



Neutral Citation Number: [2023] EWHC 761 (KB)

Case No: QB-2020-003682

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 5th April 2023

Before :

MR JUSTICE EYRE

Between :

MR MICHAEL NANA MANTEY
- and -
MINISTRY OF DEFENCE

Claimant

Defendant

Jack Holborn (instructed by **Judith Maurice Solicitors**) for the **Claimant**
Andrew Ward and Chris Richards (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 22nd, 23rd, and 24th March 2023

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 14:00pm on 5th April 2023.

Mr Justice Eyre:

Introduction.

1. The Claimant was formerly a serving soldier. On 20th October 2020 he commenced proceedings against the Defendant for damages for an alleged Non-Freezing Cold Injury (“NFCI”) which he said he had suffered because of the Defendant’s negligence and/or breach of statutory duty. The Claimant asserted that he was suffering sundry continuing disabling symptoms. The claim was discontinued after the Defendant’s disclosure of video-recorded surveillance evidence which was said to be inconsistent with the alleged symptoms. The surveillance footage was filmed on 9th and 10th September 2021. The Claimant did not appear in the footage of 9th September but that of 10th September showed discrepancies between the Claimant’s actions before and after a medical examination by the Defendant’s orthopaedic expert, Mr Warwick Radford, on that day and his presentation at the time of that examination. The Defendant says that the discrepancies are only properly explicable as demonstrating that there was a deliberate and dishonest assertion by the Claimant of symptoms from which he was not in fact suffering. The Claimant accepts that there were differences between his presentation at the medical examination and his actions as shown on the footage at times before and after the examination. However, he says that those were not the result of dishonesty on his part and that he was not fabricating the symptoms as reported to Mr Radford nor as presented in the medical examination. Following the directions to which I will refer below the matter was before me on the issue of whether the claim was fundamentally dishonest.
2. The issues to be addressed are:
 - i) Whether there was a discrepancy between the Claimant’s presentation to Mr Radford and his actions before and after the medical examination on 10th September 2021. The Claimant accepted that there were differences although he did not accept they were quite as marked as asserted by the Defendant. In addition it will be necessary to consider the extent of the differences between the Claimant’s performance as shown on the surveillance footage and his presentation at other medical examinations.
 - ii) The explanation for the discrepancy. This is a central issue in the case. The Defendant says that there was deliberate malingering whereas the Claimant says that his presentation at the examination was genuine with the greater activity shown in the surveillance footage being atypical (occurring either only once or extremely infrequently) and being the result of his medication (or his perception of its effects) and of support and encouragement received from his neighbour combined with the effects of the course of Cognitive Behavioural Therapy he had undertaken.
 - iii) Whether, if the explanation for the discrepancy was a deliberately false presentation, there was dishonesty on the part of the Claimant.
 - iv) Whether such dishonesty meant that the claim was fundamentally dishonest for the purposes of CPR Pt 44.16(1).

The Procedural History.

3. The claim was commenced on 20th October 2020.
4. On 23rd February 2022 the court notified the parties of the trial date of 20th March 2023. On 23rd March 2022 the Defendant disclosed the surveillance footage and applied to rely on it. The Claimant filed his Notice of Discontinuance on 28th April 2022.
5. On 30th December 2022 Master McCloud directed pursuant to paragraph 12.4(c) of CPD PD44 that the Defendant's allegation that the claim was fundamentally dishonest should be determined at trial notwithstanding the fact that the Notice of Discontinuance had not been set aside. At the same time Master McCloud gave directions for the trial. Those directions included a provision that the Claimant's evidence at the hearing should be limited to "the Claimant, his wife, and one other person."

The Law.

6. CPR Pt 44.16(1) provides in the following terms for an exception to the qualified one-way costs shifting regime where a claim is found to have been fundamentally dishonest:

"Orders for costs made against the Claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest."
7. By paragraph 12.4(c) of CPR PD44 the court can direct that issues arising out of an allegation that a claim was fundamentally dishonest be determined notwithstanding that a notice of discontinuance has been served and not set aside. As already seen Master McCloud made such a direction here.
8. The presence or absence of dishonesty is to be determined by reference to the approach set out by Lord Hughes in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391 at [62] and [74]. In the circumstances here application of that approach will involve reaching a conclusion as to the Claimant's belief at the times when he presented himself to the medical experts (and in particular to Mr Radford on 10th September 2021) and when reporting his symptoms to them or in his witness statement. Then, in the light of the conclusion as to the Claimant's belief, it will be necessary to determine whether his conduct in so presenting himself and/or in reporting his symptoms was dishonest by the standards of ordinary decent people. Here the issue will in practice be resolved by the answer to the first of those questions. If the Claimant knew that he was not in substance reporting his symptoms accurately and that he was thereby giving a false impression of the effects of the NFCI and reporting those symptoms as being worse than they in fact were there will be no scope for a contention that his conduct was anything other than dishonest by the standards of ordinary decent people. On the Claimant's behalf Mr Holborn did not suggest otherwise. His contentions were that the Claimant was not giving a false picture and that to the extent that he was doing so that was not deliberate.
9. If the Claimant is found to have been dishonest it will then become necessary to consider whether the claim was fundamentally dishonest for the purposes of CPR Pt 44.16(1).
10. In *Howlett v Davies* [2017] EWCA Civ 1696, [2018] 1 WLR 948 Newey LJ (with whom Beatson and Lewison LJ agreed) set out the test of fundamental dishonesty thus:

“16 As noted above, one-way costs shifting can be displaced if a claim is found to be “fundamentally dishonest”. The meaning of this expression was considered by His Honour Judge Moloney QC, sitting in the County Court at Cambridge, in *Gosling v Hailo* (unreported) 29 April 2014. He said this in his judgment:

“44 It appears to me that this phrase in the rules has to be interpreted purposively and contextually in the light of the context. This is, of course, the determination of whether the claimant is ‘deserving’, as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended, for reasons of social policy, by the QOCS rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such as claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.

45 The corollary term to ‘fundamental’ would be a word with some such meaning as ‘incidental’ or ‘collateral’. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty”.

17 In the present case, neither counsel sought to challenge Judge Moloney QC’s approach. Mr Bartlett spoke of it being common sense. I agree”.

11. The test is clear and, as Newey LJ said, a matter of common sense. Nonetheless some light on its application in practice can be derived from decisions addressing the issue of fundamental dishonesty for the purposes of section 57 of the Criminal Justice & Courts Act 2015.
12. There are differences between the effects and the language of section 57 and CPR Pt 44.16(1). The former comes into operation after the court has found that a claimant is entitled to damages and applies if the claimant has been fundamentally dishonest whereas the latter applies in respect of a claim which was fundamentally dishonest and can be invoked after discontinuance of a claim. However, as Julian Knowles J noted in *LOCOG v Sinfield* [2018] EWHC 51 (QB), [2018] PIQR P8 at [60], although there is a theoretical possibility that a claim can be fundamentally dishonest without the claimant being so that will be a rare circumstance. Moreover, here the Defendant’s case is that the Claimant was fundamentally dishonest and that it is his dishonesty which has pervaded the claim.
13. At [62] and [63] Julian Knowles J focused attention on the effect of the dishonesty on the presentation of the case and on the interests of the defendant thus:

“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/or related claim (as defined in s.57(8)), 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)*, supra.

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”.

14. That approach echoes that of HH Judge Moloney QC which the Court of Appeal approved in *Howlett v Davies* namely of considering whether the claimant was dishonest and then considering the effect of that dishonesty on the claim and whether it went to the root of the claim or to an incidental question.
15. In *Pinkus v Direct Line* [2018] EWHC 1671 (QB), [2018] PIQR P20 HH Judge Coe QC sitting as a judge of the High Court had no difficulty in concluding that the deliberate exaggeration of the severity of genuine symptoms could be fundamental dishonesty on the part of a claimant. I respectfully agree and as explained below I am satisfied that the same approach can be applicable for the purposes of CPR Pt 44.16(1). The facts of each case must be considered but the deliberate exaggeration of symptoms is capable of being dishonesty going to a substantial part of a claim.
16. Similarly in *Muyepa v Ministry of Defence* [2022] EWHC 2648 (KB) at [390] Cotter J also had no difficulty in finding that the deliberate exaggeration of “symptoms and functional limitations for financial gain” was dishonest and that in the circumstances there it was fundamentally dishonest.
17. In *Muyepa* at [388] Cotter J set out in the following terms a three-stage process which he said could assist in determining whether dishonesty had been fundamental for the purposes of section 57:

“In cases of this nature when considering whether the Claimant’s dishonesty has been fundamental dishonesty in relation to the primary claim or a related claim I have found the following three questions (which have a degree of overlap) to be helpful

(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”.

18. Applying that approach in the circumstances of that case Cotter J found that the dishonest exaggeration of the effects of a minor NFCI was fundamental dishonesty saying at [394]:

“I find that the Claimant suffered a minor NFCI. After an initial period of trying to cope with the symptoms he decided to present a picture to the defendant, his friends, medico-legal experts and the court that he was suffering from a very severe NFCI which had left him greatly disabled. He fundamentally and persistently transformed the claim by dishonest exaggeration. His dishonesty tainted the whole claim from the outset”.
19. In *Iddon v Warner* [2021] EWHC 587 (QB) HH Judge Sephton QC sitting as a judge of the High Court adopted a similar albeit differently formulated three-fold approach saying at [93]:

“In my opinion, Mrs Iddon’s dishonesty amply justifies the adjective “fundamental”. I approach the issue from three directions. 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;”.
20. In context Cotter J and Judge Sephton were considering the dishonesty of particular claimants for the purposes of section 57 and were identifying approaches which could assist in identifying fundamental dishonesty rather than setting out a checklist which must be used in every case. As will be seen below I have had regard to the factors which both judges identified when determining the issue of fundamental dishonesty here. However, it is to be noted that whereas in cases where section 57 comes into operation there will have been a finding that the claimant is entitled to damages that will not be the position where, as here, an application is made under CPR Pt 44.16(1) after discontinuance of the claim. In the latter instance it remains relevant to have regard to the value in general terms of such claim, if any, as could have been validly maintained and the value of the claim being dishonestly advanced with the degree of any disparity in value being relevant to the question of whether any relevant dishonesty is fundamental. However, in such circumstances it is not necessary (and will often be neither practicable nor appropriate) to assess the value of the potentially valid claim in the same way and with the same degree of precision as could be done when applying section 57 at the end of a trial.
21. It is clear that a claimant who deliberately and dishonestly exaggerates a valid claim can be found to have been fundamentally dishonest for the purposes of section 57. That can be so even if the exaggeration only begins at some point after the commencement of proceedings. The deliberate concealment of a recovery can cause a claimant to be found to have been fundamentally dishonest in relation to a primary claim even if the recovery only occurs after the proceedings were started. Whether such dishonest concealment will amount to fundamental dishonesty will depend at least in part on the questions of timing and value identified by Cotter J. In my judgement the same approach is applicable to a determination of whether a claim is fundamentally dishonest for the purposes of CPR Pt 44.16(1). The authorities make it clear that the test is the same as noted above. Moreover, CPR Pt 44.16(1) uses the present tense. In the circumstances of the present case that means the assessment must be made either by

reference to the position appertaining immediately before the discontinuance or, which comes to the same thing, without having regard to the fact of discontinuance. The duration of the dishonesty will be relevant as to whether the claim is properly to be characterised as fundamentally dishonest but even a claim which was wholly genuine when commenced can become fundamentally dishonest for the purposes of CPR Pt 44.16.

The Background History.

22. The Claimant was born on 30th April 1983 in Ghana and enlisted in the British army in September 2009. On 19th October 2017 the Claimant was serving in 26 Engineer Regiment and was deployed to Estonia on Operation Cabrit. He remained there until 14th December 2017 when he was evacuated back to the United Kingdom on the basis of having suffered an NFCI. The Claimant was medically discharged from the army on 31st January 2020.
23. As already noted the claim was commenced in October 2020. The Particulars of Claim were dated 5th February 2021 and were verified by a statement of truth signed by the Claimant. They alleged negligence and breach of statutory duty on the part of the Defendant. It was said that the Claimant had suffered NFCIs together with a Moderate Depressive Episode. It was also contended that the depressive episode had interacted with the NFCIs and with underlying back pain making both those conditions substantially worse.
24. The Particulars of Claim were accompanied by a Provisional Schedule of Loss also verified by a statement of truth signed by the Claimant. This set out sums totalling £1,625,314 exclusive of damages for loss of earning capacity and was broken down as to:
 - i) Damages for pain, suffering, and loss of amenity: £55,000
 - ii) Damages for loss of congenial employment: £12,500
 - iii) Past loss of earnings: £26,514
 - iv) Past loss of benefits: £6,257
 - v) Past expenses: £27,996
 - vi) Interest of past losses: £395
 - vii) Future loss of earnings: £863,551
 - viii) Future loss of benefits: £74,141
 - ix) Future loss of pension: £214,544
 - x) Miscellaneous future losses: £344,416
25. The Claimant says that the figures in the schedule were drawn up by his lawyers and that he did not expect to receive the headline figure of £1.6m. In addition by the time of his witness statement to which I will now turn the Claimant had obtained

employment and so there would have had to have been a recalculation of and reduction in the loss of earnings claim if the proceedings had continued.

26. The Claimant served a witness statement dated 16th February 2022 and this was accompanied by a statement from his wife, Georgette Fynn-Mantey, dated 20th February 2022. Those statements were prepared after the Claimant had been observed and recorded on 10th September 2021 but before the footage or the fact of the surveillance had been disclosed to the Claimant.

27. In his statement the Claimant said that he continued to suffer from disabling pain markedly reducing his ability to walk and to undertake other activities. His description of his continuing symptoms and the impact of his injuries included the following:

“149. I struggle with poor balance due to pain in my feet/legs and cannot walk for long distances. I can walk around 50- 100 metres with the aid of a walking stick. I am able to walk without a stick but find this difficult and it dependent upon the weather and the amount of pain I am in at the time.

...

154. I often feel low and want to isolate myself to avoid being a burden or embarrassing anyone. I get very anxious at the thought of people I served with, particularly in Estonia, seeing me now and knowing what I have been reduced to as a result of my NFCI.

155. I continue to suffer with ankle. I find that this comes and goes. I attended physiotherapy for this prior to my medical discharge and I was given exercises and stretching techniques to help, which I still do to this day. I was also given gel inserts to put in my shoes which helped.

...

165. I am unable to drive long distances and can only comfortably drive for around 20 minutes or so.

...

171. Georgette has also had to take up all of the tasks around the house I had previously done prior to my injury. I would frequently cook before being injured but after sustaining NFCI the pains in my hands have meant I cannot do this. I also find it difficult to concentrate for longer periods of time due to the amount of pain I am in and therefore do not feel able to cook meals. My mood became so low I was concerned about using the knives in the kitchen as I was considering self-harm.

...

172. Georgette spends approximately 1 - 2 hours per day doing tasks, chores and childcare which I would have done, if it were not for my NFCI.

173. I previously helped with the household chores, which Georgette and I shared between us. More recently, I have been able to assist by folding the dry clothes and putting them away, but I cannot do any of the cleaning/washing that involves getting my hands wet due to the pain this causes.

174. I previously would wash the cars myself however cannot do this any longer and so my wife and I pay to have the car cleaned every other week at a cost of around £15 each time.

175. We have had to pay a handy man to do some general DIY around the house because I have difficulties with gripping. I would have previously done DIY myself. My wife does the majority of the maintenance tasks around the property, all of which I did before NFI.

...

180. I cannot take my children out to play in the colder weather. I will wrap up warm and go for very short walks with my family, however I cannot walk for very long distances as my feet will hurt too much. It therefore falls to my wife to take the children out for exercise.

...

183. I was issued with crutches and then progressed to using one walking stick, which I still require, though as stated above in certain circumstances I can walk without a stick."

28. In her statement Mrs Fynn-Mantey confirmed the Claimant's account saying:

"44. I would say that overall Michael's condition has improved a little since shortly after he sustained NFI. However, he still suffers with pain and low mood and does not do as much around the house or with the children as he did pre- NFI.

...

66. I have not really seen improvement in Michael's pain levels since his injury, however his ability to cope with it has become better over time.

...

68. We used to be a very active family before Michael's injury and went for long walks e.g. in the nearby forest. Now it is always me who takes the children out to the forest and to their parties and various clubs. This is because Michael cannot help me and, although he will wrap up warm and come out for short periods of time, he cannot go out for long.

69. He is still reluctant to engage socially.

70. We live in a big Army community and Michael does not want to face up to others and tell them about his injury. He upsets other people as he doesn't want to be around them which they take personally as they do not understand his injury/illness.

71. Michael cannot walk very far, whereas before his injury he was very physically fit.

72. Michael cannot take the kids out to play in the cold, therefore it is left for me to do as well and the children miss out on their relationship with him.

73. I do all the food/grocery shopping, whereas Michael would have done this before. ... With the pain Michael is in, he finds it hard to go to crowded places and he also struggles to walk very far. Michael uses a walking stick, so it is not practical for him to go and do shopping at the supermarket."

The Claimant's Presentation at Medical Examinations other than on 10th September 2021.

29. The Claimant was seen by a total of six medical experts from three different disciplines.
30. Dr Martin Baggaley is a consultant psychiatrist who was engaged on behalf of the Claimant and who saw the Claimant and his wife on 2nd April 2019. The Claimant told Dr Baggaley that he was in “unbearable pain” for most of the time; that he could not drive for more than 15 – 20 minutes; and that he spent most of his time at home because of the pain affecting him. The Claimant attended the interview with Dr Baggaley walking with two crutches.
31. Dr Baggaley saw the Claimant again on 11th March 2022 by way of a video consultation. The Claimant reported his physical symptoms as not having changed substantially since April 2019 and, at [4], Dr Baggaley recorded his account as being that:
- “Mr Mantey told me that the symptoms in his hands and feet have not substantially changed since my last review in April 2019. He gets constant pins and needles in his hands and feet and has sometimes a burning sensation.
- b) He said he cannot walk very far, about 100 yards maximum with a walking stick.
- c) He can walk without a stick although this is more difficult. He experiences cramping in his legs.
- d) He is only able to drive a short distance because of the pain.”
32. The Claimant told Dr Baggaley that he had “a very limited social life and avoids people”.
33. Mr Frank Cross is a consultant general and vascular surgeon who was engaged by the Claimant's solicitors. Mr Cross examined the Claimant on 5th July 2019. His report included the following observation at [20]:
- “I observed Mr Mantey walking with his stick, which took the form of a single elbow crutch. There is a mild antalgic gait and he leans on it fairly heavily. He swaps the stick from one side to the other fairly frequently and the ferrule shows signs of wear. Mr Mantey showed me some orthotic insoles which had been provided by the Army podiatrists to help with the pain in his feet.”
34. Mr Cross's record, at [88] and following, of the Claimant's account of his symptoms at the time of the examination included:
- “...Mr Mantey tells me that there has been no improvement in his symptoms. There is continuous pain in the hands and feet with numbness particularly involving the feet. There are occasion tactile symptoms in cold weather such that he has difficulty picking up small items, and there are tactile symptoms in the feet which makes it difficult for him to drive such as his HGV licence has been revoked by DVLA... His wife largely carries out the domestic tasks. Georgette Mantey was able to corroborate Mr Mantey's narrative at this point. I applied a DN4 Questionnaire and he scored 8/10 which is positive for neuropathic pain.
89. He walks with a stick because there is pain in both feet on walking. The pain in the feet is such that he cannot sit for long periods without having to get up and walk around;

I did, indeed, observe this whilst I was taking his history. He shifts the stick from one side to the other to relieve his feet alternately, but does not use crutches. He can walk slowly for about fifteen minutes at a time, after which he needs to stop and bend his knee and shake his foot to try and ease the pain. He does not seem to require additional domestic heating and has the home thermostat set at 19°C. He is still suffering pain in the right knee, resulting from a fall on ice whilst loading his TBT on 6th December 2017. He uses his stick for the knee injury as well as the non-freezing cold injury.

90. Mr Mantey described excessive sweating in the hands and feet which, he tells me, was not present before his cold injury. He did not describe allodynia in the hands, and not really in the feet, but he does get pain after walking for a few minutes, as described above.... Mr Mantey is not sure what he wants to do when he leaves the Army. At the moment, the constant pain in his hands and feet is such that he finds it difficult concentrating and is worried that he might not be able to take any courses successfully.”

35. The Claimant and Mrs Fynn-Mantey had provided Mr Cross with written statements which accorded with the account given at the examination in which Mrs Fynn-Mantey had confirmed the Claimant’s account. Mr Cross noted that when the Claimant had been examined at the Institute of Naval Medicine in 2018 Dr Gemmell had said that he could not rule out exaggeration on the part of the Claimant either because of the effects of his medication or somatisation or deliberate malingering. Mr Cross recommended that this be addressed by a psychiatrist but he thought exaggeration unlikely.
36. Mr Cross examined the Claimant again on 10th January 2022. The Claimant again attended walking with a stick and with a slight limp and he was again accompanied by his wife. Mr Cross noted that the Claimant did not describe any improvement in his condition. However, on examination Mr Cross did conclude that there had been some slight improvement with sensation in the Claimant’s hands having returned to normal.
37. Mr Andrew Quaile is a consultant orthopaedic and spinal surgeon. He examined the Claimant on 19th December 2019 at which stage he had been instructed on behalf of the Claimant to report on the effect on the Claimant of a back injury suffered in 2015. The purpose of this was to determine whether the Claimant would have been able to continue in the army even if he had not suffered a NFCI.
38. At [8.16] of his report Mr Quaile noted the Claimant as reporting that:
“... his walking tolerance is 20 – 50 metres before his pain will increase. ... he can go further but he has an increase in pain levels.”
39. Mr Quaile recorded his examination findings thus at [12]:
“12.1 On examination Michael Mantey presented with signs of biopsychosocial distress including the yellow flags of fear inhibition, catastrophising behaviour and hypervigilant behaviour.
12.2 He walked using a crutch in his left arm,
12.3 He walked slowly with a limp.
12.4 He was capable of forward flexion to his knees only.
12.5 He exhibited full extension,

12.6 He had a straight leg raise of 80° on the right and 60° on the left with some leg pain.”

40. At [14.4] Mr Quaile said that:

“the Claimant presentation would tend to signify more significant symptoms than would be expected from the medical records. He is walking using a crutch for no obvious orthopaedic reason and there are signs of biopsychosocial distress...”
41. In the light of that Mr Quaile concluded that there appeared to be a psychological element in the Claimant’s presentation.
42. Mr Michael Gaunt is a consultant vascular and general surgeon. He examined the Claimant on behalf of the Defendant on 3rd September 2021.
43. In his report, at [1.2], Mr Gaunt recorded the Claimant as saying that the symptoms in his hands and feet had not improved in frequency or severity since the original injury. At [16.1 (vi)] Mr Gaunt that the Claimant had told him that he had constant symptoms in his hands and feet which were exacerbated by the cold.
44. At [2.3] Mr Gaunt said:

“DIY/Housework/Driving – The Claimant reports he can drive short distances but has difficulty feeling the pedals under his feet. The Claimant reports he is unable to perform shopping but can accompany his wife. He cannot do any DIY or gardening, he cannot climb a ladder and cannot use a drill because of decreased sensation in his hands and feet.”
45. At [7.1] under the heading “general examination” Mr Gaunt said:

“Mr Mantey walked into the consultation with a limp and using a crutch. He was wearing 3-4 top layers including t-shirt, sweatshirt, a coat, jeans, and boots. Mr Mantey moved with difficulty and undressed slowly, and proceeded to the examination couch slowly and gingerly.”
46. At [7.4] when reporting on the measurement of the Claimant’s grip strength Mr Gaunt noted that “there appeared to be poor voluntary effort”.
47. At [15.10], [16.1], [16.1(vi)], and [17.6] Mr Gaunt noted respects in which the Claimant’s presentation on examination and his account of the injury showed inconsistencies or irregularities. Mr Gaunt also said, at [16.(iv)], that the Claimant’s symptoms and level of disability were in excess of what would have been expected for a cold injury of this level but took the view that these matters might be explained by the Claimant’s psychological state.
48. Dr Michael Isaac is consultant psychiatrist and neuropsychiatrist and he interviewed the Claimant on 6th September 2021.
49. At [13] Dr Isaac reported the Claimant as telling him that “he spent most of his time indoors `except for appointments””. At [15] he noted the Claimant as saying that his medication was “not 100%” and was going to be reviewed. Then, at [19], Dr Isaac noted the Claimant as saying that a neighbour had kept him busy especially during the Covid-19 lockdown. At [27] Dr Isaac reported that the Claimant “walked painfully, using a left elbow crutch” but that he showed no other abnormalities of behaviour and that there was “no evidence of exaggerated `pain behaviour””.

50. It will be seen that a consistent picture emerges from those reports following a total of seven examinations or interviews. The Claimant attended for examination using a crutch or a stick. He said that there had been no improvement of note in his condition since the first onset of symptoms. The Claimant reported continuing levels of significant pain. He said that his walking ability had been markedly curtailed and that he needed to use a crutch or a stick other than for short distances. That account was confirmed by Mrs Fynn-Mantey on the times when she was present. The presentation and account remained substantially the same including on the occasions in January and March 2022 and in the two examinations which took place within seven days of the events of 10th September 2021 to which I will now turn.

The Claimant's Actions on 10th September 2021.

51. The Claimant's home was under surveillance from 6.18am to 5.00pm on 9th September 2021. He was not seen leaving or entering the house at any point in that period.
52. The surveillance footage showed the Claimant at four periods of time on Friday 10th September 2021. Mr Gaunt and Mr Radford set out in their supplemental reports their impressions of what was shown in the footage. Their impressions accord with mine as to what is shown.
53. The first part of the footage runs from 8.25am to 8.50am. It shows the Claimant returning from having walked his daughter to school. He is in the company of a man said by the Claimant to be his neighbour, Mr Kunal Patel. The Claimant walks with a normal gait without limping and without using either a stick or a crutch. Mr Radford accepted in cross-examination that the Claimant was walking slowly and was kicking his right foot out when walking. However, although the Claimant was not walking fast the impression I formed was that he was walking at a normal gentle walking pace. While noting Mr Radford's assessment the impression I formed was that to the extent that there was any stiffness in the Claimant's gait this appeared only when he was walking with his hand in his pocket. The Claimant engaged in a relaxed and friendly manner with various passers-by. He kicked out a couple of times with his right leg towards a plant. This was done in the course of conversation with Mr Patel and amounted in substance to a swinging of his leg. When the Claimant did that he placed his full weight on his left leg. The Claimant was then seen carrying a garden parasol and subsequently wheeling a concrete parasol base bending his back at about 90° to do so. In this footage the Claimant was wearing a sweatshirt and substantial shoes or walking boots. Although Mr Patel was wearing a T shirt and shorts it is of note that several of the other persons appearing in the footage were wearing anoraks, hoodies, or jackets of various kinds. The Claimant did not appear to be either markedly over or under-dressed in comparison to them.
54. There was no evidence as to the distance from the Claimant's home to his daughter's school. However, the surveillance log reports that on the outward journey the Claimant left his home at 8.16am arriving at the school at 8.22am. He left the school at 8.25am and arrived home at 8.27am. I have noted that the Claimant appeared to be walking at a gentle but not slow walking pace. It follows that the Claimant cannot have walked a great distance but also that he had walked unaided for about eleven minutes and that he stood and walked on his drive for a further thirteen minutes.

55. The next part of the footage runs from about 10.39am to 11.43am when the Claimant is seen on and around the driveway of his house loading his car and preparing to travel to his appointment with Mr Radford. Again he is walking without a stick in a normal manner. He twists his back freely at times while in his car turning to reach from the front seat to the back seat.
56. The Claimant is seen driving the car away from his house and he is seen in the later footage driving into and out of the hospital car park. He and his wife said that although he drove at those points it was his wife who drove for the bulk of the journey to and from their home and the hospital in London. This is consistent with an account set out by the Claimant in an email to his solicitors on Monday 13th September 2021 saying that the reason he had been late for his appointment with Mr Radford was because of his wife's difficulties in driving in London and the need for them to swap drivers at the hospital. In the light of that I accept that Mrs Fynn-Mantey drove other than at the start and end of the journeys on that day.
57. There is footage from 1.52pm which is said to show the Claimant in the hospital car park before his appointment with Mr Radford but even on repeated viewing I could not see the Claimant in that footage. However, it is not disputed that the Claimant attended at Mr Radford's examination wearing a coat and using an elbow crutch.
58. In his report of 10th October 2021 Mr Radford recorded his findings on examination of the Claimant and the Claimant's presentation at that time. The Claimant's account of what was said differed to some degree from that of Mr Radford and I will address those differences below.
59. At [4.8] Mr Radford recorded the Claimant as blaming "his cold injury for his back problem as he cannot walk properly. He recorded the Claimant as saying he tried to avoid walking due to pain in his feet". In section 8 of his report Mr Radford set out the Claimant's account of his then current condition. The following parts are of note:
- "8.1 Mr Mantey told me he still has low back pain and indicated his lumbosacral junction at the site of his pain, worse on the right. He does not have symptoms elsewhere in his spine. He told me he has continued to use one crutch for walking since leaving the Army. He holds the crutch in his left arm and always uses it out-of-doors.
- ...
- 8.4 Mr Mantey told me he cannot walk more than 50 yards due to pain in his feet. He has to stop and sit before continuing at a slow pace. He said he is unable to run. He is able to go up and down stairs in a normal manner but uses a banister. At home he has had a second banister fitted.
- 8.5 Mr Mantey is able to go shopping. He goes to the supermarket with his wife and is able to push a trolley. He can lift and carry shopping bags.
- 8.6 Mr Mantey told me bending and lifting is painful for his back. He is able to kneel and can squat.
- ...
- 8.9 Mr Mantey is able to drive his car for 20-30 minutes. If he drives for more than half an hour, he develops pain beneath his feet and around both ankles.
- 8.10 Mr Mantey said that, since leaving the Army, his symptoms have not improved and if anything his NFCI symptoms have become worse."

60. Observing the Claimant walking Mr Radford noted him using his crutch in his left hand; walking on the outer borders of his boots; and limping on his right leg.
61. In his report Mr Radford noted that the Claimant had “very well-developed thigh musculature” and in his oral evidence he said that this was consistent with the Claimant being a relatively mobile adult at the time of the examination.
62. The next part of the footage showed the Claimant in the hospital car park returning to his car at 2.25pm wearing a coat; using a crutch; and limping.
63. Footage at 5.39pm shows the Claimant returning to his home. It shows him emerging from his house very shortly after his return having changed out of his sweatshirt into what appears to be a lightweight top and wearing open-toed sandals without socks. The Claimant then drove off and was shown returning at 6.47pm. In this footage the Claimant is only seen walking to and from his car parked on his drive but he does so a number of times apparently walking in a normal manner and without using a stick or crutch.

The Claimant’s Explanation.

64. The Claimant and Mrs Fynn-Mantey served supplemental witness statements in response to the video footage and the allegation of fundamental dishonesty and were cross-examined about these.
65. In his supplemental witness statement the Claimant did not express any disagreement with Mr Radford’s record of what had been said at the examination on 10th September 2021. However, in the course of cross-examination he took issue with what was recorded at [8.1] of Mr Radford’s report. The Claimant denied saying that he always used his crutch. He said that instead he had told Mr Radford that although he walked with a crutch or a stick most of the time he was able to walk shorter distances out of doors without one on those occasions when his medication had numbed his pain. He did not take issue with any other parts of the history recorded by Mr Radford and accepted that [8.4] accurately recorded what he had said.
66. The Claimant said that he had promised that he would walk his daughter to school on 10th September 2021 as he had not done so for some time and as the new school term had just begun. In order to prepare for that and for the medical examination he had stayed at home on 9th September 2021 building up his strength.
67. The Claimant went out on 10th September 2021 after that day of preparation; having taken his medication; buoyed up by the support and encouragement of Mr Patel; and working to push through his pain limits. He said that he had been wearing thermal underclothes under his trousers and top. The Claimant said that by the time he got to the examination with Mr Radford he was feeling the effects of his exertions in the morning and of the journey to London and that the effects of the medication were wearing off. This meant that he was limping in pain and needed to use a crutch. On the return journey the Claimant took a number of breaks and took further medication which meant that on his return he no longer felt cold and that he was able to walk without a crutch.

68. In his supplemental witness statement the Claimant had emphasised the benefit he derived from his medication as follows:

“15. With the medications I am able to live with my medical condition. My pain level is controlled by the medication and I can do things that I would not be able to do without the medication...

22. ... The truth is that my medications help me to gain some control of my injury. Without the medication my mobility would be restricted and I would not be able to mobilise as well as I did on the video on 10th September 2021. Without taking the medications I would not be able to mobilise beyond 50 yards and if I did so I would end up with so much pain ...

23.... I depend on my medications to get through the day. When I take the medications the pain disappears and I feel that I am alright.”

69. In his oral evidence the Claimant attributed his ability to walk without a stick not just to the medication but also to the support of Mr Patel and to the benefits of the Cognitive Behavioural Therapy work which he had done, both of which had assisted him in pushing through his pain barrier.

70. The Claimant said that he had good days and bad days. The former being those occasions when the medication numbed his pain and he was able to mobilise more and/or to walk without a stick. He was not able to say how frequently such good days occurred but said that nine times out of ten he was in a bad way such that even with the medication he needed to use a stick and that his movement was restricted by pain.

71. Mrs Fynn-Mantey confirmed her husband’s account of 10th September 2021. She added that the reason the Claimant could be seen being greeted by others as he was walking along was that they were pleased to see him after a long period when he had not been out and about. Mrs Fynn-Mantey was reluctant to specify how often the Claimant had a good day such that he was able to walk without a stick but she did say that 10th September 2021 was the only time before or since when the Claimant had been able to walk the distance to their daughter’s school and back without the aid of a stick.

The Views of the Expert Witnesses.

72. Mr Radford and Mr Gaunt provided further reports after viewing the surveillance footage and after considering the explanation set out in the supplemental statements from the Claimant and Mrs Fynn-Mantey. They gave oral evidence at the trial and their evidence was to the same effect. In addition Dr Isaac provided further reports commenting on the footage and on the supplemental statements.

73. Mr Radford said that there was “no orthopaedic explanation for the absence of any gait abnormality in the morning and evening of 10th September 2021 and [the Claimant’s] abnormal gait and use of a crutch during the afternoon of the same day.” In Mr Radford’s opinion the most likely explanation of the differences was that the Claimant was malingering. Mr Radford said he would not have expected the examination he undertook to have aggravated the Claimant’s symptoms. Similarly he did not believe that the medication taken by the Claimant could account for changes of the degree seen although he agreed that it was medically recognised that medication can have a placebo effect.

74. In the course of cross-examination Mr Radford was shown the walking stick with which the Claimant had attended court and he accepted that the ferrule of this showed signs of wear and was cracked.
75. Mr Gaunt noted that there was a marked contrast between the Claimant's actions as shown on the footage and his presentation and account to Mr Gaunt on 3rd September 2021. Mr Gaunt pointed in addition to the contrast between the Claimant's actions before and after attending Mr Radford and at the time of that attendance. In his opinion there was "no medical explanation for these variations in appearance and function within such a short timescale".
76. Although, like Mr Radford, Mr Gaunt accepted that medication can have a placebo effect he explained that the medication which the Claimant was taking could not explain the changes in presentation on any other basis. He explained that the medication operated as controlled release medication which provided a "steady state of pain relief throughout the day". It was "not rescue medication for acute episodes of pain".
77. In his report of 12th February 2023 Mr Gaunt addressed the Claimant's account that his condition had been aggravated either by his activities on the morning of 10th September 2021 or by those activities combined with the journey to attend the examination. He pointed out that not only was there a contrast between the Claimant's actions in the morning and his presentation to Mr Radford but also between that presentation and the Claimant's actions after his return home including a change into light clothes and in particular the wearing of "strappy sandals with no socks". Mr Gaunt said, at [3.20], that "such a variation in NFCI from normal to abnormal and then normal again within a matter of hours is non-physiological and highly atypical" and, at [5.4], that the change of clothing and footwear cannot be explained medically "for someone who experiences cold related symptoms in the feet".
78. The effect of considering the footage was to cause Mr Gaunt to change his opinion and to conclude that to the extent that the Claimant had suffered a NFCI it had been a minor one from which he had fully recovered.
79. Dr Isaac said that the Claimant's appearance and behaviour in the footage differed from the latter's presentation at the interview with him. Dr Isaac noted the limited value of surveillance footage in assessing the truth or otherwise of reported psychiatric conditions. However, he went on to explain that the validity of a psychiatric diagnosis is in very large part dependent of on the accuracy of the account given to the psychiatrist. This had the consequence that a conclusion that physical injuries had been fabricated or exaggerated would give rise to a fear that reported psychiatric symptoms had also not been reported truthfully which would, in turn, undermine the psychiatric diagnosis.

My Approach to the Assessment of the Evidence.

80. A central issue is the truthfulness or otherwise of the account given by the Claimant and his wife. In assessing the credibility and reliability of a witness's evidence I am entitled to have regard to that person's demeanour when giving evidence but considerable caution is needed in doing so. In that respect I keep in mind the warning given by Dunn LJ in *Armagas Ltd v Mundogas Ltd* [1985] 3 WLR 640 at 676C that it is "safer for a judge, before forming a view as to the truth of a particular fact, to look

carefully at the probabilities as they emerge from the surrounding circumstances, and to consider the personal motives and interests of the witness.”

81. Here in assessing the explanation which has been given by the Claimant and his wife I will take account of inherent likelihood. I will also take account of the experience and roles of Mr Radford and Mr Gaunt while remembering that those gentlemen are not infallible and that I must reach my conclusion in the light of the evidence as a whole.
82. The Claimant’s explanation for the contrast between his activity on the morning of 10th September 2021 and his presentation when seen by Mr Radford placed considerable weight on the role of his neighbour, Mr Patel. There was no evidence before me from Mr Patel and Mr Ward invited me to draw an inference adverse to the Claimant from the absence of Mr Patel.
83. On the second day of the trial a witness statement dated 22nd March 2023 was provided from Judith Ibe, the Claimant’s solicitor. The statement was very short and the substance of it was limited to two paragraphs each of only one sentence. Miss Ibe said that she had been asked to confirm why Mr Mantey’s neighbour had not provided a witness statement. Miss Ibe went on to say that she had misread Master McCloud’s order as limiting the witnesses that the Claimant was permitted to call to himself and his wife.
84. Mr Ward submitted that notwithstanding that statement I should still draw an inference adverse to the Claimant from the absence of evidence from Mr Patel. He said that it remained appropriate to draw the inference in light of the very limited explanation given in Miss Ibe’s statement and in circumstances where there had been no explanation of why steps had not been taken to obtain evidence from Mr Patel even in the course of the trial.
85. In *Efobi v Royal Mail Group Ltd* [2021] UKSC 33 Lord Leggatt explained, at [41], the approach to be adopted in considering whether to draw an adverse inference from the absence of a witness. In short this is to be a matter of common sense and rationality rather than of the application of legal criteria and “whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances.” Here a solicitor has said in a statement verified by a statement of truth that the reason evidence was not sought from Mr Patel was that solicitor’s misreading of a court order. In the light of that it is not appropriate for me to draw any adverse inference from the absence of Mr Patel. In particular I cannot infer that the reason he is not before the court is that if called he would not support the Claimant’s case. I have been provided with a different reason which I accept. The position is that I simply have no evidence from Mr Patel and can draw no inference as to what he would or would not have said if he had given evidence.
86. There is no supplemental evidence from the Claimant’s expert witnesses commenting on the effects of viewing the surveillance footage on their opinions. There is more scope for drawing an inference adverse to the Claimant in this regard. It is of note that Master McCloud gave permission for supplemental reports from the Claimant’s experts to be put in evidence. It is also of note that the Claimant’s response to disclosure of the footage was to discontinue his claim. However, even in this regard considerable caution is needed and I do not infer that the reason for the absence of expert evidence on behalf

of the Claimant is that, if called, his expert witnesses would agree with the current opinions of Mr Radford and Mr Gaunt.

87. The position is nonetheless that there is no lay evidence in support of the account of the Claimant other than that of his wife; that the opinions expressed in the reports of the Claimant's experts were formed without sight of the footage; and that there is no evidence from any expert who has viewed the footage contradicting the conclusions which Mr Radford, Mr Gaunt, and Dr Isaac reached after viewing that footage.

Conclusion on the Question of what the Claimant said to Mr Radford.

88. As noted above the Claimant said that he told Mr Radford that he did not always use a stick or a crutch and that there were occasions when as a result of his medication he could walk out of doors without a stick. He took issue with [8.1] of Mr Radford's report and in particular with the passage recording him as saying that he always used a crutch out of doors.
89. Mr Radford was cross-examined on this point. He said that he had asked the Claimant about his use of a crutch asking how often and where he used one and whether he did so always or intermittently. Mr Radford said that the Claimant had told him that he always used a crutch out of doors. Mr Radford added that he tended to be very specific about this question and that he was very clear about what he meant by always. He explained that because he provided medico-legal reports and was aware that surveillance evidence could be used he took care with this question and if necessary asked it more than once to clarify the position. Mr Radford said that this was not because he had any reason to doubt the Claimant's credibility but because it was his normal approach. Mr Radford did not accept that he could have been mistaken in his recording of the Claimant's account. It was also put to him that the Claimant had tended to generalise in his answers in the sense of saying in a general way what the overall position was rather than being precise. Mr Radford did not accept that as an interpretation of the Claimant's responses in his examination. In that regard it is to be noted that the Claimant's evidence was not that he had given a general answer but that he had said that there were occasions when he did not use a crutch and that Mr Radford had failed to record his account accurately,
90. I prefer the evidence of Mr Radford to that of the Claimant on this issue for the following reasons:
- i) The challenge to Mr Radford's report was first raised by the Claimant in the course of his cross-examination. It was not included in his supplemental witness statement even though that was expressly addressing the allegation of fundamental dishonesty and in particular the contention that he had deliberately given a false account to Mr Radford on 10th September 2021.
 - ii) Mr Radford was clear in his evidence that he regarded the question of whether the crutch was used all the time or intermittently as important and that he took particular care when ascertaining what account was being given on this matter.
 - iii) The extent of the difference between the Claimant's account of what he said and what Mr Radford recorded is of note. If the Claimant is right then not only did Mr Radford incorrectly record him as saying he always used a stick out of doors

when the Claimant had said that he did not always do so but he also failed to record that the Claimant had attributed his good days to the effects of his medication. It is inherently unlikely that if such an explanation had been given Mr Radford would have in some way have misunderstood what was being said or would have failed to explore and record it.

- iv) Mr Radford was involved in the matter as a consultant orthopaedic surgeon experienced in providing reports in connexion with litigation and with no personal interest in the issues.
- v) Mr Radford's account of what the Claimant told him is consistent with that given by the other medical experts when recording what the Claimant told them subject to the limited qualification that the Claimant told Dr Baggaley in March 2022 that he could walk without a crutch but that this was more difficult. None of the experts record the Claimant as saying that there were occasions when his medication meant that he could walk unaided let alone that the effect of the medication was to make his pain disappear. Indeed the reports give the clear impression that the Claimant's account was that he was suffering pain notwithstanding taking the medication.

91. Accordingly, I find that on 10th September 2021 the Claimant told Mr Radford that he always used a stick or crutch when walking out of doors and that he made no mention of occasional good days where he could walk unaided and which he attributed to the effects of his medication. Moreover, he did so notwithstanding the fact that he had within six hours of talking to Mr Radford walked his daughter to school and had walked home without using either a stick or a crutch.

Was there a Discrepancy between the Claimant's Account and Presentation to Mr Radford and his Actions before and after his Examination?

92. This point can be addressed very shortly. It is not substantially contentious save for the issue the Claimant took with [8.1] of Mr Radford's report and on which I have rejected the Claimant's evidence.
93. At his examination by Mr Radford the Claimant attended using a crutch and limping. He said that he always used a crutch when walking out of doors and that he could not walk more than 50 yards without stopping to recover. By way of contrast the footage shows that on the morning of the day when he gave that account the Claimant walked out of doors without a stick or crutch doing so in a normal manner and at a normal albeit gentle walking speed.
94. Thus there was a discrepancy between the Claimant's account and presentation to Mr Radford and his actions as shown on the footage. There were also discrepancies between those actions and the Claimant's presentation and accounts at other medical examinations in particular those on 3rd and 6th September 2021 and on 10th January and 11th March 2022.

Conclusion as to the Explanation for the Discrepancy.

95. The differences between the Claimant's presentation to Mr Radford and his actions before and after the examination cannot be explained medically whether as a matter of

an orthopaedic or vascular mechanism or as a pharmacological consequence of the medication used. It follows that the choice lies between a conclusion that the Claimant deliberately gave a false impression to Mr Radford or a conclusion that the Claimant's actions before and after the examination were due to a psychological effect which was caused by a combination of the support of Mr Patel; the benefits of the CBT treatment; and a placebo effect from the medication and which psychological effect had worn off at the time of the examination but which had been revived by the taking of further medication by the time of the Claimant's return home.

96. There are a number of factors which operate in support of the Claimant's explanation for the discrepancy.

- i) The Claimant's account was supported by the evidence of his wife. There was no scope for any misunderstanding and it follows that if the Claimant had been deliberately creating a false impression then his wife was party to that exercise.
- ii) The walking stick which was seen by Mr Cross and that which the Claimant was using when he came to court were both worn indicating use. On the Claimant's behalf Mr Holborn placed emphasis on this saying that the stick should not be regarded as a mere prop and that this evidence of use supported the Claimant's account.
- iii) There was no footage of the Claimant having left his home on 9th September 2021 even though his home was under surveillance from 6.18am to 5.00pm on that day and this is consistent with his account of having stayed at home all day to gather his strength.
- iv) The Claimant's account that his wife drove for the bulk of the journey to the examination is supported by the email which was sent on 13th September 2021. I have already said that I accepted the evidence of the Claimant and his wife on this point. The fact of Mrs Fynn-Mantey having driven on that occasion supports the Claimant because a possible explanation for this is that the Claimant was in pain. In addition it is to be noted that the footage shows the Claimant leaving the hospital car park at 2.31pm but not returning home until 5.39pm. The journey to the hospital had only taken 70 minutes and the fact of the return journey having taken just over 3 hours supports the Claimant's account that there had been a number of breaks on that journey.
- v) The Claimant engaged in twenty-four CBT sessions from July 2020. In addition he obtained work at the end of 2021 having been seeking work for some time before then. There is force in the contention that the Claimant would not have taken either of these steps let alone both if his claim was a false one intended to obtain as high an award of damages as possible.

97. Against those factors I take account of the following matters as indicating that the Claimant deliberately gave a false account to Mr Radford.

- i) The extent of the difference between the Claimant's actions on the footage and his presentation and account to Mr Radford. The difference in physical activity is marked. The matter is not one where the Claimant is shown in the footage performing in a marginally different way from that presented to Mr Radford but

one where there is a complete contrast. This reduces the credibility of any explanation other than deliberate fabrication.

- ii) A related point is that the difference between the Claimant's actions and his account to Mr Radford is such that it cannot be explained, as Mr Holborn, sought to do on the footing that the Claimant was simply failing to be sufficiently precise and that he was giving an account of what happened generally. I have already explained why I have accepted Mr Radford's evidence of what was said at the examination. In the light of that it cannot be said that the difference resulted from the Claimant generalising in his answers (which was in any event not the explanation he gave in his evidence).
- iii) It is significant that the Claimant's actions on his return from the examination were also different from his presentation to Mr Radford. As Mr Gaunt pointed out this cannot be explained medically and it is not credible even on the Claimant's account. As a matter of inherent likelihood if the exertions of the morning and of the journey to London had brought about a deterioration of the Claimant's condition such that he was limping and needed to use a crutch it is not credible that even the placebo effect of medication and a more leisurely return journey would have brought about the degree of recovery of function which was demonstrated at the time of his return home.
- iv) The Claimant's failure to mention to Mr Radford that there were times when he could walk out of doors without a stick and when his medication controlled his pain sufficiently for him to be able to do this is highly significant. On the Claimant's evidence now such occasions happened rarely but an honest account to Mr Radford would have included reference to these. Particularly is this so given that, on the Claimant's current account, there had been such an occasion on the morning of the examination when due to his medication and with other support the Claimant had been able to walk for some distance unaided. Indeed, the rarer the event this was then the more likely it would have been that the Claimant would have been struck by it and would, if honest, have mentioned it to Mr Radford. At most the Claimant's current account explains the difference between his presentation to Mr Radford and his actions in the footage. It does not explain his failure to tell Mr Radford of the variability in his symptoms and of the effect of his medication.
- v) The Claimant and his wife failed to mention in their witness statements of February 2022 the marked variability which they now say that there was in the Claimant's symptoms. The closest which the Claimant's statement comes to referring to this is the second sentence of [149] which I have quoted above and which does not amount to saying that there was variability such that there were occasions when the Claimant could walk unaided for some distance. It is also of note that in those statements there was no mention of the effects of the medication or of the support of Mr Patel both of which are now said to have been major factors in the Claimant's ability to walk unaided to and from his daughter's school on 10th September 2021. If there was variability in the Claimant's symptoms and functional ability which was attributable to those factors one would have expected both the variability and the cause to have been stated. Apart from a single reference in the account given to Dr Isaac the Claimant failed to mention Mr Patel's support at any stage before disclosure of

the surveillance footage (though the fact that the support of a neighbour was mentioned to Dr Isaac does reduce the force of this latter element).

- vi) Although Mrs Fynn-Mantey said that 10th September 2021 was the only time the Claimant had walked to and from his daughter's school the Claimant himself said that his symptoms were variable in that he had good days and bad days (albeit in the proportion of 1:9). The Claimant did not suggest that the variability in his symptoms and functional ability had only begun on 10th September 2021. It is, accordingly, of note that the Claimant failed to report that variability not just to Mr Radford but also to Mr Gaunt or Dr Isaac on 3rd and 6th September 2021 respectively. The Claimant also failed to report this to Mr Cross in January 2022. Although in March 2022 the Claimant told Dr Baggaley that he could walk without a stick with difficulty this was not, when seen in context, a report of variability such as the Claimant now asserts but was associated with the Claimant telling Dr Baggaley that his symptoms had not changed since April 2019 and that he had constant pins and needles.
 - vii) The Claimant's explanation for why he was walking without a stick or a crutch on the morning of 10th September 2021 was not credible. He said that this was because he had promised to walk his daughter to school. However, he did not suggest that he had promised to walk her to school without a stick nor that his use of a stick or crutch when walking her to school would have been in some way unacceptable to her or a breach of his promise. If the position was that the Claimant normally needed a stick or crutch to walk then one would have expected him to have taken that with him even if he found that he did not need to use it. The Claimant's account of matters involves him setting off on walking a longer distance than he normally did even with the use of a stick and choosing to do so without any walking aid when the reason for the expedition was not to walk without a stick but to accompany his daughter to school. This simply does not make sense.
98. The factors standing against the Claimant's explanation are overwhelming and I am satisfied that the more likely explanation for the discrepancy is that the Claimant deliberately presented himself in a false manner to Mr Radford and deliberately gave a false account of his symptoms at the examination on 10th September 2021.
99. I also find that on the balance of probabilities the Claimant deliberately gave false accounts in the examinations on 3rd and 6th September 2021 and in January and March 2022. In that regard there is no suggestion on behalf of the Claimant that his condition changed materially between 3rd and 10th September 2021 with the variability of symptoms only occurring on and after the latter date. Such a change is inherently unlikely. Moreover, in his examination of the Claimant on 3rd September 2021 Mr Gaunt noted that some of the physical findings on examination were irregular and that there appeared to be "poor voluntary effort" when the Claimant's grip strength was being measured. The Claimant's presentation and the account he gave were substantially consistent on all those occasions and having concluded that the presentation and account were deliberately false on 10th September 2021 I am satisfied that they were false on the other occasions. I will consider below whether the same conclusion should be reached in respect of the Claimant's presentation and account at the examinations in April, July, and December 2019.

Was the Claimant Dishonest?

100. This question can be answered shortly. The Claimant knew that he was not suffering from the symptoms and reduced functionality which he presented and reported to Mr Radford and to the other experts earlier in September 2021 and again in January and March 2022. He chose to report symptoms which he knew were false and from which he was not suffering. He did so in the context of a substantial damages claim. The only possible explanation is that he did so deliberately and with a view to enhancing the value of the claim. Such conduct was clearly dishonest.

Was the Claim fundamentally dishonest?

101. In light of those findings and having regard to Mr Gaunt's revised opinion I find on the balance of probabilities that the Claimant suffered a minor NCFI from which he had fully recovered at some point before September 2021. The Claimant dishonestly portrayed himself as having suffered a more serious injury which had a continuing and disabling effect doing so for financial gain.
102. As Cotter J explained in *Muyepa* it can be difficult to determine when the dishonest conduct started. Here in the light of my conclusion about dishonesty at the examinations from 3rd September 2021 onwards it began at the very latest on that date. There are potent arguments in favour of the view that it began at an earlier time. I have regard to the consistency between the accounts which the Claimant gave in 2019 to Mr Cross, Dr Baggaley, and Mr Quaile and those which I have found to have been false from September 2021 onwards. Moreover, regard must be had to Mr Gaunt's revised opinion that the Claimant suffered a minor NCFI from which he had fully recovered. The Claimant's reporting to Dr Baggaley, Mr Cross, and Mr Quaile of severe and disabling symptoms persisting at the same level of effect in April, July, and December 2019 respectively is not consistent with the only injury suffered having been a minor NCFI sustained in December 2017 from which the Claimant was progressing to a full recovery. This would tend to indicate that the Claimant had been giving the same false account throughout. However, I am conscious of the need for caution and I am alert to the possibility that the deception took the form of continuing to assert symptoms which had formerly been genuine but which had passed. I note that when examining the Claimant at the Institute of Naval Medicine in 2018 Dr Gemmell was concerned that there was an element of deliberate exaggeration. Again caution is needed in that regard particularly as there is no report from Dr Gemmell and his suspicions only appear from the quotations (albeit lengthy ones) of his views in the reports of others. In those circumstances and in particular in the light of Mr Gaunt's revised opinion I find on the balance of probabilities albeit with some reservation that the claim was dishonestly exaggerated when it was commenced in October 2020 nearly three years after the initial minor injury was suffered.
103. However, even if the Claimant's dishonesty only began at the start of September 2021 (and I am satisfied that is the very latest time by which the dishonesty had begun) that was still comparatively early in the life of the action. It was at a stage when evidence and in particular expert evidence was still being gathered and well before a trial date had been identified.
104. That dishonesty tainted the whole of the claim. It went to the heart of the claim; it substantially affected the presentation of the case as a whole; and led to a significant

inflation in the claim's value. The claim was being advanced either at the outset or at the latest from September 2021 on the false footing that the Claimant was suffering from an enduring and disabling condition. That characterisation of the claim and of the effect on the Claimant affected in particular the proper value of the damages for pain, suffering, and loss of amenity and the future financial loss claim. It was also relevant, though to a lesser extent, to the claim for past losses. I take account of the points that the figure of £1.6m set out in the provisional schedule of loss was a headline figure and that the Claimant had accepted that his obtaining of work would lead to a reduced claim for future loss of earnings. Nonetheless, the claim as falsely presented either at the outset or from September 2021 onwards was of a different order of magnitude from that which could have been properly advanced in respect of a minor NFCI from which there had been a full recovery.

105. Putting it shortly there was dishonesty as to a central feature of the case namely the extent and continuing effect of the Claimant's injuries. This would have the effect of substantially increasing the value of the claim over the value of any properly tenable claim and pervaded the presentation of the case from at the latest early September 2021 onwards. In those circumstances I find the claim to be fundamentally dishonest.

The Standard of Proof applied.

106. In their skeleton argument Mr Ward and Mr Richards for the Defendant had invited me to indicate whether I was satisfied to the criminal standard of proof in respect of my findings of deliberate exaggeration and fundamental dishonesty. In his closing submissions Mr Ward explained that this point while not being abandoned was not being pressed and as will be apparent from the foregoing parts of this judgment I have approached my findings by reference to the balance of probabilities.