ventilated.

87 The experts were invited to comment upon whether Mr Shaw's account of his injuries differed from what was seen in the surveillance videos and the other evidence presented by the defendant and, if so, what effect that had upon their views.

88 In the joint report from these experts dated 24 June 2021, Professor Harris did not think that Mr Shaw had been fundamentally dishonest in his description of his ongoing symptoms and their effects. I found it surprising that an orthopaedic surgeon thought it appropriate to express a view in a report about whether the patient had been

fundamentally dishonest: that is clearly not an issue for orthopaedic opinion but is a matter for the court. It seems to me that Mr Clayson's approach was far more attractive. (Mr Clayson said that there were inconsistencies between what Mr Shaw had told the surgeons and what was shown on the recordings, and that one explanation for such inconsistencies was that Mr Shaw was exaggerating his symptoms for the purpose of this claim. He recognised that it would be a matter for the Court to decide if Mr Shaw had been fundamentally dishonest.) I found that Professor Harris came close to acting as advocate for the claimant, for example, in his assertion that tandem skydiving was a "passive activity". I felt that Professor Harris tended to accept Mr Shaw's complaints to him uncritically and without adequate regard to the fact that some of those complaints were demonstrably inaccurate.

89. Mr Clayson told me that Mr Shaw's pronounced limp was consistent with his shortened right leg. He told me that he contrasted a limp caused by the shortening of a limb and an antalgic gait caused by pain. I was impressed by the fact that Mr Clayson fairly accepted that one would not ever say that a fracture was 100% pain free. He explained that, even absent complete bony union, a fracture can be stable and relatively pain-free. He fairly conceded that there was a risk of long-standing pain even though the fracture of the femur had achieved substantial union. In general, I felt that Mr Clayson's approach was the more fair-minded and objective.

90. These experts disagreed about the probable effect of the discrepancy in Mr Shaw's leg length. Professor Harris's view is expressed in the Joint Statement as follows:

> "The literature suggests a leg length discrepancy of more than 2-3cm can be associated with back pain, arthritis of the hip, knee pain, and stress fractures. This however is very difficult to quantify."

Professor Harris did not identify or produce the literature upon which he relied. Mr Clayson referred me to a meta-analysis undertaken by Vogt *et al* in 2020, the conclusion of which was this:

> "A direct connection to back pain is questionable, but a mildly elevated incidence of knee arthritis seems likely. The evidence base on the indications for treatment of leg-length discrepancy is poor; only informal consensus recommendations are available."

I prefer the view of Mr Clayson which is supported by Vogt's paper. I find that Mr Shaw has a mildly elevated risk of knee arthritis. It will not require operative treatment.

91. Professor Harris stated that Mr Shaw requires single-storey accommodation. He was not impressed by the evidence that Mr Shaw was more capable than he had reported to Professor Harris. He believed that Mr Shaw was at high risk of falling, a risk that was likely to increase as Mr Shaw got older. He suggested that Mr Shaw's case fell at the "extreme end" of the spectrum. Mr Clayson expressed a more nuanced, and to me, a more attractive view. He accepted that Mr Shaw might have difficulty if he had a job that involved repeatedly climbing up and down ladders and stairs, but thought that he would have no problem in going up and downstairs at home. He would not support single-storey accommodation.

92. I heard from Alexa Dawson, a physiotherapist instructed by the claimant. The defendant instructed Ruth Obeten to prepare a report, but Ms Obeten passed away before the trial and so could not give evidence. Ms Dawson fairly conceded in cross-examination that Mr Shaw's account of his history was different from what she now knew it to be. She nevertheless maintained her view that Mr Shaw required 12 sessions of physiotherapy a year for the rest of his life. She argued that as Mr Shaw ages, he will deteriorate more rapidly than somebody who has not suffered such injuries and "the input of physiotherapist will mitigate that". I was not convinced by Ms Dawson's evidence, which in my estimation made significant over-provision for a man who has already undergone significant physiotherapy and who continues to be active.

93. I did not hear oral evidence from other experts, since there was substantial or complete agreement between experts of like discipline. I shall refer to their evidence as necessary in my assessment of the value of the claim.

94. It is relevant to mention the evidence of the care experts, Maggie Sargent for the claimant and Fiona Johnson for the defendant. Mrs Sargent prepared reports dated 27 July 2021 and 27 August 2021. For her first report, Mrs Sargent obtained a history from Mr Shaw and asked Mrs Shaw (who was then providing voluntary care to Mr Shaw) to prepare the care diary referred to earlier in this judgment. On the basis of the account she had obtained, Mrs Sargent expressed the view that Mr Shaw had required 70 hours of care from 1 January 2019 until 30 June 2019 and 56 hours between 1 July 2019 and 31 October 2019. She assessed that 56 hours a week of care plus sleep-in care would be required until Oliver reached the age of 5. Mrs Sargent subsequently reduced her estimate of care considerably. When the trial commenced, I was told that the care experts would meet again and seek to provide a further joint statement. In the event, Ms

Johnson heard Mr Shaw's evidence and Mrs Sargent was provided with a transcript of the evidence during the trial. Following their discussions, they provided a further joint statement. They said "We both consider that there has been a need to review this based on the further evidence made available to us to assist the court but would advise that it is a challenging case and consider that it is a matter for the court." The revised costings draw attention to the features of the evidence that have led them to their conclusion. In my view, the experts have identified the principal issues in the case, and I am content to accept the conclusions that they reach about the amount of care required. It is significant that the experts have agreed that the care required between 1 January 2019 until 30 June 2019 was 35 hours a week and from 1 July 2019 until 31 October 2019, 21 hours a week.

95. Employment experts were instructed to assist the court in relation to what Mr Shaw's earnings would have been if he had not sustained his accident. The experts' task was complicated by the absence of clear evidence about Mr Shaw's employment before the accident, as I mention earlier in this judgment. The experts have nevertheless agreed a figure derived from an analysis of Mr Shaw's banking and from the annual survey of hours and earnings ("ASHE"). In my view, it represents a fair basis for assessing what Mr Shaw was earning immediately before the accident and what he might have been earning but for the accident.

Some important factual findings

96. It is convenient to set out some factual findings at this stage in my judgment, since my findings inform the approach I take to the case.

97. I have taken into account the parties' submissions in relation to the findings of fact I should make. I have borne in mind the submission of Mr Knifton that no witness testified to some of the things the defendant alleged against Mr Shaw, for example, undertaking a BASE jump or climbing outdoors. I take into account that surveillance was undertaken on only 16 days, and Mr Shaw was only seen on 8 of those days. I make no apology for the fact that in making my evaluative assessment of the evidence, I have drawn inferences from the evidence and I have considered and taken into account the demeanour of witnesses whilst they gave evidence.

98. I bear in mind that Mr Shaw undoubtedly sustained the serious injuries referred to earlier in this judgment. I appreciate that such injuries could, in a different claimant, have had devastating and severely debilitating consequences.

99. I find that Mr Shaw differs from many other people in his enthusiasm for adventurous sporting activities. I readily accept that prior to his accident, Mr Shaw undertook a wide variety of adventure sports, including skydiving, BASE jumping, mountain biking and climbing. I accept the evidence of many of the witnesses I heard that Mr Shaw was determined to return to these activities if he could. I accept that Mr Shaw was prepared to endure discomfort or pain to attempt them and that he might suffer from fatigue after he had done so. In my view, his determination to return to adventure sport in the face of such serious injury is entirely commendable.

100. Mr Shaw maintained his contacts in the BASE jumping community. He went to Croatia and Italy in April 2019 in order to meet his BASE jumping friends. The defendant urged me to conclude from the Terrace Group Photo that Mr Shaw had undertaken a BASE jump, perhaps into water, during this visit. I am not satisfied, on the balance of probabilities, that Mr Shaw undertook a BASE jump on this occasion. I accept the evidence of Mr Gibbs that Mr Shaw did not undertake a jump on this occasion and that he was then so disabled that his friends would not allow him to do so. I am fortified in this conclusion by the fact that it was not until the following July that Mr Shaw went to his GP to obtain a certificate that would allow him to undertake a tandem skydive. If Mr Shaw had already undertaken a BASE jump in April, I see no reason why he would attend his GP to obtain such a certificate. I find that Mr Shaw sought the certificate from his GP in July 2019 because he intended to undertake a tandem jump. Despite his serious injuries, he felt well enough to do so. I find that in April 2019, Mr Shaw was able to board and disembark from the rescue boat on Lake Garda and walk, barefoot and without walking aids, across the gravel path shown in the image.

101. The defendant reminded me about the visit to Norway referred to in Ms Sparkes's notes and invited me to find that Mr Shaw intended to attempt BASE jumping into water during this visit. In my view, there is insufficient evidence to support such a conclusion.

102. In relation to the BASE Group photo, however, I consider that the most probable explanation of Mr Shaw's presence is that he had in early May 2022 undertaken a BASE jump. He had bought from Mr Gibbs the BASE jumping equipment he had used

in his introductory course, paying for it even after he had suffered his accident. He accepted in cross-examination that in the image he was shown carrying all the equipment required to undertake a BASE jump. I found that his evidence about the friend who wished to remain anonymous was unconvincing. I was not persuaded to the contrary by the evidence of Mr Gibbs, who told me that he had been with Mr Shaw "just the once," which I take to mean the occasion in April 2019. I find that Mr Gibbs had forgotten about or misremembered the events of May 2022. I remind myself that Mr Gibbs explained that it was a feature of BASE jumping that reaching the exit point may involve a lengthy journey on foot.

103 I find that Mr Shaw bought two electric mountain bikes in the summer of 2020. He cycled with David van der Merwe and Jozef Barnaby. He intended to accompany Mr Barnaby up Snowdon, to which end he undertook several training rides in Macclesfield Forest in September and October 2020. He cycled with Mr Barnaby on the Llanberis path up Snowdon on 16 October 2020. I reject the evidence of Mr Shaw and Mr Barnaby that they did not reach the summit. His physiotherapist recorded, "cycled up Snowdon with e-bike struggled on way down but felt sense of achievement." I believe that Mr Shaw would have told his physiotherapist if he had not been able to reach the top of the hill and would not have felt the sense of achievement referred to in the note if he had not done so. I note that electric mountain bikes provide the rider with additional assistance, but the amount of assistance depends on the setting selected by the rider. Even if Mr Shaw had used the maximum assistance possible, his achievement was considerable, especially bearing in mind that on 10 August 2020, he had undergone an operation on the ununited fracture of his right femur. On 13 November 2020, despite his injuries, Mr Shaw was able to load 2 electric mountain bikes onto a towbar-mounted bike rack. He was able to sustain on his left hand the weight of a mountain bike that had to be leaned over in order to allow him to open the rear door of his Land Rover.

104 The recording of 14 October 2019 showed Mr Shaw at Awesome Walls climbing centre in Bredbury. I accept that he did not use the climbing wall on that occasion, because the length of time he was present at the climbing centre was insufficient to allow any appreciable climbing to be undertaken. He was able to negotiate the stairs without apparent difficulty. I find that Mr Shaw went climbing frequently in September 2020 and in the following months, as the case notes demonstrate. I find that on 13 November 2020, Mr Shaw intended to climb outdoors at Harpur Hill, a well-known sport climbing

venue. Ms Sparkes's case management notes reveal that on 9 November 2020, Ms Sparkes ordered a belay device and a dozen quick draws for delivery in 3 – 5 working days. This equipment is designed to be used by climbers. These items were likely delivered to Mr Shaw before he left home on 13 November. I find that he took his new gear, intending to do some climbing at Harpur Hill, as he had explained to Ms Mead that day. I am unimpressed by the evidence of those witnesses who argued that the climbing harness would have sustained Mr Shaw's full weight. Whilst it is true that the very purpose of a climbing harness is to sustain a climber's weight in the event of a fall, most of the time the harness will bear little, if any, of the climber's weight during ordinary climbing. I find that Mr Shaw erected and used a slack line at his home. The use of a slack line requires balance and co-ordination.

105. I accept that Mr Shaw was unable to mobilise without the use of walking aids in the period after his discharge from hospital. I accept that the walking aids he used included a wheelchair (which he hired for a period), crutches and a stick. I accept that he used the Rascal Voyager scooter he had bought second-hand for a period, including when he went to Amsterdam with his brother in late 2018. I accept that Mr Shaw used walking aids, including the scooter, after the operation on 15 May 2019. I accept that Mr Shaw used some walking aids after the operation in August 2020 although I note that Mr Shaw's old scooter ceased to work in about May 2020 and he did not buy a new one until 9 November 2020. It follows that he could not have used a scooter between those dates, in particular, whilst he was recovering from the operation in August 2020. He had sold the new scooter by 31 January 2022. I accept that Mr Shaw may have used some walking aids when he was in the Ilizarov frame in 2023.

106. With the exceptions I have just referred to, I am satisfied that Mr Shaw sought to avoid walking aids as soon as he was able, and had largely abandoned the use of walking aids by the Autumn of 2019. This conclusion is consistent with my finding that Mr Shaw was determined to overcome the disabilities that prevented him from undertaking adventure sports. By Autumn 2019, he had been fit enough to visit Croatia and Italy (where the Terrace Group photo shows no evidence of the use of walking aids) and fit enough to apply for a skydiving certificate from his GP. I conclude from the recording of 26 September 2019 that Mr Shaw was able to walk to his local shop and back without walking aids by September 2019. The distance covered was around 900m in all. I reject Mr Shaw's evidence that this was the only occasion on which he walked to

the shop without walking aids. His evidence is inconsistent with that of several of the witnesses who accepted that they had walked with him to the shops in Offerton and Alderley Edge. I accept the submission that the evidence of those witnesses may well underplay Mr Shaw's abilities. I consider it significant that in only one of the recordings is Mr Shaw shown with any walking aid.

107. I accept that Mr Shaw limps when walking.

108. I accept that in the period immediately following his discharge from hospital in October 2018 and following the operations on his right leg, Mr Shaw may have had difficulty negotiating stairs. I do not accept that at any other time Mr Shaw was reduced to crawling up and down the stairs on all fours. I do not accept that Mr Shaw has had such problems with his balance and stability that he was in danger on stairs. This finding is supported by various pieces of evidence: he told the nurse on 3 October 2019 that he could manage one flight of stairs; he told Sarah Keddy on 15 October 2019 that he could ascend and descend stairs (though with difficulty); he told Mr Muir on 27 January 2020 that he "could do the stairs". I am confident that I can rely upon these notes which were made contemporaneously by health professionals with an interest in recording accurately Mr Shaw's abilities. My attention has not been brought to any medical note suggesting that Mr Shaw has suffered injury as a result of losing his balance or stumbling. I reject the suggestion that this man, who used a slack line, is unable to manage safely on stairs.

109. In relation to the various holidays referred to above, I note that Mr Shaw travelled in budget airlines. I accept that he used additional space around his seat when available, but I reject the suggestion that he could not fly unless he had extra space around him. He flew alone (by which I mean without a companion) on his flight to Poland in January 2020. I find that when he was away on holiday, he arranged for Mrs Shaw or Courtney to look after Oliver; I am sure that they would have done so whether or not Mr Shaw had suffered his accident. I find that Mr Shaw's care needs would have been met by the friends with whom he was away on holiday; such needs would have been more limited than when he was at home and required to undertake housework and look after Oliver.

110. I find that Mr Shaw was able to drive a vehicle with an automatic transmission without difficulty after he had passed his driving test.

111. I find that the "Activities of Daily Living" video was not representative of Mr Shaw's disabilities at the time it was made. I do not accept that Mr Shaw usually held his left upper limb in awkward immobility as shown on the recording. I do not accept that Mr Shaw needed or usually used a bath cushion. I do not accept that Mr Shaw needed or usually used the detachable handle seen on the recording when he enters or leaves a car. I do not accept that Mr Shaw needed to adopt the laborious procedure of securing a vegetable on spikes before peeling: he was perfectly capable of holding the vegetable in his left hand.

112. I find that the experts have accurately recorded the history Mr Shaw gave to them. In my view, it is extremely unlikely that experienced expert witnesses would omit to record in their notes and in their reports significant features of the claimant's history or mis-record significant parts of his current complaints.

The value of the claim

113. In assessing the value of the claim, I have had regard to the written and oral submissions of the parties. It is unnecessary to set out the submissions in detail.

114. I consider first the claim for pain, suffering and loss of amenity. In addition to the orthopaedic injuries and the consequent scarring to which I have already referred, I must consider the evidence of the expert psychiatrists who believe that Mr Shaw suffered from an adjustment disorder. Dr O'Brien believes that Mr Shaw also developed post-traumatic stress disorder. I note that in his evidence, Mr Shaw told me that he was very strong mentally and did not think that he had suffered either an adjustment disorder or post-traumatic stress disorder. I conclude from this evidence that Mr Shaw has not been greatly affected by his psychiatric injuries.

115. I was referred to *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases*, 16th edition. I consider that the following guidelines are helpful:

(1) Mr Shaw's left wrist has now been arthrodesed. He will probably require further surgery on the wrist. The appropriate guideline appears at 7(H)(a). I would place Mr Shaw's injuries towards the top of the bracket, which is said to be £47,620 to £59,860. My figure is £55,000.

(2) Mr Shaw's right wrist has achieved bony union. I accept that he has some persisting pain in the right wrist. The appropriate guideline appears at 7(H)(c). I

would place Mr Shaw's injuries towards the bottom of the bracket, which is said to be £12,590 to £24,500. My figure is £15,000.

(3) As to Mr Shaw's right leg, the femur has now achieved bony union. He had a fractured patella. The appropriate guideline appears at 7(J)(b)(iv). I would place Mr Shaw's injuries towards the top of the bracket, which is said to be £27,760 to £39,200. My figure is £35,000.

(4) Mr Shaw's left femur fractured, but after nailing has not proved troublesome. He had a fractured left patella. There is no guideline which is unequivocally apposite, though it seems to me that the left leg suffered a "less serious leg injury" of the kind dealt with at 7(J)(c) of the Guidelines. My figure is £15,000.

The aggregate of those figures is £120,000. The figures set out in the Guidelines need to be updated for inflation. The starting date for the calculation is September 2021 because, as Lambert J explains in the introduction to the *Guidelines*, that was the index date used when updating the previous guidelines. The adjusted figure is £120,000 x 379/308.6 = £147,375.

116 In my view it is necessary to increase that figure for several reasons. As the orthopaedic experts pointed out in their evidence, the combination of injuries in this case was particularly disabling. I consider that the loss of amenity in this case is particularly significant for a young man whose passion is adventure sports. Although I have found that Mr Shaw has undertaken some of these activities, it must be frustrating for him that his abilities are significantly curtailed and are accompanied by pain and fatigue. The figure derived from the Guidelines does not take account of the injury to the ankle or the psychiatric injury (even though Mr Shaw made light of it). The award should be enhanced to take account of the significant scarring, the effect of which in my judgment is not adequately reflected in the guidelines to which I have referred.

117 In my judgment, the appropriate award for pain, suffering and loss of amenity is £160,000.

118. When approaching the claim for special damages for loss of earnings, I take into account Dr Banks's calculation of what Mr Shaw was earning before the accident (between £17,417 and £18,127 per annum, net). I note that the employment experts agree that Mr Shaw would now be earning £21,810 net per annum. Based on these figures, I find that Mr Shaw's average annual earnings in the period from the date of the

accident until now would have been £19,800. His loss of earnings until 5 February 2024 (the date on which the trial commenced) is therefore 5.6 x £19,800 = £110,088. I make no deduction for travelling expenses as urged by Mr Snarr because there is no reliable evidence that Mr Shaw would have incurred them. I accept the submission that Mr Shaw must give credit for the Housing Benefit he received: see *Clenshaw v Tanner* [2002] EWCA Civ 1848. I accept Mr Snarr's calculation of the benefit received. The aggregate award is therefore £99,065.17.

119 In relation to past gratuitous care, the experts agree that the appropriate sum is £65,523.79. It is common ground that this figure must be reduced by 25% in accordance with *Housecroft v Burnett*. I accept the submission that the Carers' Allowance that Mr Aksu received should be deducted. The appropriate award is £47,936.84.

120 A claim is advanced for the Case Management fees claimed by Ms Sparkes. In my view, there is merit in the defendant's submission that Ms Sparkes's fees were not proportionate to the amount of case management actually required and that Ms Sparkes's performance was suboptimal. Doing the best I can, I find that the appropriate award is £10,000.

121 I would allow the claim for services in the sum claimed, £3,907.06

122 Past medical expenses are largely agreed. I disallow the clam for medical cannabis since there is insufficient evidence to support the proposition that this was reasonably required – on the contrary, there was evidence that it was positively harmful. The figure that I allow is £18,877.07

123 The appropriate award for aids and equipment is £11,476.56. I would not allow the claims for active hands, a smart crutch, vapourise, muscle stimulator, bath cushion or ring doorbell because the claimant has not satisfied me that these expenditures were reasonably required as a result of his injuries.

124 The claim for taxi fares is agreed at £830. I would allow the cost of obtaining the first scooter. I am not convinced that there was any need for the second scooter, Mr Shaw having managed adequately without for several months. The award for transport costs is £2,829.00.

125 I accept that Mr Shaw reasonably required single floor accommodation when he was in an Ilizarov frame. I accept that he might reasonably have moved into such

accommodation before his operation in January 2023 and that he may have been required to remain at such accommodation until the end of a tenancy, so that the total period is 1 year. I accept that it was appropriate to seek such accommodation near where his mother lived, because she was providing a lot of help with Mr Shaw and with Oliver. I accept that Mr Shaw paid rent of £1,000 a month. The rent in the property Mr Shaw would have lived in but for the accident would have increased since by 2023: I find that it would have been £700 a month, so that the monthly loss is £300. I make no allowance for a deposit, since the deposit will be returned at the end of the period. Apart from this, I would make no award for accommodation. The appropriate award is therefore £3,600.

126. Mr Shaw claimed the costs of having Mr van der Merwe create tattoos to conceal some of his scarring. In my judgment, some of the costs that Mr Shaw claims would have been incurred in any event, because Mr van der Merwe planned to extend his existing tattoos. Unfortunately, the evidence about what work was done that was additional to that originally planned was far from clear. Doing the best I can, I would award £4,000 under this head of claim.

127. It is common ground that interest runs on general damages for pain, suffering and loss of amenity at 2% *per annum* from the date of service of the claim form, which was 8 August 2019. Interest runs on special damages at one half the special account rate.

128. In relation to future losses, the parties have agreed the appropriate multipliers, which I shall adopt.

129. I approach the award for future loss of earnings in conformity with the Ogden Tables 8th edition. I reject the defendant's submission that I should discount the figure for the earnings Mr Shaw would have enjoyed, had he not suffered his accident. In my judgment, the employment experts' agreed sum reflects the particular facts of this case and it requires no further adjustment. I reject the defendant's submission that I should make a more optimistic assumption about his future earnings than is suggested in Table B in the Ogden Tables. Mr Shaw is poorly qualified. He is not suited for desk-based employment. He has been out of work for nearly 6 years (though I accept that he has undertaken some limited voluntary work). He has multiple disabilities, in particular, a fused left wrist, limited extension in the left fingers and a significantly shortened right

leg. In my view, the appropriate award is £546,288, as set out in Mr Knifton's closing submissions.

130. The care experts' agreement about future care has greatly simplified my task in calculating the claim for future care. The following features affect my assessment of the claim for future care:

131. I do not accept Professor Harris's view that Mr Shaw will require appreciably more care once he reaches the age of 75. I therefore reject the claim for a substantial additional amount after Mr Shaw reaches 75. I do not accept that the care needs attributable to the accident will diminish once Mr Shaw reaches the age of 75. I therefore reject the defendant's submission that the claim should be substantially diminished after Mr Shaw reaches 75.

132. I find that Mrs Shaw will continue to help Mr Shaw and Oliver for some time. However, she will not do so after she reaches the age of about 75. At that stage, Mr Shaw will have to obtain paid help from elsewhere. It is appropriate to make a *Housecroft* discount in respect of Mrs Shaw's involvement, but not thereafter. I would therefore divide the multiplier and award as follows:

9 x (£2,870.40 x 75%) = £19,375.20

(56.6 – 9) x £2,870.40 = £136,631.04

The aggregate is £156,006.24.

133. Mr Shaw underwent an operation on his wrist during the course of the trial. I have found that Mr Shaw will undergo further surgery on his radio-ulnar joint at some point in the future. The care experts have assessed that he will require additional agency care for 3 months following each surgery at a cost of £7,508.

134. The total claim for future care is therefore £171,022.24.

135. It is common ground that the award for future loss of services is £89,376.

136. The "Activities of Daily Living" video shows Mr Shaw setting about his physiotherapy exercises with diligence. He has proved to be an active man even despite his serious injuries. I reject the claim that Mr Shaw requires significant physiotherapy input in the future. I consider that Mr Shaw will face occasional periods in the future when he needs a short course of physiotherapy to ensure proper compliance with exercises and to

address the effects of aging. I would allow 5 sets of 6 sessions at £55 a session = £1,650.00. I allow the cost of the Therabands he will use in his exercises, £425.

137. I find that Mr Shaw will probably incur the cost of membership of a climbing wall. He would have incurred that cost in any event.

138. I do not believe that Mr Shaw requires psychotherapy.

139. It is common ground that Mr Shaw requires orthotics at an agreed cost of £37,356.

140. The claim for a reclining chair is agreed in the sum of £4,581.

141. Given my findings about the activities of which Mr Shaw is capable, and given that I have not accepted his case that he has any significant difficulty on stairs, I do not consider that the claimant has a reasonable need for single-storey accommodation.

142. I calculate that the appropriate award of damages in this case is £1,212,389.94, as follows:

Pain, suffering and loss of amenity	£160,000.00
Past losses	
Earnings	£99,065.17
Gratuitous care	£47,936.84
Case Management	£10,000.00
Services	£3,907.06
Medical expenses	£18,877.07
Aids and equipment	£11,476.56
Transport costs	£2,829.00
Accommodation	£3,600.00
Tattoos	£4,000.00
Future losses	
Earnings	£546,288.00
Care	£171,022.24
Services	£89,376.00
Physiotherapy and Therabands	£2,075.00
Orthotics	£37,356.00
Reclining chair	£4,581.00
Total	£1,212,389.94

143. The parties agree that the interest on the award for pain, suffering and loss of amenity should be £14,912.60. I calculate that the award of interest upon special damages should be £2,843.12.

Fundamental dishonesty: the legal framework

144. There has been growing recognition of the problem of false claims in our courts. In *South Wales Fire and Rescue v Smith* [2011] EWHC 1749 (Admin) Moses LJ expounded the difficulties in a passage approved by the Supreme Court in *Summers v Fairclough Homes* [2012] UKSC 26:

> "2. For many years the courts have sought to underline how serious false and lying claims are to the administration of justice. False claims undermine a system whereby those who are injured as a result of the fault of their employer or a defendant can receive just compensation.
>
> 3. They undermine that system in a number of serious ways. They impose upon those liable for such claims the burden of analysis, the burden of searching out those claims which are justified and those claims which are unjustified. They impose a burden upon honest claimants and honest claims, when in response to those claims, understandably those who are liable are required to discern those which are deserving and those which are not.
>
> 4. Quite apart from that effect on those involved in such litigation is the effect upon the court. Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty. The system is seriously damaged by lying claims. It is in those circumstances that the courts have on numerous occasions sought to emphasise how serious it is for someone to make a false claim, either in relation to liability or in relation to claims for compensation as a result of liability."

145. In section 57 of the Criminal Justice and Courts Act 2015, Parliament acted to impose upon courts the obligation to dismiss claims where the claimant has been fundamentally dishonest. The section provides, so far as relevant:

> "57 Personal injury claims: cases of fundamental dishonesty
>
> (1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim")—
>
> > (a) the court finds that the claimant is entitled to damages in respect of the claim, but
> >
> > (b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.
>
> (2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.
>
> (3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.

(4) The court's order dismissing the claim must record the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim.

(5) When assessing costs in the proceedings, a court which dismisses a claim under this section must deduct the amount recorded in accordance with subsection (4) from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant.

..."

146 The statutory requirement of "fundamental dishonesty" requires separate consideration of two questions: whether there was dishonesty, and whether it was fundamental: see *Elgamal v Westminster City Council* [2021] EWHC 2510 (QB)("*Elgamal*") at [61].

Dishonesty

147 In *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 the Supreme Court made clear that "dishonesty" is a jury question (see at [48]). At [74], Lord Hughes JSC (with whom the other justices agreed) explained:

"When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

"Fundamental"

148 There are several cases that address what is meant by "fundamental."

149 In *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 (*"LOCOG"*) Robin Knowles J approached the issue in this way:

"62. In my judgment, a claimant should be found to be fundamentally dishonest within the meaning of s.57(1)(b) if the defendant proves on a balance of probabilities that the claimant has acted dishonestly in relation to the primary claim ... and that he has thus substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation. Dishonesty is to be judged according to the test set out by the Supreme Court in *Ivey v Genting Casinos Limited (t/a Crockfords Club)*...

63. By using the formulation "substantially affects" I am intending to convey the same idea as the expressions "going to the root" or "going to the heart" of the claim. By potentially affecting the defendant's liability in a significant way "in the context of the particular facts and circumstances of the litigation" I mean (for example) that a dishonest claim for special damages of £9000 in a claim worth £10 000 in its entirety should be judged to significantly affect the defendant's interests, notwithstanding that the defendant may be a multi-billion pound insurer to whom £9000 is a trivial sum"

150. In *Iddon v Warner* [2021] EWHC 587 I identified 3 features of the case that justified the use of the adjective 'fundamental' (at [93]):

"Firstly, to deploy the dichotomy proposed by HHJ Moloney QC and approved by the Court of Appeal in *Howlett v Davies*, Mrs Iddon's dishonesty does not go to some incidental or collateral part of the claim; it went to the heart of her claim. Secondly, to adopt the words of Julian Knowles J in *LOGOC v Sinfield*, her dishonesty has substantially affected the presentation of her case – indeed it has pervaded her case to the extent that Mrs Iddon has scarcely taken any step in the action that was not tainted by dishonesty. Thirdly, the effect of her lies was to seek to inflate the value of a case which I have held to be worth just over £70,000 into a case worth over £900,000."

151. In *Muyepa v Ministry of Defence* [2022] EWHC 2648, Cotter J identified at [388] three questions that helped him reach a conclusion whether dishonesty had been fundamental dishonesty:

"(a) At what stage and in what circumstances did the Claimant's dishonest conduct start? In some cases the true core of the claim, the base, can be determined without considerable difficulty and the dishonesty can be traced to a point/time when the Claimant decided to consciously exaggerate for financial gain, for example after an operation or treatment has alleviated symptoms. The timeframe may be an extended period, e.g. as residual symptoms gradually ease, or sharply defined. In other cases it may be more difficult to identify when the dishonest conduct started. In any event the court is entitled to proceed with considerable caution in answering this question given the limits of any reliable evidence.

(b) Does the dishonesty taint the whole of the claim or is it limited to a divisible element?

(c) How does the value of the underlying valid claim (which the court must assess) compare with that of the dishonesty inflated claim? There is no set ratio as to what constitutes fundamental dishonesty but it is usually important to consider relative values."

152. In *Elgamal* Jacobs J said at [70]:

"The relevant statutory word is "fundamental". That is the only statutory word, and paragraphs [62] and [63] in *Locog* should not be read as though they are a substitute for it. Furthermore, as Julian Knowles J explained in paragraph [63], he was seeking to capture the same idea as the expressions "going to the root" or "going to the heart"

of the claim. In my view, those expressions do sufficiently capture the meaning of "fundamental" in the present context, and the difference between conduct which is ... "merely" dishonest and fundamentally dishonest."

153. In *Denzil v Mohammed* [2023] EWHC 2077, Freedman J reviewed the authorities and drew these principles from them (at [41]):

"(i) There is a danger about elaboration and metaphor. Otherwise, the courts will be applying the elaboration and metaphors of previous judges such that the word of the statute will fade into history and will not be applied: see *Elgamal* , para 70 per Jacobs J.

(ii) The statutory word "fundamental" should be given its plain meaning. The expressions "going to the root" or "going to the heart" of the claim are often sufficient to capture the meaning of the statutory word. Provided that it is understood in the same way, it might assist in some cases in respect of applying the word "fundamental" to consider whether the dishonesty "substantially affected the presentation of (the) case, either in respects of liability or quantum, in a way which potentially adversely affects the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation": see *LOCOG*, paras 62–63.

(iii) The question whether the relevant dishonesty was sufficiently fundamental should be a straightforward jury question. As stated above, this judgment would return to this. "It is a question of fact and degree in each case as to whether the dishonesty went to the heart of the claim. That must involve considering the dishonesty relied upon, and the nature of the claim both on liability and quantum which was actually being advanced": see *Elgamal* at para 72 per Jacobs J.

(iv) It will often be appropriate in this holistic exercise to consider the extent to which the alleged dishonesty resulted in an inflated claim, that is the extent to which the dishonesty, if not exposed, would potentially have resulted in a higher quantum of recovery in respect of the claims made. This involves consideration of the various losses claimed by a claimant and assessing the potential impact of the alleged dishonesty on the award for those losses: see *Elgamal* at para 73, per Jacobs J.

> "In some cases, it will be obvious that the dishonesty had a potential impact on the amount that might be awarded for a particular head of loss. For example, a personal injury claim will invariably involve a claim for PSLA, and a dishonest description of symptoms and suffering will inevitably have a potential impact on the PSLA. The significance of that potential impact is a matter for consideration in the context of whether the dishonesty went to the root of the claim. Conversely, it may be clear that the alleged dishonesty has no material impact on a particular head of loss": see Elgamal per Jacobs J, at para 74.

154. In *Roberts v Kesson* [2020]EWHC 521, Jay, J pointed out at [54]

"The Court must be satisfied on the balance of probabilities that the Claimant *has been* fundamentally dishonest. The real question is whether the Claimant has been fundamentally dishonest and not whether he has persisted in that dishonesty."

Substantial injustice

155. In *LOCOG* Julian Knowles J said (at [65]):

"Given the infinite variety of circumstances which might arise, I prefer not to try and be prescriptive as to what sort of facts might satisfy the test of substantial injustice. However, it seems to me plain that substantial injustice must mean more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty. That must be so because of s. 57(3). Parliament plainly intended that sub-section to be punitive and to operate as a deterrent. It was enacted so that claimants who are tempted to dishonestly exaggerate their claims know that if they do, and they are discovered, the default position is that they will lose their entire damages. It seems to me that it would effectively neuter the effect of s 57(3) if dishonest claimants were able to retain their 'honest' damages by pleading substantial injustice on the basis of the loss of those damages per se. What will generally be required is some substantial injustice arising as a consequence of the loss of those damages."

This notion that substantial injustice must mean more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty was approved in *Razumas v Ministry of Justice* [2018] EWHC 215 (QB) at [213] – [215], *Iddon* [2021] EWHC 587 (QB) at [98], in *Muyepa* [2022] EWHC 2648 (KB) at [396] and in *Woodger v Hallas* [2022] EWHC 1561 (QB).

156. In *Iddon* , I said:

"97. In my judgment, section 57 of the Criminal Justice and Courts Act 2015 is frankly punitive in character. A claimant who is fundamentally dishonest is penalised by having his claim dismissed. Parliament has plainly concluded that the aim of addressing the evils of dishonest claims justifies depriving a claimant of the part of the claim he can prove and providing the defendant with the windfall of not having to satisfy a lawful claim, albeit one that may have been dishonestly presented. The only escape from the default position of dismissal arises if the injustice the dishonest litigant suffers is "substantial."

98. I respectfully agree with Julian Knowles J when he said in *Sinfield* that "substantial injustice must mean more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty."

99. I consider that I have to have well in mind the damage done to our system of justice by dishonest claims in general and by this claim in particular in deciding whether this claimant would suffer "injustice" if her claim were dismissed..."

Submissions on fundamental dishonesty

157. It was common ground that the burden is on the defendant to establish dishonesty. The standard of proof is the balance of probabilities.

158. Mr Knifton KC submitted that in making a decision about dishonesty (which affects the claimant's reputation as well as his entitlement to damages), the court must exercise great care. He submitted that fraud and dishonesty are inherently improbable such that cogent evidence is required for their proof. He referred me to a number of cases in which the court has expressed views about whether, in the context of the particular case, dishonesty has been made out. I do not consider it necessary to refer to them in detail. I summarise their effect in this way: before making a finding of dishonesty, I must be able to exclude innocent reasons as the most probable explanation for the conduct under scrutiny.

159. On the facts, Mr Knifton reminded me about how extensive and disabling Mr Shaw's injuries were. He pointed out that Mr Shaw's condition was bound to fluctuate as he had operation after operation. He suggested that some of the apparent inconsistencies in Mr Shaw's evidence might be ascribed to the fluctuation in his condition. He submitted that Mr Shaw may have been seeking to convince experts of the gravity of his condition. He submitted that Mr Shaw had made an honest mistake in underestimating how far it was to the local shop. He suggested that in asserting that he had only walked to the shop once Mr Shaw may have made an honest mistake. Mr Knifton reminded me of Mr Shaw's evidence that he had adopted documents prepared by others as part of his case without giving proper thought to their contents. He submitted that Mr Shaw had limited educational qualifications and dyslexia; the court ought to take those matters into account when assessing whether to accept Mr Shaw's explanation.

160. On the question whether any dishonesty was fundamental, Mr Knifton submitted that Mr Shaw had undoubtedly suffered serious injury; this was not a case where a claimant was feigning serious injury when his injuries were minor. In 2020, he submitted, the diagnosis was unclear, and Mr Shaw's condition was fluctuating. Mr Knifton questioned whether any inaccuracies in Mr Shaw's evidence had affected the medical evidence significantly.

161. Mr Knifton submitted that the statute allowed the court an unfettered discretion in determining whether a dishonest claimant suffers "substantial injustice" by the

dismissal of his claim. He invited me to reject the proposition that that "substantial injustice" must mean more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty. He submitted that the proper approach is for the court to conduct a balancing exercise, weighing the culpability and extent of the claimant's dishonesty against the injustice to him of dismissing his legitimate claim. He submitted that the court should take into account the fact that the defendant had not admitted primary liability and had disputed contributory negligence, that the claimant had a substantial legitimate claim and that the claimant would be liable to refund the interim payments made. He pointed out that even if the court decided that the claim should not be dismissed on the grounds of substantial injustice, the court could still penalise him in costs.

162. Mr Kennedy KC submitted that Mr Shaw has been dishonest about the level of his mobility and function and about the extent of his activities. He submitted that Mr Shaw had presented claims that were wholly or partly dishonest because exaggerated. He submitted that Mr Shaw had sought to conceal his previous dishonesty with further dishonesty, extending even to his evidence at trial. He submitted that Mr Shaw had recruited witnesses to present a dishonest account.

163. Mr Kennedy submitted that the dishonesty was fundamental because the claimant's lies about his mobility and his ability to return to activities he had done prior to the accident go to the heart of the claim. He pointed out that significant heads of loss were no longer pursued. He contrasted the amount claimed in the schedule of loss dated May 2020 and the schedule served immediately before the trial.

164. Mr Kennedy pointed out that it was for the claimant to establish that he would suffer substantial injustice if the claim were dismissed. He submitted that the size of the legitimate claim is not relevant to the issue of substantial injustice. He pointed out that a dishonest claimant whose claim was dismissed was in the same position as somebody who had suffered a similar accident but did not have a solvent tortfeasor to sue.

165. Both counsel referred me to speeches made during the passage of the Bill through Parliament.

Findings and conclusions on fundamental dishonesty

166. In 2019 and 2020 Mr Shaw presented accounts of his condition which require careful scrutiny, as follows:

(1) Mr Shaw's accounts to the medical experts who examined him paint a picture of a man who has extremely limited mobility: see his accounts to Professor Harris on 9 November 2019 and 15 October 2020, to Mr Muir on 27 January 2020, to Dr Vincenti on 3 November 2020 and Ms Obeten on 3 December 2020. This account was repeated at paragraph 4.4 of the Schedule of Loss dated 26 May 2020 and in Mr Shaw's witness statements dated 31 July 2020 and 9 December 2020. It was repeated to Mr Kiely, whom Mr Shaw told he used a mobility scooter.

(2) Mr Shaw also gave the impression that he had been unable to return to any of his pre-accident activities: see his accounts to Professor Harris on 9 November 2019 and 15 October 2020; to Mr Clayson on 26 November 2019 and Mr Muir on 27 January 2020 and in paragraph 4.5 of the Schedule of Loss dated 26 May 2020. In his witness statement dated 9 December 2020, Mr Shaw says he had started to climb again before he saw Professor Harris but he said he knew he would never return to skydiving. That statement makes no mention of his cycling activities.

(3) The account that Mr Shaw and his mother gave to Maggie Sargent on 9 July 2020 led Mrs Sargent to suppose that he had required 70 hours of care a week between 1 January 2019 until 30 June 2019 and 56 hours between 1 July 2019 and 31 October 2019.

(4) Mr Shaw presented as a man who had significant transport needs: see the account he gave to Mr Kiely and the comment in his witness statement of 9 December 2020 about needing a quad bike. Mr Kiely's recommendation based on Mr Shaw's account found its way into paragraph 6.4 of the Schedule of Loss dated 26 May 2020. Mr Shaw's account of his difficulties was supported by the recording of his driving in the "Activities of Daily Living" recordings, where, for example, he awkwardly uses his right hand to operate the levers on the left hand side of the steering wheel. In his witness statement of 9 December 2020, he suggested that if he had a quad bike he could attend skydiving or base jumping events with his friends.

(5) Based upon his mobility issues, Mr Shaw advanced a claim that he required to use Business Class air travel and that he required a companion who also required Business Class travel: see paragraph 6.9 of the Schedule of Loss dated 26 May 2020.

167 In my judgment, all of these accounts were untrue and misleading, as my findings demonstrate:

(1) By the Autumn of 2019, Mr Shaw could walk to his local shop and back without walking aids, a distance of about 900 metres which included walking over rough grass. He did not need a scooter. I have found that this was not a "one off", but was representative of Mr Shaw's capabilities at the time. After his operation in August 2020, his mobility was affected for about 4 weeks, but by 9 September 2020 he was at the climbing wall and by 16 October 2020, he was going up Snowdon on an electric mountain bike. It was misleading to say, as he did in the statement of 4 December 2020, that he could "now manage 100 yards without a crutch." Mr Shaw's evidence cannot be accounted for on the basis that his symptoms fluctuated.

(2) The evidence Mr Shaw presented in support of his application for an interim payment leaves the reader with the impression that he had not made any substantial return to any of his pre-accident activities. In fairness, Mr Shaw mentions in his witness statement of 9 December 2020 holding on to the handlebars of a bike and the fact that he had "started attempting to go climbing at the climbing wall." However, he says that he would never return to skydiving, which was misleading since he had obtained a certificate that he could undertake a tandem skydive about 18 months previously. At the time of the application for an interim payment, Mr Shaw had resumed outdoor climbing and he had recently cycled up Snowdon on his electric mountain bike. The fact that he could undertake these activities was plainly material to the question of what function Mr Shaw had achieved, notwithstanding his serious injuries. It was misleading not to acquaint the court and the experts in the case about the true facts but instead allow them to labour under the misapprehension that he could only manage to walk very limited distances with the help of a walking aid.

(3) The account given to Mrs Sargent on 9 July 2020 was misleading and untrue, because the amount of care he in fact required was 35 hours a week between 1 January 2019 until 30 June 2019 was and 21 hours a week from 1 July 2019 until 31 October 2019.

(4) The claim for transport costs was misleading because at the time it was made, Mr Shaw was taking driving lessons with an instructor who made clear that no special adaptations were required to his vehicle. It was untrue that Mr Shaw required a scooter as he told Mr Kiely and when he verified paragraph 4.4 of the Schedule of Loss: at these times he had no operable scooter, and in any event, he would not have used it. He did not need a quad bike to access the outdoors, because he was able to cycle in Snowdonia and he had been able to visit his BASE jumping friends in Italy and Croatia on two occasions. He did not need a quad bike to attend BASE jumping events, because he attended them using no walking aids at all.

(5) The claim for travel costs was misleading because Mr Shaw had already shown himself capable of travelling alone in economy class on several occasions.

168 Mr Shaw responded to the defendant's attack upon his case in the Amended Reply and in his subsequent evidence, in his witness statements and orally. In relation to his responses, I make the following observations:

(1) Mr Shaw said that he had miscalculated "the distances involved" when he stated that he could walk 100 – 200 metres. I reject as wholly implausible the notion that Mr Shaw believed that a distance of 900 metres was only 100 – 200 metres. He said that he did not use a stick when visiting his grandmother, which in my view carried with it the implication that when *not* visiting his grandmother he *did* use a stick. In my view this was misleading because he did not use a stick most of the time. Mr Shaw said that 26 September 2019 was "the only time he had made the journey without a stick or mobility aid". He repeated this in cross-examination. As my findings demonstrate, that was a misleading statement.

(2) Mr Shaw said that on 13 November 2020, the purpose of the visit to Harpur Hill was so that Jozef Barnaby could climb. This is misleading because Mr Shaw intended to climb too. In the Amended Reply, Mr Shaw said that he had not gone up a mountain on his mountain bike because that would be far beyond his ability; he said that he could not access off-road locations on his electric bike. This was misleading since Mr Shaw had ridden his electric bike up Snowdon. He later re-amended his pleading to suggest that he would be very fatigued and would have difficulty accessing off-road locations. When he was cross-examined about this

paragraph, Mr Shaw maintained that Snowdon was not a mountain; by "mountain" he meant something like Mont Blanc or Monte Rosa. I consider that this answer was misleading. I am sure that Mr Shaw does not believe that it would be possible for him to ascend Mont Blanc on a quad bike, which is what he seemed to be suggesting in his evidence. Under cross-examination, he said that he had not been BASE jumping since his accident. This is misleading because he had been BASE jumping in 2022.

(3) In paragraph 16 of the Amended Reply, Mr Shaw responded to the criticisms about the transport claim evidenced by Mr Kiely's report. He suggested that Mr Kiely might have got his information "in other documentation." I reject this possible explanation; there was no evidence that Mr Kiely relied upon any other source of information than Mr Shaw himself. He persisted in the claim that he continued to use a scooter. This was misleading because, as I have found, he did not.

(4) He continued to maintain that he required a travel companion, which in my view was misleading, given the many budget flights abroad he has undertaken since the accident. In cross-examination, he suggested that he had discussed the significant travel claim with Maggie Sargent and, on her advice, thought that the claim was reasonable. This was misleading because at the time Mr Shaw made the claim in the Schedule of Loss of 26 May 2020, he had not yet seen Mrs Sargent.

169. *Ivey* requires me to make findings about Mr Shaw's state of knowledge or belief. I find that when Mr Shaw made the application for an interim payment in November 2020, he knew that he was capable of walking much more than 200 metres without a walking aid. He knew that he could do much better than he had told the experts to whom he gave a history. When Mr Shaw made the application, he knew that he no longer required a scooter to mobilise. His scooter had broken down 6 months previously and (as I have found) he did not need and did not use the new scooter Ms Sparkes bought for him. Mr Shaw knew that he could climb both at the climbing wall and outdoors. He knew that he had gone up Snowdon on his mountain bike. He was aware that he had gone to his GP to get a certificate to allow him to undertake tandem skydiving. He knew that he had travelled in economy class to see his BASE jumping friends. He knew that the account of his care needs advanced by his mother and him in July 2020 was significantly overstated. He knew that he could drive an un-adapted vehicle. He knew

that the excuses he gave in the Amended Reply, the Re-Amended Reply, in witness statements and in his oral evidence were misleading and untrue.

170. I have carefully considered the submission that Mr Shaw did not realise that he was advancing exorbitant claims because he simply relied upon his experts and his lawyers to present his case. I reject this submission for several reasons.

171. The first reason is that Mr Shaw verified the Schedule of Loss and the witness statement dated 9 December 2021 with a statement of truth. In my view, the statement of truth indicates that the person verifying a document knows what they are signing and vouches for its accuracy. This is the object of the clear policy evident in recent rule changes: the form of the statement of truth has been altered so that a person who verifies a document appreciates the serious consequences of verifying without an honest belief in its truth; the rules have changed to ensure that persons whose own language is not English express themselves in their own language. The court is entitled to expect that a person who verifies a document understands it and has an honest belief that what he is verifying is true. Under cross-examination, Mr Shaw recognised his responsibility for the accuracy of the documents he verified (even though he later suggested that he had simply agreed to what an expert or a lawyer had told him). I reject the submission that Mr Shaw had limited capacity to understand what he was signing owing to his poor educational attainment, his cannabis abuse or childhood neurodevelopmental disorders. He coped admirably in the witness box with a huge variety of bundles containing thousands of pages. I am satisfied that he knew what he was signing when he verified the Schedule of Loss of 26 May 2020 and the witness statement of 9 December 2020.

172. I reject Mr Shaw's suggestion that the claim for travel costs was based upon expert opinion and he simply assented to it. He told me that this substantial claim stemmed from a discussion with Maggie Sargent. That is simply untrue, because Mr Shaw had not even met Mrs Sargent at the time the claim was advanced.

173. The third reason is that the opinions expressed by the experts depend upon facts that could only have come from Mr Shaw himself, and Mr Shaw knew the real position. Mr Shaw knew how much care he had received in the period January 2019 – June 2019. A moment's reflection about Mrs Sargent's expert evidence ought to have led Mr Shaw to realise that he had not received anything like 10 hours of care a day at a time when he

was fit enough to travel to Croatia and Italy with his BASE jumping friends. The reason Mr Kiely advised that Mr Shaw required a highly specified Mercedes car and a quad bike is that Mr Shaw gave him to understand that his condition demanded it, and Mr Shaw (who was at the time taking driving lessons in an unadapted car) knew that this was untrue.

174. I am fortified in my conclusion that Mr Shaw appreciated what case he was advancing in his application for an interim payment by the fact that the defendant's email of 4 December 2020 alleged that the evidence to date overstated Mr Shaw's disabilities and understated his function. I am confident that Mr Shaw was advised to consider the case he was presenting very carefully, lest it be alleged later that he had been fundamentally dishonest in relation to his claim. If Mr Shaw did not understand the case he was advancing, this was his chance to seek an explanation of those parts of his claim he did not understand. He chose not to set the record straight.

175. I have reached the conclusion with regret that Mr Shaw advanced a case that his mobility and function were severely compromised when he knew that his mobility and function were not nearly so severely affected as he made out. He then gave explanations and excuses which he knew to be untrue. I do not think that the ordinary person would consider that Mr Shaw was merely exaggerating his disability in a manner that might be excused, if not condoned. His account was too different from reality to be accounted for by exaggeration. In my judgment, Mr Shaw's conduct was dishonest by the standard of ordinary decent people.

176. In considering whether Mr Shaw's dishonesty was "fundamental," I take into account the following features:

(1) I accept that Mr Shaw suffered serious injury in the accident: this is not a case in which he has feigned serious injury where none exists.

(2) But in my view, the central issue in the case on quantum was the extent to which Mr Shaw's undoubted injuries affected his mobility and function. The lies Mr Shaw told in 2019 and 2020 went directly to the central issues of his mobility and function. They were not incidental or collateral.

(3) The effect of Mr Shaw's lies on the pleaded value of the claim was striking. The Schedule of Loss dated 26 May 2020 valued the case at £6,465,578. The actual value of the claim I have found to be just over £1.2 million. (It is fair to point out

that in 2020, the prognosis was not so clear as it is now. Thus, if Mr Shaw's right femur had not achieved substantial union in 2023, his claim may have been significantly greater. However, if Mr Shaw had been honest about his function in 2020, the claims for transport and travelling then stated to be over £1,000,000 – now abandoned – would have been significantly less.)

(4) If Mr Shaw's lies were not an issue in the case, it would have been a relatively straightforward matter of determining Mr Shaw's condition and prognosis and deciding what losses flowed as a result. I consider it highly likely that the defendant's insurers would have settled the case at the latest after joint statements had been prepared. Instead, the court has had to unpick Mr Shaw's lies in order to arrive at the true facts. The parties have incurred the costs of a ten-day trial with leading and junior counsel on both sides. Experts have had to be present throughout the trial to hear the evidence, in case their views have to be modified because the facts upon which their opinions were predicated proved to be inaccurate. The court's valuable resources have been expended. The lies have had a very significant effect upon the costs of the case and the use of court resources.

177. I conclude that Mr Shaw's lies in relation to the claim constituted fundamental dishonesty in relation to it. I am therefore obliged to dismiss his claim unless he persuades me that he would suffer substantial injustice.

178. I heard submissions on the meaning of "substantial injustice" in the context of section 57. I respectfully agree with Julian Knowles J that, because of the words in section 57(3), "substantial injustice must mean more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty" – see *LOCOG* at [65]. Subject to that application of the canons of statutory interpretation, I consider the expression to consist of ordinary English words whose meaning is not ambiguous, obscure or absurd.

179. I was referred to a ministerial statement made by Lord Faulks about this provision. I did not hear submissions about whether I was entitled to have regard to Lord Faulks's statement and was initially inclined to conclude that I ought not to. I have reflected on the position. In my view, the statement may be helpful in identifying the mischief at which the statutory provision is aimed and it is therefore permissible to consider it. The relevant passage is as follows:

"This is part of a series of measures taken by the Government to discourage fraudulent and exaggerated claims, which arise often in motor accident cases and so-called "trips and slips" claims. Such claims cause substantial harm to society as a whole, not least in increasing the insurance premiums that motorists have to pay. I notice that the noble Lord criticised the Government; I think that the inference was that they were in some way in league with the insurance industry. We are talking here about insurance premiums paid by members of the public. These cases also eat up valuable resources of local and public authorities and employers, which could otherwise be used for the benefit of business and in providing services to the public.

Under the current law, the courts have discretion to dismiss a claim in cases of dishonesty, but will do so only in very exceptional circumstances, and will generally still award the claimant compensation in relation to the "genuine" element of the claim. The Government simply do not believe that people who behave in a fundamentally dishonest way—and I will come to address the adverb in a moment—by grossly exaggerating their own claim or colluding should be allowed to benefit by getting compensation in spite of their deceit. Clause 45 seeks to strengthen the law so that dismissal of the entire claim should become the norm in such cases. However, at the same time, it recognises that the dismissal of the claim will not always be appropriate and gives the court the discretion not to do so where it would cause substantial injustice to the claimant. To that extent, some of the remarks of my noble friend Lord Marks were entirely apposite. The clause gives the court some flexibility to ensure that the provision is applied fairly and proportionately.

The amendments tabled by my noble friend Lord Marks and others would considerably weaken the effect of the clause by simply giving the court a wide discretion were it satisfied that the claimant had been fundamentally dishonest, which would enable it to either dismiss the claim, reduce the amount of damages or to do neither. That would make it much less likely that those provisions would be used, even in cases where the claimant has clearly been fundamentally dishonest. I do not believe that that would be appropriate. We do not believe that people who behave in a fundamentally dishonest way should be able to benefit by getting compensation regardless."

Insofar as the statement sheds light upon the meaning of "substantial injustice," I consider that the minister identified that the court was to be given "some flexibility to ensure that the provision is applied fairly and proportionately." However, the Government was not prepared to give the court a wide discretion as an Opposition amendment proposed: the court might only decline to impose the sanction of dismissal "where it would cause substantial injustice to the claimant". I find little assistance in this statement by way of elaboration of the meaning of "substantial injustice".

180. I accept the submission that section 57(2) confers upon the court a broad discretion to determine whether the dishonest claimant will suffer substantial injustice.

181. I am, I think, entitled to consider the effect upon the dishonest claimant of being deprived of his damages. This is perhaps what Julian Knowles J had in mind when he said in *LOCOG* at [65]. "What will generally be required is some substantial injustice *arising as a consequence of the loss of those damages*" (my emphasis). Thus, although I reject Mr Knifton's submission that "in a case of very high value, the loss of legitimate damages *alone* may be a sufficient reason to find that the claimant would suffer substantial injustice," I accept the proposition that the court may take into account the consequences for the dishonest claimant of not receiving damages for the losses he has proved to be genuine.

182. Mr Kennedy urged me to consider the position of a person who was injured to a similar extent as Mr Shaw, but had no solvent tortfeasor to sue. I find it helpful to consider the position of such a person in order to make a comparison.

183. In the present case, I did not hear evidence about what would happen to Mr Shaw if his claim were dismissed: I must draw inferences from the evidence that was presented to me. I take into account the following:

(1) If Mr Shaw's claim is dismissed, he may be required to repay the interim payment of £150,000 that he has spent (The court has a discretion whether to order the interim payment to be repaid: see CPR 25.8(2)(a)).

(2) The court may give permission for an order for costs to be enforced against him: see CPR 44.16(1). (This sanction is available whether or not the claim is dismissed.)

(3) Mr Shaw may have incurred debts relating to his condition and his pre-trial losses in the expectation that he would obtain a substantial award of damages that would have allowed him to liquidate his debts. I accept that some of these debts arose before the allegation of fundamental dishonesty was made.

(4) I have found that Mr Shaw has a limited earning capacity. If his claim is dismissed, he will not earn as much as he would have done if he had not been injured, and he will not be compensated for those losses. He will, however, have the same state support as the victim who has no solvent tortfeasor to sue.

(5) I have found that Mr Shaw requires additional care and assistance. He requires orthotics. If his claim is dismissed, he will have to rely upon the (probably much less generous) support provided by the state (such as NHS treatment and support

provided pursuant to the Care Act 2014) just as the victim who has no solvent tortfeasor to sue would have to do.

The principal consequence of the dismissal of the claim would be that Mr Shaw's financial position would be much less favourable, even parlous. Owing to state provision, however, his basic needs would be met.

184. Mr Knifton submitted that I should take into account that the defendant did not admit liability and made unsuccessful allegations of contributory negligence. In my view, these matters have little bearing on whether the claimant would suffer substantial injustice if his claim were dismissed.

185. I also take into account the blameworthiness and effect of Mr Shaw's dishonest conduct.

186. I have found that Mr Shaw lied to the experts and to the court about the extent of his disabilities. I am confident that after the defendant sent the email of 4 December 2020, if not before, Mr Shaw was made aware of the potential consequences of presenting a dishonest claim. Despite this, he did not admit that he had lied; on the contrary, he continued to lie. He was unrepentant.

187. I have addressed earlier in this judgment the effect upon this litigation of Mr Shaw's lies: this claim, which would probably have settled if Mr Shaw had been honest, occupied the court's time for 10 days with the consequent cost to the parties and expenditure of court resources. Mr Shaw's lies have added to the corrosive effect upon honest claims referred to by Moses LJ in the *Smith* case referred to above.

188. I am not persuaded that Mr Shaw would suffer substantial injustice if his case were dismissed. He told important lies about his condition. After the defendant's email of 4 December 2020, if not before, Mr Shaw ought to have been aware of the grave consequences of doing so. Rather than admit his error, Mr Shaw persisted in his lies. He gambled that his lies would not be found out or that the court would excuse them, although he was aware of the risk that his claim might be dismissed if he were found out. Although the dismissal of his heavy claim will cause Mr Shaw significant financial hardship, I have concluded that it will not inflict substantial injustice. Mr Shaw has only himself to blame.