



Neutral Citation Number: [2021] EWHC 615 (QB)

Case No: QB-2017-001884

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2021

Before :

MASTER DAVID COOK

Between :

MRS PATRICIA SMITH
- and -
LONDON BOROUGH OF HARINGEY

Claimant

Defendant

Mrs Patricia Smith in person
Charlotte Reynolds (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 8th, 9th and 10th February 2021

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.

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MASTER DAVID COOK

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 4.00 pm on Thursday 18 March 2021.

MASTER COOK:

1. The Claimant seeks damages for personal injury arising from a workplace incident that occurred on 23 April 2014 when the Claimant was assaulted by a service user with learning difficulties in a facility operated by the Defendant. Liability has now been agreed on the basis that the Claimant will receive 75% of damages to which she is entitled. This is the assessment of damages hearing.
2. The only complicating factor in what would otherwise have been a relatively straight forward task is the Defendant contends that the Claimant has been fundamentally dishonest in the presentation of her claim with the result it should be dismissed in its entirety pursuant to section 57 of the Criminal Justice and Courts Act 2015. Section 57 provides:

“(1) This section applies where, in proceedings on a claim for damages in respect of personal injury (“the primary claim”)

(a) the court finds that the claimant is entitled to damages in respect of the claim, but

(b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.

(2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.

(3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.

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

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

(8) In this section—

“claim” includes a counter-claim and, accordingly, “claimant” includes a counter-claimant and “defendant” includes a defendant to a counterclaim;

“personal injury” includes any disease and any other impairment of a person's physical or mental condition;

“related claim” means a claim for damages in respect of personal injury which is made—

(a) in connection with the same incident or series of incidents in connection with which the primary claim is made, and

(b) by a person other than the person who made the primary claim.”

3. The Claimant now acts in person having parted company with her solicitor in January 2020, in the circumstances I have had regard to Civil Procedure Rule ("CPR") 3.1A and the fact she has not had the benefit of legal representation at this hearing. Her case before me is that as a result of an injury she suffered to her lower back in the 2014 assault she has gone on to develop chronic pain in her lower back and that as a result of this pain she is suffering from low mood and depression all of which means she is unable to work. In particular she complains of a pain in her pelvic area described in her schedule of loss as follows:

“The Claimant has experienced pain in her Pelvic. This is something she has never had. Claimant has not experienced limitations or had experienced any back problems prior to accident apart from when she had a whip-lash in her neck, which was very temporary. The Claimant has never had or experienced any limitations lower, pelvis and legs at any time previously. This was caused by the attack.”

4. The Claimant claims general damages and loss of income to her intended date of retirement at the age of 67 in 2036 set out in her schedule of loss at over £624,000.
5. The Defendant accepts the Claimant was assaulted by a service user in 2014 however its case is that the Claimant suffered a self-limiting soft tissue trauma responsible for lumbar symptoms for three to four months and an injury to her right wrist that fully resolved within two to three months. The Defendant relies on seven particular features in support of its contention that the claim now advanced by the Claimant is fundamentally dishonest:
- i) the Claimant has sought to conceal her pre-accident history of back problems,
 - ii) the Claimant has sought to understate the consequences of a road traffic accident in April 2013,
 - iii) Mr Pearse, Consultant Orthopaedic Surgeon, noted inappropriate clinical signs during examination on 18 February 2019.
 - iv) Dr Mallett, Consultant Psychiatrist, notes the potential for `deliberate exaggeration and `substantial reasons to be concerned about the Claimant's reliability.

- v) there are inconsistencies between the level of disability reported and the appearance of the Claimant on video surveillance,
 - vi) the medical records subsequent to the index events are inconsistent as to the history of injury allegedly sustained, and
 - vii) The claim appears to have significantly grown in value without any explanation having been provided.
6. In view of the Defendant's case and before the hearing commenced I asked the Claimant if she understood the Defendant was making very serious allegations against her which, if proved, could have far reaching consequences for her. I also pointed out to her that she was in some difficulty because she was unable to have her experts attend court. She confirmed to me that she understood all of this and wanted to proceed with her case. I am satisfied that she made a fully informed decision.
7. In the circumstances it is appropriate to proceed in accordance with the guidance given by Mr Justice Julian Knowles in the case of *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 QB,

*“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 a 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.

64. Where an application is made by a defendant for the dismissal of a claim under s 57 the court should:

a. Firstly, consider whether the claimant is entitled to damages in respect of the claim. If he concludes that the claimant is not so entitled, that is the end of the matter, although the judge may

have to go on to consider whether to disapply QOCS pursuant to CPR r 44.16.

b. If the judge concludes that the claimant is entitled to damages, the judge must determine whether the defendant has proved to the civil standard that the claimant has been fundamentally dishonest in relation to the primary claim and/or a related claim in the sense that I have explained;

“c. If the judge is so satisfied then the judge must dismiss the claim including, by virtue of s 57(3), any element of the primary claim in respect of which the claimant has not been dishonest unless, in accordance with s 57(2), the judge is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.”

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

The Claimant's evidence and the development of her case

8. I heard evidence from Claimant and read the evidence of Mr Percy, a consultant orthopaedic surgeon, and Dr Isaac, a consultant psychiatrist, which had been obtained by the Claimant. Neither expert attended the trial although Dr Isaac had produced a written joint statement with Dr Mallett the psychiatrist instructed by the Defendant. On behalf of the Defendant I heard expert evidence from Mr Pearce, a consultant orthopaedic surgeon and Dr Mallett.
9. The Claimant was clearly an intelligent and articulate lady. She had attained a QCF level 5 in Health and Social Care and was employed by the Defendant as a team leader on an annual salary of £31,998 at the time of the 2014 incident. She had an impressive mastery over the documents in the case and had clearly given them a lot of study. It became clear in cross-examination that she had spent the weekend before the hearing began going through her medical records with her GP practice administrator in order to counter some of the points that had been set out in Ms Reynolds' skeleton argument. She professed to be in great pain throughout the trial and gave most of her

evidence from a standing position. She told me that it was in her nature to work through her pain. She was adamant that she had suffered the severe radiating pelvic pain she described from the time of the 2014 incident. She was highly emotional at times especially when relating how she had had to cope with her pain. However, for reasons which will become apparent I found much of her evidence on the crucial issues in this case to be unconvincing, unreliable and ultimately of little assistance in assessing the damages to which she is entitled. For understandable reasons most of her evidence addressed the Defendant's contention that she had been dishonest in relation to the presentation of her claim.

10. Given the issues I must consider it is useful to examine the way in which the claim has developed and the nature of the evidence the Claimant has deployed along the way. Proceedings were commenced on 21 April 2017 towards the end of the three year limitation period for a personal injury claim. The claim form sought damages of £500,000. The particulars of claim attached to the claim form were drafted by Innocent Eruteyan a solicitor with the firm Shaddai & Co. Contrary to the requirements of PD 16 para 4.2 and 4.3 no schedule of past and future expenses and losses or medical report were attached.
11. At paragraph 6 of the particulars of claim the incident giving rise to the claimant's injury was described as follows:

“On 23 April 2014, whilst on duty as the Team Leader the Claimant was violently and viciously attacked by the particular service user. The attack happened in the room lounge the service user went for the Claimant's neck and sought to grab her by the neck. The service user had the Claimant gripped for a period as the Claimant struggled to free herself from the service user. The service user pushed the Claimant and force of the push propelled the Claimant onto a protruding and pointed part of a wall in the main lounge and violently impacting with her with the wall on her back. The Claimant's clothes were ripped torn in the attack.”

12. The particulars of claim, paragraph 8, stated that the Claimant suffered injuries to her right wrist and lower back in the attack. At paragraph 14 they were stated to be “*life threatening*” and “*life-changing*”. Further particulars of injury were given at paragraphs 16 and 17:

“16. The Claimant suffered chronic pain and she is in constant and continuing chronic pain and she is at a point where medication can no longer remedy her pain.

17. Claimant suffered anxiety and distress and she is in constant and continuing anxiety and distress, etc.”

13. A Defence was filed on 1 June 2017. The Defence noted that:

“The Claimant sent a portal Claim Notification Form (EL1) for Low Value Personal Injury Claims on 3 December 2014 in which the value of her claim was said to be up to £10,000 and

her injuries were described as: "soft tissue injuries to her lower back and right upper forearm." It was stated that the Claimant had attended North Middlesex Hospital following the alleged assault but was not detained overnight. It was stated that there was no recommendation from a medical professional that the Claimant should undertake any rehabilitation such as physiotherapy and that the Claimant had returned to work having had 20 days off."

14. On 18 October 2017 Deputy Master Hill QC made directions for a trial on liability and quantum which required the Claimant to serve medical evidence in support of her claim by 5 January 2018 and to serve a preliminary schedule of loss of 8 November 2017 and a final schedule of loss by 26 January 2018.
15. On 8 November 2017 the Claimant served a schedule of loss verified by a statement of truth. In this document verified by a statement of truth her pain suffering and loss of amenity is described as follows:

"Psychiatric Damage Generally

The attack has left the Claimant with an underlying problem may actually be depression possibly akin to a form of post-traumatic stress disorder £92,240

The handicap upon the labour

The claimant has been in frequent and severe (sic) since the incident and if affected her employment and will affect future employment" £41,675"

16. The Claimant also served the report of Mr Percy which was based on an examination of the Claimant which took place on 25 September 2017. In the course of that examination the Claimant told Mr Percy and he recorded that she had never had trouble with her back before the 2014 incident. It is unclear precisely what the extent of the Claimant's medical records before Mr Percy was but he also recorded that he had access to extensive medical records was not able to see any reference to back pain in the past. He did note that an MRI scan taken in March 2017 revealed the Claimant's L4-5 disc had degenerated but there was no significant bulge or neural compromise. I am satisfied that Mr Percy has recorded this information accurately as is becoming of an expert who owes an overriding duty to the Court. Mr Percy expressed his opinion as follows:

"89. On review today she complained of persisting back pain dating back to the time of the material injury now three and a half years ago. Going into her history it is apparent that her back pain became more severe and debilitating in June 2016 for no very obvious reason and has continued to get worse. This is difficult to explain clinically as the material injury to her back would be classified as a soft tissue injury and soft tissue injuries would improve with time rather than get worse. When symptoms get worse following a soft tissue injury like this

it is highly suggestive of a functional element, and although there does appear to be a mechanical cause for this Lady's persisting symptoms, namely a degenerate L4/5 disc, I believe that there is a very significant functional element to her persisting symptoms and I would urge an in depth assessment by a psychiatrist.

90. The MRI findings of a degenerate L4/5 disc would not be attributable to any injury sustained in this assault. This would be a constitutional degenerative condition. However, as a consequence of the degenerative L4/S disc I believe her back was vulnerable to this sort of injury and I think it likely on the balance of probabilities that she would eventually have developed back pain in any event as a consequence of the slow progress of the degenerative condition at L4/L5.

91 What seems to have happened here is that this lady had a vulnerable back at the time. She did not suffer symptoms before but as a consequence of the soft tissue injury sustained at the time of the assault the pre-existing degenerative condition of her lumbar spina was aggravated and the onset of symptoms precipitated by a factor of about three years, On top of that there now appears to be a significant functional element to her persisting symptoms and disability.”

17. Mr Percy's position was therefore that the Claimant had a pre-existing asymptomatic degeneration of the spine at the L4/5 level which was wholly unrelated to the accident. That she had suffered a soft tissue injury to her back in 2014 and it was likely, in the absence of previous back symptoms, that the soft tissue injury had aggravated the onset of severe symptoms by a period of about three years. Mr Percy also noted a significant functional element on the basis of the Claimant's description of worsening symptoms following soft tissue injury. At best and without more this evidence would restrict the Claimant's future loss claims dramatically to a cut-off date in June 2019, three years after the onset of severe symptoms in June 2016.
18. The Claimant then sought to instruct a psychiatrist and in February 2019 Deputy Master Stephens gave permission for the Claimant to serve an updated report from Mr Percy and a report from a consultant psychiatrist with expertise in chronic pain. The Defendant was given permission to rely upon orthopaedic surgeon, Mr Pearse, and a psychiatrist, Dr Mallett. The Claimant was ordered to serve an update schedule of loss.
19. The process of obtaining medical evidence then proceeded. Mr Pearse saw and examined the Claimant on 18 February 2019. Mr Isaac saw and examined the Claimant in July 2019. Dr Mallett saw and examined the Claimant on 26 September 2019. Whilst this process was underway and unbeknown to the Claimant the Defendant had commissioned enquiry agents to carry out surveillance of the Claimant.
20. On 15 January 2020 the Claimant served her updated schedule of loss and responses to Part 18 Questions. The Claimant personally signed the statement of truth on these

documents. I note at this point the Claimant had received the report of Dr Isaac and the report of Mr Pearse had been served by the Defendant.

21. In answer to the question whether she experienced any limitations or had experienced any back problems before the accident she replied:

“The Claimant has not experienced limitations or had experienced (sic) any back problems prior to accident apart from when she had a whip-lash in her neck, which was very temporary. The Claimant has never had or experienced any limitations lower, pelvis and legs at time previously.”

22. In answer to a question concerning paragraph 11 of her witness statement of 21 February 2019 where she stated that she believed her diagnosis of soft tissue injury at A&E the day after the incident was wrong she replied:

“This was the first instance at the hospital following the attack and the hospital had not done full investigations into my complaint. It was an early diagnosis until they realised that the treatment that was being given to me was not helping and they did further investigation and realised my disc was damaged. The Claimant’s GP had sent to hospital to be examined by the Gynaecologist team because of the pain radiating from my back to the pelvic. After two examinations, it was concluded that there was nothing wrong with the pelvic but that the pain was being contributed from her lower back pain. It is clear that the soft tissue diagnosis is wrong.”

23. Shortly after the Claimant provided this material to the Defendant the Defendant disclosed video tapes of surveillance carried out on 18 February, 8 March, 26 September, 9 November and 13 November 2019 and made an application to rely upon the surveillance tapes, to file an amended defence and to access the Claimant’s DWP records. The video evidence was put forward by the Defendant on the basis that it showed the Claimant undertaking a number of activities which she had stated she could not do or only do with difficulty. Shortly after the application was made the Claimant parted company with her solicitor.

24. At a hearing on 24 February 2020 I entered judgment for the Claimant for 75% of her damages and gave permission for the Defendant to rely on the surveillance evidence, permission for an amended defence and a reply and made further directions for the assessment of damages. I also gave permission for the Claimant to rely upon the report of Dr Isaac which had been served late.

25. Dr Isaac noted in his report that the Claimant’s *cognitive function was grossly normal, with no gross deficits apparent in comprehension, attention or memory*. At paragraphs 82 and 83 of his report he stated:

“82. My impression is that the orthopaedics experts cannot explain Ms Smith’s persistent back pain as being caused by the soft tissue injury of the index event. Such injuries should clear up by themselves in a matter of months. I note there is

difference between the orthopaedic experts as to Ms Smith's pre-existing physical vulnerability. I of course defer to the relevant experts in their opinion on the nature and cause of any physical injuries Ms Smith's sustained in the index event.

83. I also note that Ms Smith has reportedly given a different account of the index incident (paragraph 64, above), stating to me and to the experts that this was due to an assault by the client, FM."

26. Dr Isaac noted that if the orthopaedic experts view was accepted then the Claimant's pain cannot be readily explained by the circumstances of the 2014 assault, there could be a psychiatric explanation but this would depend upon whether her account of the event and her subsequent clinical trajectory was both full and accurate. He identified two diagnostic possibilities. First an adjustment disorder with mixed anxiety and depressed mood (DSM5 309.28, ICD 10 F43.23). Second Somatic symptom disorder with predominant pain (DSM 300.82, ICD10 45.1). He was clear that there was no evidence of any other psychiatric condition and no evidence of Post-Traumatic Stress Disorder.
27. The Claimant responded to the amended Defence, which set out in detail Defendant's case under each of the seven headings set out at paragraph 5 above, in her Reply and a witness statement dated 18 March 2020 and which she signed with a statement of truth. She told me when giving evidence that she had received some help with these documents from a friend or adviser and that the words used did not entirely reflect what she had meant to convey and that for cultural and linguistic reasons some of the meaning had been misrepresented. For reasons which I will come to in due course I reject that explanation and find both the Reply and witness statement accurately set out what the Claimant intended to be her evidence.
28. On 18 March 2020 the Claimant applied to the court for an order to restrict the Defendant's ability to rely on the surveillance evidence on the basis that it infringed her HRA Article 8 rights. On 16 April 2020 that application was dismissed as being totally without merit.
29. On 10 November 2020 I made an order staying the claim. It transpired that the Claimant had been made bankrupt on 26 January 2020 and had not informed the defendant or the court of that fact. The Claimant indicated that she was attempting to persuade the Official Receiver to assign the cause of action to her. The Claimant was successful in her efforts to persuade the Official Receiver to assign the cause of action to her. On 15 December 2020 I gave the Claimant permission to put written questions to the Defendant's experts and for the Defendant to call its experts at trial.
30. At the conclusion of the Claimant's evidence on the second day of the trial I pointed out to her that the claim set out in her schedule of loss was clearly overstated. To her credit she recognised that the sum presented for her annual loss was too high as it included some extra payments and was expressed as a gross sum, she blamed this on her former solicitor and on this issue I accept her explanation. She accepted that her annual loss was more properly stated as a net figure of £25,039. She did not however accept the medical evidence she had produced in anyway undermined her claim and was adamant she wished to proceed with her claim for loss of earnings until the date

of her retirement which would amount to approximately £241,459 on the amended figures.

The Defendant's medical evidence

31. Mr Pearse gave evidence in accordance with his reports. He gave his evidence in a measured and careful manner. I accept his evidence without reservation. In particular I accept that the Claimant told him she had not had a history of low back pain, that she struggled to drive long distances and had to rely on online shopping deliveries as well as help from her sister with household shopping. I accept that her reference to her "sister" is simply her way of referring to a close female friend

32. I also accept Mr Pearse's examination of the Claimant elicited a number of inappropriate clinical signs set out at a paragraph 39 of his report:

"The claimant moved in an extremely laborious and slow manner during the interview and examination. She was initially able to move her head on her neck in a normal manner but all cervical spine movements became restricted during the formal examination. I was unable to attempt a straight leg raise but earlier clinicians have described normal straight leg raise finding. The claimant also stated that she was unable to actively flex her lumbar spine in the erect position but she was able to sit on the examining couch with her legs extended in a position of lumbar flexion."

33. Mr Pearse agreed with Mr Percy that the Claimant's descriptions of her symptoms getting worse following soft tissue injury was "highly suggestive" of a functional element and that the Claimant was demonstrating functional overlay.

34. Mr Pearse also noted that there was no contemporaneous medical evidence relating to the incident. The Claimant initially went home and took analgesia. She called an ambulance on 24 April 2014, the following day and was seen at the North Middlesex Hospital. The X-ray taken on that occasion and a later MRI scan showed that the Claimant did not suffer any structural damage to her spine as a result of the incident. For that reason he concluded with confidence that the Claimant suffered a soft tissue injury.

35. Mr Pearse's opinion set out at paragraphs 42 and 43 of his report was:

"I am not able to explain the claimant's reports of continuing, allegedly severe lumbar pain and associated disability are the physical basis of the injury sustained during the alleged incident. On the balance of probabilities, the mechanism of the alleged incident would be in keeping with self-limiting soft tissue trauma and a degree of psychological shock. I consider that the soft tissue trauma would have been responsible for localised lumbar symptoms for up to three to four months, following which I would have anticipated the claimant to have made a full and complete recovery."

In summary, Patricia Smith developed right wrist and low back symptoms following an alleged incident whilst at work in April 2014. The claimant's right arm symptoms fully resolved within two to three months of the incident. I am unable to explain the persistent, allegedly severe lumbar symptoms and associated disability on the physical basis of the lumbar injury sustained in the accident. I agree with the claimants expert that there is functional overlay and a specialist psychology report is recommended. I am unable to explain the claimants reported inability to undertake physical activities or return to gainful employment on the physical basis of the injury sustained in the incident of 23 April 2014."

36. In the circumstances I reject the opinion of Mr Percy that the Claimant suffered an exacerbation of an asymptomatic underlying degenerative condition. There is in any event, as described below, ample evidence in the Claimant's records of pre-existing back problems of which Mr Percy was unaware.
37. Dr Mallett gave evidence in accordance with his reports and confirmed his joint statement with Dr Isaac. I found Dr Mallett to be a careful and conscientious witness. I am satisfied he took trouble to explain his questions to the Claimant and sought to establish what she could and could not do on a good day. I accept his evidence without reservation. In particular I accept the Claimant told him that she could walk for up to four minutes, that she needed help with shopping and housework, that she could not look after her child and elderly father, that her self-care had deteriorated, that she could only drive an automatic car for about five to 10 minutes and that for any journeys in excess of 10 minutes her sister would drive.
38. There was in any event a large amount of agreement between Dr Mallett and Dr Isaac. They both agreed that psychiatric diagnosis is inherently subjective and depended in large measure on the accuracy of the subjects account. They both agreed there were good reasons to be concerned about the Claimant's reliability. They both agreed that if the Claimant's account was genuine, a somatic symptom disorder with predominant pain is probable but that this could not have been caused by the 2014 incident.
39. Both Mr Pearse and Dr Mallett commented on the surveillance evidence in their supplemental reports. Neither expert changed his opinion as a result of considering this evidence. Mr Pearse commented:

"The video surveillance highlights an individual who was able to mobilise in a normal manner and perform repetitive flexion and extension of the lumbar spine without difficulty or apparent discomfort. The footage also shows the Claimant using a crutch for the first time as she attended a medicolegal appointment. I can confirm that there is no medical indication for the use of the crutch."

Mr Mallett commented :

"There is nothing in the surveillance or further documentation that leads me to substantially alter the findings of my report

except to say that it underlines the fact that Ms Smith's account of her symptoms and disability cannot be relied upon. If her account of her physical symptoms cannot be relied upon, then in my opinion (although it is not possible to infer her mental state directly from the surveillance) the account of her psychological symptoms cannot be relied upon either."

The Assessment of the Claimant's damages

40. On the basis of my findings the expert evidence with one minor exception only supports an award of pain suffering and loss of amenity. I find that the Claimant suffered a self-limiting lumbar soft tissue injury to her wrist and lumbar spine which fully resolved within three months.
41. In my judgment the Claimant's soft tissue injury to the lumbar spine falls at the margin of chapter 7(B)(c)(ii) and (iii) of the JC Guidelines (15th Edition). I would assess a sum of £2500. The Claimant's wrist injury would fall within Chapter 13(c) Minor Injuries. I would assess a sum of £2,300. Allowing for overlap I would award the total sum of £3,200 general damages.
42. Any pain the Claimant currently experiences cannot have been caused by the 2014 incident and there is absolutely no evidence to suggest that the diagnosis of soft tissue injury made at the time was wrong. It follows she can have no claim for loss of earnings as she continued to work until she was made redundant in July of 2017. There is a small claim for damage to clothing in the sum of £250 which I shall allow.
43. Before interest the Claimant is entitled to damages of £3,450. The damages fall to be reduced by 25% in accordance with the agreement on liability, that is £2,587.50.

Fundamental Dishonesty

44. I must now consider whether the Defendant has proved to the civil standard that the Claimant has been dishonest in the presentation of her claim. In considering this issue I must apply the test as set out by the Supreme Court in *Ivey v Genting Casinos Limited* [2017] UKSC 67 [Lord Hughes, para 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."

45. I have already noted that the Claimant informed Mr Percy she had never experienced problems with her back before and that she denied a history of low back pain to Mr Pearse on 18 February 2019. In her schedule of loss dated 15 January 2020 she stated that she had not suffered any back problems prior to the incident in April 2014. In her Reply dated 18 March 2020 she maintained that she did not have a history of back pain. In her witness statement of the same date she accepted that she had suffered whiplash in an accident which occurred in April 2013 but maintained this had not caused her any lower back pain only some neck and upper thoracic pain.
46. The Claimant's pre-incident medical records reveal a very different picture.
- i) 2003 – GP records: '*Chronic back pain*'
 - ii) 17.02.03 – GP records: '*Ongoing back pain...Letter from Homerton Hosp re: physio for back pain...low back pain 6/52*'
 - iii) 18.02.03 – Physio referral for "*neck and low back pain*".
 - iv) 21.7.05 – GP records: "*Had car accident 29.11.04 ... backache*"
 - v) 08.11.05 – GP records: "*Back pain still there*"
 - vi) 02.02.06 - North Middlesex University Hospital Radiology Thoracic and lumbar spine.
 - vii) 09.01.06 – GP records: "*Pain in lower thoracic and upper lumbar spine since after accident Nov 29th 2004*"
 - viii) 02.03.06 – Tottenham Walk In Centre: "*Back pain on and off for the last year*"
 - ix) 10.04.06 – GP records: "*Back pain ongoing for a while...starting physio next wed*"
 - x) 12.04.06 – Physio records: "*Chronic non specific LBP post RTA*"
 - xi) 05.08.06 – Physio discharge – "*Chronic LBP*"
 - xii) 08.08.06 - North Middlesex Hospital A&E – "*presented to the A&E Department with rta back pain*"
 - xiii) 19.02.07 – GP records: "*Back pain*"
 - xiv) 20.02.07 - North Middlesex University Hospital Radiology Thoracic and lumbar spine.
 - xv) 2009 – OH records refer to "*time off work in 2009 having hurt her back*".
 - xvi) 04.06.13 – Ambulance Records: "*L sided chest and back pain*".
 - xvii) 04.06.13 – A&E Records: "*Back pain*".
 - xviii) 11.11.13 – North Middlesex University Hospital – "*C/O PAINS TO CHEST AND BACK*"

47. The Claimant was subjected to detailed cross-examination by Ms Reynolds on the content of these entries, in the course of cross-examination the Claimant accepted that she knew she must give truthful answers to the questions put to her by the experts.
48. The Claimant denied that note (i) referred to her and suggested her GP had made a mistake when transcribing her notes as a new patient and also suggested that the record did not refer to her because her date of birth was wrongly recorded. I reject that explanation. Her previous GP's notes clearly referred to back pain and a reference to physiotherapy in February 2003 and the error in relation to her date of birth was a simple mis transcription of her date of birth, 05.12.69 instead of 05.12.68.
49. The Claimant was asked about the many entries referring to back pain following a car accident in 2004. Her response was that she did not remember the accident at all until she saw the relevant entries while going through her medical notes shortly before the trial. She then said that she was now able to recall the episode because it happened after the birth of her child and described details of accident which involved a low velocity bumper to bumper collision.
50. Broadly speaking the Claimant was forced to accept that the entries in her medical notes were accurate but she continued to maintain she could not recall many of the incidents until she examined the records. Notwithstanding this the Claimant was able to recall under cross-examination details of pain she suffered following her epidural when her child was born and details of an injury she suffered at work in 2009. A more telling example is provided by the entries relating to the Claimant's admission to hospital via ambulance in 2013 with backpain. In her witness statement and when first asked about this she denied that it had happened, when that denial came untenable due the number of records relating to the incident she accepted that it had happened and blamed the person who had drafted her statement for failing to mention it.
51. In my judgment the Claimant demonstrated a clear ability to remember the past details of events associated with the recorded instances of back pain which is wholly inconsistent with forgetting.
52. I have found that the Claimant demonstrated inappropriate signs in her examination by Mr Pearse on 18 February 2019 as set out at paragraphs 32 and 33 above.
53. I accept that the Claimant told Mr Pearse the following on 18 February 2019;
 - i) she uses a crutch to aid mobility,
 - ii) she remains unable to undertake any household chores,
 - iii) she continues to rely on online shopping deliveries as well as help from her sister with household shopping.
54. I accept that the Claimant told Dr Mallett on 26 September 2019 that;
 - i) she can only manage around 4 minutes walking on a good day before she has to stop and rest,
 - ii) she can drive an automatic car for around 5-10 minutes maximum,

- iii) her sister has to help her with her shopping.
55. In her schedule of loss dated 15 January 2020 the Claimant stated that her pain prevents her from going out and that she is confined to the house.
56. I have reviewed the surveillance evidence carefully. In my judgment this evidence clearly demonstrates the Claimant has much greater functionality than she was prepared to admit to Mr Pearse and Dr Mallett.
57. On 18 February 2019, which was the date of Mr Pearse's assessment, the Claimant is shown driving and walking normally while carrying bags and demonstrates normal lumbar flexion with fluid movements.
58. On 8 March 2019 she is shown driving to a leisure centre and leaning into her car without any apparent difficulties. She walks freely without restriction and swings a water bottle. After she is shown purchasing items from a shop and carrying them in a bag.
59. On 26th September 2019, which is the date of Dr Mallett's assessment she is shown driving for 78 minutes, a long journey. She is also seen comfortably bending into her car to retrieve items. She walks for a total of 32 minutes again freely and without apparent restriction.
60. On 13 November 2019 she was observed driving to a shopping centre, shopping and in particular bending down to retrieve an item from the floor.
61. The Claimant sought to suggest that Mr Pearse had not recorded her responses accurately and that his reference to her only being able to walk for 5 to 10 minutes were his words not hers. I have already accepted Mr Pearse's account as accurate, however the matter goes further. In the Claimant's DWP records there is a letter which she wrote on 10 December 2018 in support of her application for reconsideration of her claim for Employment and Support Allowance in which she describes her abilities in a manner which is wholly consistent with her account recorded by Mr Pearse. In fact in this document she states that she could not walk or stand for more than 2 to 5 minutes.
62. The Claimant sought to explain Mr Pearse's observation of inappropriate signs by suggesting that pain killers that she was taking could mask the pain. However, at paragraph 11 of her witness statement she has stated that she did not take pain killers when she was driving as they make her drowsy. She was driving on this day.
63. The Claimant sought to explain away her ability to lean into her car by saying that it was leaning not bending. The fact of the matter is her spine was in flexion which is something she said to the experts and to the court she could not do.
64. I agree with the observation of Dr Mallett that external surveillance does not provide a direct insight into a person's level of subjective experience but if someone claims that they cannot do a particular activity and are then seen doing it, then clearly the issue is not whether such an activity is out of character or not but whether they have been misleading or inconsistent in their claim of what they are able to do.

65. As I noted at paragraph 28 above the Claimant applied to the court in an attempt to restrict the Defendant's use of the surveillance evidence, I have no doubt that she did so because she appreciated that it contradicted the various accounts she had given to others of her abilities.
66. I do not intend to examine every inconsistency and explanation given by the Claimant. In my judgment the Claimant has been both inconsistent and knowingly misleading in her accounts to the experts and to the court. She has demonstrated a willingness to manipulate the facts to suit her arguments. No proper explanation has been provided for the way in which this claim developed from a simple low value personal injury claim into a claim for serious injury worth over £600,000. I suspect part of the reason may well be because the Claimant is in financial difficulty, there being numerous references to this in the records. While the Claimant has sought to blame her solicitor for the way in which her claim was initially presented she has adopted, developed and maintained her claim while acting in person. In my judgment she has done so deliberately in order to bolster what she saw as an important element of her claim, the claim for loss of earnings. Given my findings there is simply no room to suggest that unconscious exaggeration may be at work.
67. I have no doubt that the Claimant now experiences pain in her spine and pelvic area but this is a result of her degenerative condition which has nothing to do with the 2014 incident giving rise to this claim, a fact of which I have no doubt she is well aware particularly as it has been very clearly explained by the orthopaedic experts. It follows that I am satisfied on the balance of probabilities she has deliberately exaggerated her disability to the court and to the experts. The purpose of the deliberate exaggeration was to support her claim for loss of earnings.
68. Applying the test in *Ivey v Genting Casinos Limited* I find the Claimant's deliberate exaggeration to be dishonest. It follows I am satisfied that the Claimant is entitled to damages but that she has been fundamentally dishonest in relation to her claim. In the circumstances I am required to dismiss the claim unless I am satisfied that the claimant would suffer substantial injustice.

Substantial injustice

69. I remind myself of the remarks of Julian Knowles J in *Sinfield*, section 57 of the Criminal Justice Act and Courts 2015 was intended to be punitive in character and "substantial injustice" must mean more than the fact that the Claimant will lose her damages. The Claimant has pursued this claim in the face of overwhelming evidence which she has deliberately but ineffectively sought to counter. The fact the Claimant may be in financial difficulty is no excuse. The Defendant has been put to great trouble and expense to rebut the loss of earnings claim and the Claimant's exaggerated assertions of disability. Ultimately the Claimant has only herself to blame for this situation and I am not satisfied that she would suffer substantial injustice by a result that Parliament clearly intended when enacting this legislation.
70. The claim is dismissed.