Neutral Citation Number: [2020] EWHC 2095 (QB)

Case No: D04YP162/BM90151A

**In the High Court of Justice**
**High Court Appeal Centre Birmingham**
**On appeal from the Stoke-on-Trent County Court**
**Order of HHJ Rawlings dated 1 August 2019**
**County Court case number: D04YP162**
**Appeal ref: BM90151A**

Birmingham Civil and Family Justice Centre
Priory Courts, 33 Bull Street,
Birmingham B4 6DS

Date: 31/07/2020

**Before** :

**MR JUSTICE MARTIN SPENCER**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **DAVID CRAIG PEGG** | **Claimant and Respondent** |
| **- and -** | |
| **1. DAVID WEBB** | **Defendants and Appellants** |
| **2. ALLIANZ INSURANCE PLC** | |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr Matthew R. Smith (PSQB)** (instructed by **Keoghs Solicitors**) for the **Defendants/Appellants**

**Miss Chetna Parmar** (instructed by **Sheldon Davidson Solicitors** ) for the **Claimant/Respondent**

Hearing dates: 14 July 2020

- - - - - - - - - - - - - - - - - - - - -

# APPROVED JUDGMENT

**Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10.30am on 31 July 2020.**

**MR JUSTICE MARTIN SPENCER**

## Introduction

1. Pursuant to permission granted by myself on 15 June 2020, the second Defendant, Allianz Insurance Plc (hereinafter "the Defendant"), appeals against the order of HHJ Rawlings dated 31 July 2019, sitting in the County Court at Stoke-on-Trent. Somewhat unusually, the Defendant appeals against an order whereby the claim was dismissed. However, despite dismissing the claim, the learned judge ordered the Defendant to pay 60% of the Claimant's costs and this is effectively an appeal against that costs order. The reason for the unusual costs order made by the judge was that the Defendant had run a case of "fundamental dishonesty" against the Claimant and this had meant that what would otherwise have been a one-day fast-track claim became a two-day multitrack claim. There are two grounds of appeal: first that the learned judge erred in failing to make a finding of fundamental dishonesty against the Claimant; secondly, in any event, the costs order made was wrong in principle.

## Background facts

2. The background facts are that Mr Pegg, the Claimant, was the front seat passenger in a BMW X5 motorcar being driven by one Steven Farthing (his brother-in-law and his boss) when, on 2 June 2016, there was a collision when the first Defendant, Mr David Webb, drove his Citroen DS5 motorcar into the rear of the BMW motorcar which was stopped and waiting to turn left into Sutherland Road. This collision was wholly the fault of the first Defendant, Mr Webb. The claim was for the injury and losses alleged by the Claimant to have been suffered as a result of the accident, namely soft tissue injuries to the neck, left elbow and left knee together with physiotherapy charges of £426. At trial, the Claimant relied upon a medical report from a Dr Shakir dated 24 August 2016 in which Dr Shakir gave a longevity to those injuries of six months post-accident. Thus, even at its highest, this was a low value claim.

3. The principal line of defence on the part of the Defendant, which had the conduct of the defence, was that this was a bogus claim based upon a collision which never happened or, if it did occur, was contrived between the parties. Having heard the evidence, the learned judge came to the conclusion that the Claimant had proved his case and that there was a genuine collision and that the Claimant was a front seat passenger in the BMW motorcar as alleged. He found that this was not a dishonest claim with no collision having taken place or with any collision having been staged with the Claimant's knowledge. The Defendant does not appeal against that finding.

4. However, at trial the Defendant had a second string to its bow, namely in relation to the damages claimed by the Claimant based upon the report of Dr Shakir. Clearly, if the learned judge had found that the collision was bogus, it would have followed that Mr Pegg's claim to have been injured and the information he gave to Dr Shakir about his injuries would equally have been wholly bogus. Independently of this, though, the Defendant alleged that the Claimant had so exaggerated his injuries and had so misled Dr Shakir, both in what he said and what he failed to say, that he had been fundamentally dishonest in relation to his injuries even on the basis that there had been a genuine collision on 2 June 2016. To a certain extent, the learned judge acceded to the Defendant's submissions in that he found that there had indeed been a failure on the part of the Claimant to give Dr Shakir relevant information and what he

told Dr Shakir about the longevity of the injuries was inconsistent with his own evidence at trial such that no reliance could be placed upon Dr Shakir's medical report and, without medical support, the claim had to fail. However, despite this, the learned judge did not make a finding of fundamental dishonesty and the Defendant's complaint is that, in failing so to find, the learned Judge ignored or failed to take adequate account of matters pointing to fundamental dishonesty which were "staring him in the face" and he failed to follow his own findings to their logical conclusion.

5. In order fully to understand the Defendant's case, it is necessary to explore the history in a little detail. The accident took place on 2 June 2016. The Claimant sought no medical help of any kind at the time: he did not attend upon his own GP, nor did he attend the hospital walk-in centre or Accident and Emergency Department. The Claimant did, though, instruct Winn Solicitors and they arranged for the medical examination and report of Dr Shakir and a course of physiotherapy. The date of the initial assessment and treatment session by the physiotherapy clinic (On Medical Limited of Heaton Road, Newcastle-upon-Tyne) was 23 June 2016 (see paragraph 40 of the Claimant's witness statement), 3 weeks after the accident. There is an invoice from On Medical to Winn Solicitors dated 20 July 2016 showing that, after the initial assessment and treatment, the Claimant underwent three further treatment sessions and finally there was a discharge evaluation. Thus, by the time of the issue of the invoice, on 20 July 2016, the physiotherapy treatment was complete and the Claimant had been discharged.

6. In the meantime, documents disclose that, on 2 July 2016, exactly one month after the index accident, the Claimant had a fall when he rolled his quad bike. Then, four days later on 6 July 2016, the Claimant was lifting his quad bike and felt sudden onset of pain to his left lower back. He attended the emergency department of the University Hospital of North Staffordshire at 9.10pm complaining of pain in his lower back and his left leg. The diagnosis was "musculoskeletal (non-trauma)" and he was discharged with a prescription of Diazepam and Codeine with referral to physiotherapy. Two days later on 8 July 2016, the Claimant attended the Walk-in Centre at Stoke-on-Trent. The note of that attendance was as follows:

> "PC [presenting condition] – injury left lower back/hip
>
> HPC [history of presenting condition] – 6/7 [6 days] ago fell rolled quad bike – no injury noted at time but noticed stiffness to left leg. Lifting quad bike 2/7 [2 days] ago and felt sudden onset of pain to left lower back. Attended A & E and advised disc injury. Today S/B [seen by] physio and stated pelvis not working on left side – felt improvement for approx. 20 mins then pain returned. Taken diazepam and co-codamol. Paracetamol and Nurofen and using Voltarol gel with very little improvement. Attended today as would like a pelvic and hip x-ray to exclude fracture.
>
> PMH [previous medical history] slipped to lumbar spine; diabetes, arthritis – bi-lateral ankle surgery
>
> Medication – Metformin; codeine; analgesia as above

> Allergies – nil known
>
> O/E [on examination] weight bearing with limp to left leg. Walking with foot in external rotation but patient reports actively doing this to make walking less painful. Altered sensation to left thigh but no change since being examined by doctor in A & E. Anal tone intact. No bladder or bowel disfunction. No shortening or abnormal external rotation to left leg – some external rotation to ankles bi-laterally post-surgery to ankles. No bony tenderness to hip or pelvis – pelvis stable on rocking and no crepitus or increased pain. Able to internally and externally rotate at hip. Able to flex and extend at hip. Painful on all movements due to back injury.
>
> Impression – sciatica/lower back injury as diagnosed in A & E – no clinical indication for hip or pelvis x-ray at this time.
>
> Plan – patient reassured – advised contact 111 over weekend if unable to tolerate pain for analgesia review. Understood by patient and happy with this."

It may be commented that the failure of the Claimant to make any mention of the injuries arising out of the index road traffic accident a month earlier and his alleged ongoing symptoms as a result of that accident is something of a "deafening silence".

## The Medical Evidence

7. As stated, two weeks later on 20 July 2016, the Claimant was discharged from further physiotherapy treatment and the next significant event is that, on 17 August 2016, he attended on Dr Nadeem Shakir for the medical examination arranged by Winn Solicitors Limited through Premex Services Limited, a well- known agency for the provision of medical reports in road traffic accident cases. Dr Shakir's report indicates that the time spent with the Claimant was 10 minutes. Dr Shakir's report is dated 24 August 2016 and is set out in standard sections. Section B.3 relates to the history with section B.3.1 describing the history of the incident in question. B.3.2 deals with treatment and states:

> "*I have been told that following treatments have been received as a result of the index accident*: Mr Pegg did not receive any treatment at the scene of the accident. After the accident he travelled to work in the same vehicle. He attended physiotherapy. He has had 4 sessions. <u>The treatment is ongoing</u>. He took painkillers regularly for the first four weeks and then as required. He has been doing exercises suggested by the physiotherapist." (emphasis added)

Section B.3.3 is headed "**Past medical history**" and states:

> "*Mr Pegg informed me of the following medical history*: there is no significant history of relevant musculoskeletal or psychological problems."

Section B.4 of the report deals with the injuries/symptoms and present position reported by the Claimant. There were five aspects to this:

1) Shock and shakiness ( three days);

2) Pain stiffness and discomfort to the neck: "He developed moderate pain, stiffness and discomfort in the neck two days after the accident. These improved and are now mild to moderate and intermittent."

3) Pain stiffness and discomfort to the left elbow: "He developed moderate pain, stiffness and discomfort in the left elbow 3 days after the accident. These improved and are now mild to moderate and intermittent."

4) Pain, stiffness and discomfort to the left knee "He developed moderate pain, stiffness and discomfort in the left knee on the day of the accident. These improved and are now mild to moderate and are intermittent."

5) Fear of travel "Mr Pegg described no issues related to travel anxiety as a result of the index accident."

8. Section C of Dr Shakir's report deals with the consequences of the accident in relation to employment and domestic circumstances. So far as the former is concerned, Dr Shakir states:

> "Mr Pegg states that his occupation is as an office worker for 40 hours per week. Mr Pegg did not take any time off work due to financial reasons. Mr Pegg explains that he still has difficulty with bodily movements required to perform his duties."

Dr Shakir records ongoing problems with sleep, ability to manage personal care, ability to do DIY, shopping, carrying bags and lifting items, restriction to social life and restriction to exercise and walking. All these are expressed to be "improved and now mild to moderate". Section D deals with examination and Dr Shakir reported finding muscle spasm and soft tissue tenderness in the neck. The report states that movement of the left elbow appeared to cause pain and discomfort as did movement of the left knee. Section D.3.2 covers diagnosis and prognosis and in respect of the three areas of injury, the neck, the left elbow and the left knee, Dr Shakir recommended further physiotherapy, namely a further six sessions making ten in total and gave the opinion that symptoms in relation to all three areas would fully resolve six months from the date of the accident. Finally, at section G.1, Dr Shakir separately signed the following endorsement: "I confirm that I have verified with the claimant the facts as referred to in this report."

## The Proceedings

9. The proceedings were issued on 11 December 2017 and were accompanied by Particulars of Claim, dated 22 November 2017 and with the statement of truth signed personally by the Claimant. At paragraph 5 under Particulars of Injury it is pleaded:

> "The claimant sustained the following injuries: -

a) Injury to the neck which resolved six months from the date of the accident;

b) Injury to the left elbow which resolved six months from the date of the accident;

c) Injury to the left knee which resolved six months from the date of the accident."

The Particulars of Claim also asserted that the Claimant sustained the injuries as set out in Dr Shakir's medical report which was appended to the Particulars of Claim.

10. On 27 April 2018, the Claimant signed his witness statement in the proceedings in which he stated, among other things, the following in relation to his injuries:

> "22) For the first few weeks after the accident my symptoms continued to get worse and worse. My knee and neck constantly ached and this restricted my movements significantly. My elbow wasn't as bad, it was still sore but it wasn't the same kind of constant pain.
>
> 23) I did undergo a course of physiotherapy and this did assist my recovery. I will go into more detail about this below.
>
> 24) After the first month or so following the accident my injuries levelled out for another month or so before starting to gradually improve.
>
> 25) I took pain relief on a regular basis for the first four weeks and then as and when needed for another few months.
>
> 26) I started a course of physiotherapy treatment and that really helped. I could feel a real improvement by the time I had a few sessions.
>
> 27) I carried on with the exercises at home because the pain in my knee, neck and elbow would still flare up occasionally.
>
> …
>
> 34) I was examined by Dr Shakir who wrote a report on my injuries on 24 August 2016. This was approximately 2.5 months after my accident.
>
> 35) Dr Shakir discussed the accident and my injuries with me as well as performing an examination. It was Dr Shakir's opinion that my neck, left elbow and left leg would resolve by six months from the time of the accident.
>
> 36) I accept Dr Shakir's opinion and will rely upon the same for the purposes of having my damages assessed. "

At paragraph 40 of his witness statement, the Claimant, having confirmed that his course of physiotherapy with On Medical Limited had been arranged by Winn Solicitors, stated that he was contacted by telephone by On Medical Limited for the purposes of a triage assessment on 23 June 2016. He wrongly stated that he had undertaken a course of five sessions of treatment in total: the invoice from On Medical Limited indicates the number of treatment sessions was four.

## The Trial and Judgment of HHJ Rawlings

11. Thus it was that the matter came before Judge Rawlings for trial. When the Claimant gave evidence, he initially confirmed the contents and accuracy of his witness statement and confirmed the accuracy of the report of Dr Shakir. However, in the course of cross-examination, Mr Pegg changed his evidence and conceded that he had made a recovery from his neck injury within three to four weeks of the accident and a recovery from his elbow injury within four to five weeks of the accident. Furthermore, disclosure of the Claimant's GP records showed that he had reported ankle pain on 12 June 2013, foot pain on 14 October 2013 and knee pain on 8 July 2014. He had also reported low back pain on 11 September 2015. Thus, the Claimant was unable to say for how long he had suffered symptoms in his knee as a result of the accident because of his pre-existing injury. This is reflected in paragraph 16 (m) of the judgment where the learned judge states:

> "(m) At trial, Mr Pegg's evidence as to the longevity of his injuries conflicted with the prognosis in Dr Shakir's medical report, the Particulars of Claim and Mr Pegg's first two witness statements, all of which placed the longevity of his injuries at six months, but at trial, Mr Pegg said three to four weeks for recovery from his neck, and four to five weeks for his elbow, and he could not say for his knee because of his pre-existing injury. That, says Mr Smith [counsel for the defendant] is a complete change of his case in relation to the longevity of his injuries and an indication of dishonesty."

12. At paragraph 19 of the judgment, Judge Rawlings stated that he had come to the conclusion that Mr Pegg had proved his case that there was a genuine collision, on the balance of probabilities, and that Mr Pegg had not pursued a dishonest claim on the basis that there was no collision or that the collision was staged with his knowledge. The learned judge set out his reasons in a number of sub-paragraphs and it is sub-paragraph (g) which is relevant for present purposes. This states as follows:

> "(g) If Mr Pegg was asked about previous relevant musculoskeletal injuries by Dr Shakir, then, in my judgment, he should have disclosed, firstly, his previous problems with his knees, and possibly also his back and feet, and the accident that he had in falling off a quad bike in early July 2016, around five weeks or so before he was examined by Dr Shakir. Mr Pegg says, in cross-examination, he could not recall Dr Shakir asking him the question. That is unsurprising. However it is clear from the report of Dr Shakir that he is recording that he did ask that question and is setting out what Mr Pegg's response was and I find that Dr Shakir did ask Mr Pegg about previous

> relevant injuries. Nonetheless, I cannot be sure as to precisely what that question was ('relevant injuries' is somewhat subjective) I am not satisfied that the failure on the part of Mr Pegg to disclose to Dr Shakir previous problems he had had with his knees, and possibly back and feet, was dishonest, that is an attempt by him to hide from Dr Shakir that the injuries he was suffering from may be wholly or partly due to causes other than the index collision. The quad bike accident is different, it took place on 2 July 2016, four weeks after the index accident and six weeks before Mr Pegg was examined by Dr Shakir. I accept that, on the balance of probabilities, Mr Pegg knew that it was relevant to tell Mr Shakir about the quad bike accident but he did not do so."

The clear inference from this paragraph is that the learned judge considered that the failure by the Claimant to tell Dr Shakir about the quad bike accident was dishonest.

13. At paragraph 19.(i), Judge Rawlings dealt with the discrepancy about the longevity of the injuries and stated:

> "(i) As for discrepancies between Mr Pegg's evidence at trial about the longevity of his injuries compared to what was contained in Dr Shakir's report, I am not satisfied that evidence was dishonest. I accept Mr Stephens' point that, after three years, Mr Pegg may have trouble in recalling the precise longevity of what were relatively minor injuries."

I confess that I do not understand this paragraph in the judgment. It was not so much Mr Pegg's evidence at trial about the longevity of his injuries compared to what was contained in Dr Shakir's report which was being alleged to be dishonest, but his endorsement of Dr Shakir's report in the Particulars of Claim, his witness statement and at the start of his evidence when, as he later admitted in cross-examination, the longevity of his injuries had in fact been significantly shorter.

14. Judge Rawlings returned to these matters at paragraph 24 et seq of his judgment where he dealt with the Claimant's injuries. Having referred to Dr Shakir's report, the learned judge stated:

> "26. The Particulars of Claim of Mr Pegg and both of the witness statements of Mr Pegg proceed upon the basis that what is set out in Dr Shakir's report is correct, and that is that Mr Pegg recovered from all three injuries six months after the index collision. As for the evidence of Mr Pegg at trial, when he was asked how long it took him to recover from the injuries: for the neck, he said three to four weeks from the accident, for the elbow that physiotherapy had helped, he thought he'd recovered from the elbow injury around four to five weeks after the accident, for his knee, he said that the physiotherapist had told him there was nothing she could do for him because his knee was already damaged before the accident. He could not, therefore, say when, if at all, he recovered from the injury

caused to his knee by the index accident, because he had other issues with his knee which pre-dated the accident and he was unable to separate out the symptoms caused by the index accident from the pre-accident causes.

27. Two matters emerged from the disclosure of Mr Pegg's medical records. He was experiencing problems with his knees, lower back and feet prior to the index accident, and, on 6 July 2016, Mr Pegg visited the emergency department of North Staffordshire Hospital, complaining of pain in his lower back and left leg, and subsequently attended a walk-in centre, on 8 July 2016 when he confirmed that on 2 July 2016, around four weeks after the index accident he had fallen off and rolled a quad bike. He did not notice an injury at the time but noticed stiffness to his left leg and the onset of pain to his lower back. He attended A & E which advised of a disc injury. He complained to the walk-in centre he had pain in his pelvis.

28. My findings on the evidence, as to Mr Pegg's injuries are as follow:

(a) When Mr Pegg was examined by Dr Shakir on 17 August 2016, two months and 15 days after the accident, he had some injuries, namely: unrestricted movement of his neck but with pain on that movement. There is some objective evidence of that injury, because a muscle spasm was noted by Dr Shakir. Unrestricted movement of the knee, but pain reported on movement of which there was no objective evidence. Unrestricted movement of the elbow, but pain reported on movement, of which there was no objective evidence;

(b) So far as the injury to Mr Pegg's left knee is concerned, Mr Pegg accepts that he had existing problems with his knees before the index accident. He also said that the physiotherapist had told him that she could not do anything for his left knee because of the pre-existing injury. Mr Pegg did not tell Dr Shakir about either his existing problems with his knees or the quad bike accident that occurred on 2 July 2016, the records for which say that he had injured his left leg in the quad bike accident;

(c) At trial, Mr Pegg said that he could not say when he had recovered from the injury caused to his left knee by the index accident because of his pre-existing problems with his knees;

(d) I come to what I considered to be the inevitable conclusion that as far as Mr Pegg's left knee is

concerned, whilst he may have banged his knee in the index accident which may have caused some pain, he has been unable to prove either the nature or the extent of the injuries suffered to his left knee as a result of the index accident because he is unable, himself, to describe the nature and extent of the injury caused by the index accident to his left knee as separate from his pre-existing problems, and Dr Shakir's report does not assist because Dr Shakir was unaware of his existing knee problems and the accident on the quad bike on 2 July 2016, when Mr Pegg reported to the hospital walk-in centre that he had suffered an injury to his left leg when he fell off the quad bike;

(e) So far as the neck injury is concerned, the medical report of Dr Shakir noted, in examination, full movement of the neck but pain associated with such movement reported to him by Mr Pegg, and a muscle spasm. On the face of it, the muscle spasm is some objective evidence of Mr Pegg having an injury to his neck on 17 August 2016 and Dr Shakir suggested that Mr Pegg would recover from his neck injury six months after the examination;

(f) Dr Shakir's medical report also noted, on examination, full movement of the elbow, but pain reported as associated with that movement, there was no objective evidence of injuries such as, for example, the muscle spasm in Mr Pegg's neck;

(g) At trial, when asked how long his neck and elbow injuries lasted, Mr Pegg said the elbow four to five weeks and the neck three to four weeks. Mr Smith says that the evidence given by Mr Pegg, at trial, regarding the longevity of his neck and elbow injuries is damning. Mr Pegg was clear as to how long it took him to recover, at trial, from those injuries and that evidence contrasts starkly with the prognosis given by Dr Shakir;

(h) Mr Stephens says that it is not surprising that around three years or so after the index event, Mr Pegg is unable to recall precisely when he recovered from his injuries, particularly when, on any view, those injuries were relatively minor. Mr Stephens says that I should therefore take the medical report of Dr Shakir as the contemporaneous and reliable evidence as to when Mr Pegg recovered from the injuries to his neck and elbow.

> (i) I am not satisfied that Mr Pegg can rely upon the information contained in Dr Shakir's medical report as to the nature and extent of the injuries to his neck and elbow. I accept Mr Stephens' point that Dr Shakir's report, prepared two months and 15 days after the accident is more likely to be accurate than what Mr Pegg said at trial around three years later, but nonetheless, there is a significant difference between the recovery period suggested by Mr Pegg at trial, and the six month recovery period suggested by Dr Shakir which, to an extent, undermines the reliability of the information contained in Dr Shakir's report. More importantly, Mr Pegg did not tell Dr Shakir about the quad bike accident that occurred on 2 July 2016, a month after the index accident and some six weeks before Dr Shakir examined Mr Pegg, and whilst the injuries reported by Mr Pegg to the hospital and walk-in centre, as a result of the quad bike injuries, were injuries to his back, left leg and hip, I am unable to rule out the real possibility that any injuries suffered by Mr Pegg in the index accident to his neck and left elbow were at least exacerbated by the quad bike accident of which Dr Shakir was entirely unaware. Rolling a quad bike may cause or exacerbate injuries to many parts of the body. Pain from one part of the body may refer to another part of the body, for example, an injury to the back often refers to the neck and vice-versa;
>
> (j) Without Dr Shakir having an opportunity to consider whether the accident involving the quad bike could have had any effect on the injuries to Mr Pegg's neck and elbow, or the pain he was complaining of or experiencing from them, when he examined Mr Pegg I do not think I can rely upon Dr Shakir's report as reliably setting out the nature and extent of the injuries suffered by Mr Pegg to his neck and elbow as a result of the index accident.
>
> 29. That means that, in respect of each of the injuries, I've not found that Mr Pegg has been dishonest, but I have found that he has not made out his case in relation to the nature and extent of the injuries he suffered as a result of the accident which means his claim must be dismissed."

## The Submissions on Appeal

15. On this appeal, Mr Smith, for the Defendant, submits that the learned judge failed to follow through his reasoning in dismissing the claim to what Mr Smith said was or should have been its logical conclusion, namely that the Claimant had been fundamentally dishonest in relation to the injuries which he alleged he had sustained as a result of the collision. He submitted that, in addition to the finding of dishonesty

in relation to the Claimant's failure to disclose to Dr Shakir the quad bike accident, the learned judge should also have made a finding of dishonesty in relation to the history of previous injuries given to Dr Shakir. The learned judge should not have refused to make a finding of dishonesty on the basis that he could not be sure as to precisely what question had been asked when there had been a complete failure to disclose anything at all by the Claimant in relation to his previous injuries and Dr Shakir had specifically endorsed the report with the confirmation that the facts referred to in the report had been verified with the Claimant which included: "There is no significant history of relevant musculoskeletal or psychological problems." He further submitted that the learned judge's reason for not making a finding of dishonesty in relation to the Claimant's evidence about the longevity of the injuries makes no logical sense. At trial, the Claimant was saying in clear terms that the effects of the accident had been spent within five weeks. Whatever the Claimant remembered three years after the accident at trial, if that evidence was accurate and true, then it completely undermined everything that he had been telling Dr Shakir at the interview on 17 August 2016. By then, two and half months after the accident, he should have been saying that he had no residual symptoms in the neck or elbow, the symptoms in his left leg were similar to those pre-existing before the relevant accident and in any event there had been a subsequent accident in relation to the quad bike. Thus, if the Claimant knew that he had recovered within five weeks of the accident at trial, then he would have known this at all previous material times including when he saw Dr Shakir, when he signed the Particulars of Claim, when he signed his two witness statements and when he gave evidence initially at trial. In addition, Mr Smith submitted that there is a clear lie in what the Claimant told Dr Shakir in that he said that his physiotherapy treatment was ongoing when the documentation shows beyond peradventure that he had been discharged from physiotherapy on 20 July 2016. Reliance upon the muscle spasm was misplaced because, given the intervening accident involving the quad bike - an accident which, on its face, was significantly more serious than the index accident because the Claimant had attended A & E and then the Walk-in Centre after the quad bike accident, but had sought no medical treatment at all after the index accident, - it could have been attributable to the quad bike accident. Mr Smith submitted that there was such a body of evidence that no reasonable judge, considering that evidence properly, could have failed to come to the conclusion that, in relation to the injuries allegedly sustained in the accident, the Claimant had been fundamentally dishonest.

16. For the Respondent, Miss Parmar submitted that the learned judge, having heard the evidence at trial including the evidence in relation to whether the collision had taken place at all, was fully entitled to come to the conclusion that the Claimant had not been dishonest, never mind fundamentally dishonest. Given the judge's conclusions that this was a genuine collision which had not been staged, this endorsed the honesty of the Claimant on those matters and that was something which the learned judge was entitled to take into account when considering the Claimant's honesty in relation to other matters such as his injuries. In addition, Miss Parmar

17. submitted that the injuries from the quad bike, not involving the neck or left elbow but the lower back only, were distinct from the injuries in the index accident, that there was no overlap and therefore the Claimant may have had an excuse for not mentioning the quad bike accident to Dr Shakir. Miss Parmar further submitted that, as the case law makes clear, the judge in a case such as this should take a rounded

view of the evidence, not just the evidence in relation to the injuries but all the evidence in the trial in coming to a decision whether a Claimant has been dishonest. She referred to the following passage from my own judgment in *Molodi v Cambridge Vibration Maintenance Service* [2018] EWHC 1288 (QB) at paragraph 42:

> "However, where the trial judge has heard the evidence and has not concluded that the claimant was dishonest, I direct myself that it would require a very clear case indeed for an appellate court effectively to overturn the trial judge's conclusion in that respect and find that the claimant was dishonest despite not having seen the witnesses give evidence."

She submits that where, in relation to the principal issue at trial, namely whether there had been a collision at all or whether this was a bogus claim, the judge has found, on reasonable grounds, that the Claimant is genuine and not dishonest, he is perfectly entitled to make similar findings in relation to the allegations of injury. She submitted that this case is nowhere near the glaringly obvious case such as *Molodi* and even if there was a finding of dishonesty in relation to the failure to disclose the quad bike accident to Dr Shakir, this was not sufficient to justify a finding of fundamental dishonesty.

## Discussion

18. The first ground of appeal is that Judge Rawlings was wrong in failing to find the Claimant fundamentally dishonest pursuant to CPR 44.16. By the provisions of part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into force on 1 April 2013, the right of claimants to recover from defendants the costs of success fees and after the event insurance premiums was abolished. The "quid pro quo" for this, in personal injury actions, was "Qualified One-way Costs Shifting" ("QOCS"). This was a form of costs protection for such claimants whereby they would not be liable to pay the full costs of the defendant in cases which were unsuccessful. CPR part 44.14 provides:

> "… Orders for costs made against the claimant may be enforced without the permission of the court, but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant."

Parts 44.15 and 44.16 then provide for exceptions to QOCS where permission is not required (44.15) and permission is required (44.16). Part 44.16 provides

> "Orders for costs made against a claimant may be enforced to the full extent for such orders with the permission of the court where the claim is found, on the balance of probabilities, to be fundamentally dishonest."

19. The concept of fundamental dishonesty was considered by HHJ Moloney QC in *Gosling v Hailo* (unreported) where he stated:

> "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."

This was endorsed by the Court of Appeal in *Howlett v Ageas* [2017] EWCA Civ 1696.

20. In the present case, where the damages claimed are confined to pain, suffering and loss of amenity in relation to the injuries and the cost of physiotherapy, dishonesty as to the extent of the injuries would, in my judgment, be fundamental because the extent of the claimant's injuries is not merely incidental or collateral but forms the very basis of the claim. This is shown by, if nothing else, the fact that the learned judge, having been unable to find the injuries claimed proved, dismissed the claim. If, then, Judge Rawlings should have found the Claimant to have been dishonest in the way he had presented his claim for damages by reference to the injuries sustained in the accident, it would follow, as it seems to me, that this was not merely dishonesty, but fundamental dishonesty.

21. So far as the concept of "dishonesty" is concerned, the test for dishonesty at common law was restated by the Supreme Court in *Ivey v Genting Casinos Limited* [2018] A.C. 391 at paragraph 74:

> "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."

22. Also, by way of preliminary observation, it is relevant to consider the appellate jurisdiction of the High Court in an appeal of this nature. By CPR 52.21, an appeal to this court from the County Court is limited to "a review of the decision of the lower court". Pursuant to 52.21(3) the appeal court will allow an appeal where the decision of the lower court was either wrong or unjust because of a serious procedural or other irregularity in the proceedings. By 52.21(4) the appeal court "may draw any inference of fact which it considers justified on the evidence."

23. The scope of an appellate court was further elucidated by the House of Lords in *Benmax v Austin Motor Company Limited* [1955] AC 370 where it was held that there

was a distinction between the finding of a specific fact and the finding of fact which is really an inference drawn from facts specifically found. In the case of "inferred" facts, an appellate tribunal will more readily form an independent opinion than in the case of "specific" facts which involve the evaluation of the evidence of witnesses, particularly where the finding could be founded on their credibility or bearing. In the course of his judgment, Viscount Simmonds LC cited from the judgment of Lord Cave LC in *Mersey Docks and Harbour Port v Proctor* [1923] AC 253 at 258-9 where Lord Cave said:

> "It is the duty of the court of appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly."

Viscount Simmonds went on to say:

> "This does not mean that an appellate court should likely differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turns solely on the credibility of the witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of a fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts."

Thus, in the present case, it is submitted on behalf of the appellant that it is in relation to the evaluation of the facts which Judge Rawlings found or should have found that he went wrong.

24. Mr Smith, for the Defendant, referred me to the remarks I made in *Molodi v Cambridge Vibration Maintenance Service* [2018] EWHC 1288 (QB) at paragraph 42 and although the present case is not a "whiplash" case, I consider that those remarks have equal applicability:

> "The problem of fraudulent and exaggerated whiplash claims is well recognised and should, in my judgment, cause judges in the county court to approach such claims with a degree of caution, if not suspicion. Of course, where a vehicle is shunted from the rear at a sufficient speed to cause the heads of those in the motor car to move forwards and backwards in such a way as to be liable to cause 'whiplash' injury, then genuine claimants should recover for genuine injuries sustained. The court would normally expect such claimants to have sought medical assistance from their GP or by attending A & E, to have returned in the event of non-recovery, to have sought appropriate treatment of physiotherapy (without the prompting or intervention of solicitors) and to have given relatively consistent accounts of their injuries, the progression of

> symptoms and the timescale of recovery when questioned about it for the purposes of litigation, whether to their own solicitors or to an examining medical expert or for the purposes of witness statements. Of course, I recognise that claimants will sometimes make errors or forget relevant matters and that one hundred percent consistency and recall cannot reasonably be expected. However, the courts are entitled to expect a measure of consistency and certainly, in any case where a claimant can be demonstrated to have been untruthful or where a claimant's account has been so hopelessly inconsistent or contradictory or demonstrably untrue that their evidence cannot be promoted as having been reliable, the court should be reluctant to accept that the claim is genuine or at least deserving of an award of damages."

The present case is unusual in the sense that the weaknesses in the evidence led Judge Rawlings to conclude that the Claimant had failed to prove any injury or loss at all and he thereby dismissed the claim. However that reasoning did not lead the judge to draw an inference or make a finding that the Claimant had been dishonest. Should it have done?

25. In my judgment, there are factors in this case which pointed strongly, if not inexorably, to the conclusion that the Claimant had been dishonest in his presentation of his injuries to the expert instructed, Dr Shakir, and also to the court, but which Judge Rawlings failed to deal with, either adequately or, in some cases at all. These factors are as follows:

i) The fact that the Claimant sought no medical assistance at all after the index accident, whether by attending his GP or by attending A & E or otherwise. He did instruct solicitors and it was the solicitors who arranged for physiotherapy to be carried out and this should immediately have raised at least a suspicion in the mind of the judge.

ii) On 6 July 2016, the Claimant attended A & E in respect of the accident he had sustained involving the quad bike – initially rolling the quad bike on 2 July and then aggravating the injury when lifting the quad bike on 6 July. The Claimant then attended the walk-in centre at Stoke-on-Trent on 8 July and a very full note was made as set out in paragraph 6 above. However, at no stage is there any evidence that the Claimant informed either the A & E doctor (Dr Murphy) or the walk-in centre practitioner, of the injuries he had sustained on 2 June 2016 in the index accident, nor did he tell them that, over the previous four weeks, his symptoms from that accident had been getting steadily worse, as he asserted later in his witness statement (see paragraph 10 above). The failure of the Claimant to inform those medical practitioners of the index accident and the injuries and symptoms arising from it is inexplicable if the Claimant's evidence about the injuries sustained in the index

accident is correct or anywhere close to being correct. This is the first deafening silence.

iii) There is then the attendance upon Dr Shakir on 17 August 2016 and the failure of the Claimant to inform Dr Shakir of the quad bike accident and the injuries in that accident. He could not have forgotten about the quad bike accident: it was only a few weeks before. Furthermore, he must have been aware of the significance of the accident and its potential for contaminating any findings made by Dr Shakir about the injuries sustained in the index accident. No-one in the position of the Claimant could have failed to have appreciated the significance of the quad bike accident and the only reasonable inference to be drawn is that the Claimant deliberately failed to tell Dr Shakir about it in order to mislead Dr Shakir about the effects of the index accident. Indeed, this was effectively the finding of the learned judge at paragraph 19 (g) of the judgment (see paragraph 12 above). This was the second incidence of "deafening silence".

iv) The position is then significantly aggravated by what can only have been positive lies told by the Claimant to Dr Shakir in two regards:

(a) On the basis of his evidence given at trial, namely that the effects of the injury to the neck were spent by three to four weeks after the index accident and the effects of the injury to the elbow was spent within four to five weeks of the accident, and on the basis that this evidence was true (and there is no reason to believe that it was not thought to be true by the Claimant), he must have deliberately misrepresented the fact that he was still feeling the effect of those injuries when he saw Dr Shakir with the result that Dr Shakir reported that the symptoms were now mild to moderate and intermittent.

(b) In addition, he is reported as having told Dr Shakir that his physiotherapy treatment was ongoing. However, as the Claimant must have known, he had been discharged from further physiotherapy by On Medical Limited on 20 July 2016, almost a month previously.

v) The Claimant then compounded the dishonesty towards Dr Shakir by lying about the longevity of the injuries in the Claim Form and his witness statements and, even worse, adopting Dr Shakir's description of the injuries and prognosis of six month's recovery when he knew that Dr Shakir had been misled by him into giving this prognosis. This is not capable of explanation by reference to the passage of time between the accident and the trial. When the Claimant saw Dr Shakir, he had ceased to have symptoms for a month or so, on the basis of the evidence he

gave to the court, and when he signed the Statement of Truth in the Particulars of Claim and he signed his witness statements he knew he had not suffered symptoms from his injuries for a period of six months. This formed the basis of his claim for damages.

26. In my judgment, on the basis of the above, no judge could reasonably have failed to have come to the conclusion that the claim for damages as presented by the Claimant in this action was a fundamentally dishonest one, perpetrated by fundamentally dishonest accounts to the only medical expert and in the various court documents.

27. The appeal is accordingly allowed and the order dismissing the Claimant's claim will be endorsed with a finding of fundamental dishonesty on the part of the Claimant in relation to the claim for damages.

## Costs

28. Given my decision on the first point, it is unnecessary for the purposes of this judgment to give views on the second point of appeal, namely whether the costs order made by the learned judge was wrong in any event. It is agreed by the parties that, in the event of my allowing the appeal on the first ground (as I have done), the costs order cannot stand and needs to be revisited. I invited submissions from counsel as to the appropriate order to be made. It remains the case, of course, that the Defendant failed to prove fundamental dishonesty in relation to the accident itself, that is whether it was a bogus claim because there had been no collision or there had been collusion between the parties, and Mr Smith conceded that it would be appropriate to reflect this in the order for costs. He submitted that if ground 1 succeeded, part 44.16 would be satisfied and the Claimant would lose his costs protection. He submitted that the order should be that the Claimant pay 70% of the Defendant's costs.

29. Miss Parmar, perhaps somewhat boldly, submitted that the order made by the learned judge should prevail but with an adjustment of the percentage to be paid by the Defendant to the Claimant from 60% to 40%. This is a submission I have no hesitation in rejecting.

30. Given the finding of fundamental dishonesty, and the application of part 44.16, and given that the claim has failed, it is, in my judgment, appropriate to make an order that the Claimant pay the Defendant's costs. The Defendant was justified in alleging fundamental dishonesty and this had the effect of taking the case out of the fast-track and into the multi-track. However, I acknowledge that a significant part of the evidence and court time was directed towards the question whether the accident was bogus and the parties had colluded, and some adjustment to the full order must be made to reflect the Defendant's failure to prove fundamental honesty in that regard. Having considered the matter carefully, I have come to the conclusion that the order suggested by Mr Smith is the correct one and that the Claimant should pay 70% of the Defendant's costs, to be assessed on the indemnity basis.