Neutral Citation Number: [2019] EWHC 1216 (QB)

Case No: HQ16P00052

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Strand,
London

Date: 14 May 2019

Before:

HER HONOUR JUDGE MELISSA CLARKE
Sitting as a Judge of the High Court

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Between:

SUDHIRKUMAR PATEL — **Claimant/ Respondent**

- and -

(1) ARRIVA MIDLANDS LIMITED
(2) ZURICH INSURANCE PLC — **Defendants/ Applicants**

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Mr Alan Jeffreys, QC (instructed by Transcare Law) for the **Applicants**
Mr Satinder Hunjan QC (instructed by Affinity Law) for the **Respondent**

Hearing date: 7 April 2019

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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.

Her Honour Judge Melissa Clarke:

Introduction

1. This the determination of an application made by the Defendants on 6 March 2018 to dismiss the Claimant's claim pursuant to section 57 of the Criminal Justice and Courts Act 2015 (section 57) on the grounds that it is fundamentally dishonest, and for costs. Mr Jeffreys, Queen's Counsel, represents the applicant Defendants and Mr Hunjan, Queen's Counsel represents the respondent Claimant.

2. The claim is one in personal injury arising from a road traffic accident on 26 January 2013 when it is not disputed that the Claimant, a pedestrian, was in collision with a bus owned by the First Defendant and driven by one of their employees. The Second Defendant was the insurer of the bus.

3. The medical records show that after the collision, the Claimant had a cardiac arrest at the scene of the accident and was resuscitated after 4 minutes by a bystander performing CPR. He was taken to Leicester Royal Infirmary, where he was diagnosed with a subarachnoid haemorrhage and admitted. He spent 3 days in the intensive care unit until 1 March 2013, then a few weeks on the general ward, and then he was transferred on 4 April 2013 to a local rehabilitation unit where he remained until he was discharged home in May 2013. The Claimant's case is that, despite an initial recovery, he began to deteriorate within a week of the collision and at the time of filing the claim he was significantly disabled.

4. An amended particulars of claim and amended provisional schedule of loss were filed on 4 May 2016 and 5 May 2016 respectively. The Claimant's litigation friend, his son Chirag Patel, signed both documents with a statement of truth. The amended provisional schedule of loss runs to 8 pages of headline categorisation of past and future loss, but is entirely unparticularised as to narrative, as to relevant dates, and as to quantum. Each heading merely contains beside it *"TBC".*

5. The amended particulars of claim pleads that the Claimant sustained a cardiac arrest, a traumatic brain injury, anoxic brain injury and a severe conversion disorder. It attaches a medical report of Dr Fleminger, Consultant Neuropsychiatrist, dated 14 February 2015. This is based on (i) Dr Fleminger's examination of the Claimant and interview with both Chirag Patel and the Claimant's wife, Mrs Patel, on 19 January 2015; and (ii) his later review of the Claimant's medical records.

6. Dr Fleminger describes that he found the Claimant in bed, mute, almost entirely unresponsive and without movement in his hands, arms or legs. I will look at that report in more detail later in this judgment, but the following quote summarises the information provided by Chirag Patel of his father's disability:

> "I gained the impression from his son that his level of disability has been reasonably static over the last few months. In terms of his current state [the Claimant] says very little and almost nothing that is meaningful. He does nothing for himself. It is not possible to assess his mood or thoughts. He requires complete care, showing only the slightest participation in personal activities of daily living like washing and toileting, and being largely immobile. He spends hours in bed doing nothing. At best he will sit out

> appearing to watch tv, or opening his eyes and looking around when family visit".

7. Dr Fleminger could find no neurological reason for the Claimant's condition. He considered whether the Claimant's unusual presentation was feigned, but on balance, and for reasons given in the report, he diagnosed the Claimant as having a severe conversion disorder arising from the collision. He also assessed the Claimant as lacking the capacity to litigate, in the following terms:

> "Given his present mental state Mr Patel lacks capacity to make decisions about his finances and affairs and about his compensation case. Whether or not he can understand what information he is given and use and weigh this information in the balance to make decision, he is unable to communicate any decision he has made. Whether or not he regains capacity in the future depends on the outcome of his conversion disorder".

8. The Defendants instructed an expert Consultant Neurologist, Dr Schady. He visited the Claimant, examined him and interviewed Chirag Patel in August 2016. He also found the Claimant in bed, mute and unresponsive. Chirag Patel told him that this was a typical day for the Claimant.

9. Dr Schady produced a report dated 8 September 2016, which I will also look at in more detail in due course. He agreed with Dr Fleminger that there was no neurological reason for the Claimant's condition. He agreed with Dr Fleminger that the Claimant was either feigning his disability or had a subconscious conversion disorder. Unlike Dr Fleminger he felt unable, clinically, to distinguish between these two possibilities, but he said: *"I agree with Dr Fleminger that the hallmark of the latter is consistency, i.e., unchanging disability regardless of circumstances and whether or not the patient is aware that he is being observed"*.

10. Unbeknownst to any of the Claimant, his family, or the two medical experts, the Defendants had instructed surveillance operatives to observe the Claimant over several days in May 2016, some 16 months after Dr Fleminger's visit to the Claimant and several months before Dr Schady's visit. On the first day, 24 May 2016, they saw nothing of interest. On 25 May 2016 they saw, and video recorded, the Claimant and his second son Neil make a number of visits to seven tyre and vehicle shops in Leicester, over a period of a number of hours, on two separate excursions during the same day. They shared the results of that surveillance with the Claimant's solicitors on 7 September 2016 and with Dr Schady on 9 September 2016.

11. Dr Schady's opinion after viewing the surveillance tape, expressed in a letter of the same date and signed with an expert's declaration, is as follows:

> "There is a striking contrast between the appearance of the subject of these observations and the man I saw on 25 August. I can confirm that they are one and the same person even though the degree of animation is starkly different. The man captured by surveillance can walk, speak and engage in interaction with those around him in a normal manner, which was clearly not the case when Dr Fleminger and I examined him.

> Under the circumstances the diagnosis of a conversion disorder is no longer tenable. Mr Patel's disability is feigned. Moreover, this must be evident to his son, whose description to us of his father's condition can only be described as frankly deceitful. He lied to us. Mr Patel did not do so, as he did not speak, but his pretence of disablement represents an equally regrettable attempt to deceive, presumably for the purpose of financial gain.
>
> It is now possible to go beyond what I stated in my recent report. Not only is there no neurological explanation for Mr Patel's disability but there is no medical condition, whether physical or psychological, to account for it".

Procedural background

12. The Defendants applied, and were permitted in early October 2017 a few weeks before the liability trial, to amend the Defence to plead that the claim should be struck out pursuant to s57 of the Criminal Justice Act 2015 on the basis of fundamental dishonesty of the Claimant and his litigation friend in relation to the claim.

13. The Amended Defence also pleaded that the Claimant was in breach of Practice Direction 16 to the CPR since there had been no attempt by the Claimant to particularise any past losses and expenses. I pause to note that it remains unparticularised.

14. The claim proceeded to a trial on liability at the end of October 2017, which was heard by Mr Derek Sweeting QC, sitting as a Deputy High Court Judge. In a reserved judgment handed down on 12 March 2018, he found in favour of the Claimant on primary liability but made a finding of 40% contributory negligence.

15. Mr Derek Sweeting QC also considered two consequential applications: first an application by the Claimant for his costs on the indemnity basis in relation to liability issues; and secondly an application by the Defendants to adjourn the issue of those costs to the determination of the s57 application. He acceded to the Defendants' application.

16. This s57 application came before Master Brown for case management. He made directions by order of 10 July 2018 which provided, inter alia:

> "3. The Claimant has permission to serve any witness statement of fact upon which he intends to rely (including a witness statement from the litigation friend) by 4pm Monday 1st October 2018.
>
> 4. The Defendants have permission to adduce and rely upon the surveillance evidence acquired by Exam Works and the witness statements of surveillance operatives M Brookes and D Cawdron together with the surveillance footage and facilities for playing the same at the hearing.
>
> 5. The Claimant has permission to serve a medical report from Dr Fleminger (consultant neuropsychiatrist) dealing with the surveillance evidence by 4pm Monday 1st October 2018, subject to any application on the Claimant's behalf for further directions in this respect, which must be made by 4pm on Monday 17th September 2018.

6. The Defendants have permission to adduce and rely upon:

   (a) the medical report of Dr Fleminger, Consultant neuropsychiatrist, dated 19th January 2015

   (b) The medical report of Dr Schady dated 8th September 2016 and his further letter dated 9th September 2016

7. The Defendant has permission to call the above named medical experts in the event that there is any dispute about the contents of their reports".

17. The Claimant has served witness statements from his sons Neil Patel and Chirag Patel, his wife, and two witnesses who are apparently unrelated friends of the family: Anita Patel and Sushil Taylor. The Defendants submit that the Claimant does not have permission to rely on those witness statements and so if he wishes to rely on that evidence, he must call the witnesses to give oral evidence or put in the statement as hearsay evidence, pursuant to CPR 32.5(1). The Claimant disagrees. He submits that CPR 32.5 relates to the use of witness statements at trial, and this is not a trial but the hearing of the Defendants' application.

18. I am with the Claimant. The relevant rules relating to witness evidence at hearings such as this one are:

   i) Rule 32.2(1)(b) *"The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved – (a) at trial, by their oral evidence given in public; and (b) at any other hearing, by their evidence in writing."*

   ii) Rule 32.6: *"Subject to paragraph (2), the general rule is that evidence at hearings other than the trial is to be by witness statement unless the court, a practice direction or any other enactment requires otherwise."* Subsection (2) provides that a party may also rely on his statement of case or his application notice, if the relevant document is verified by a statement of truth.

   iii) Rule 32.7:*"Where, at a hearing other than the trial, evidence is given in writing, any party may apply to the court for permission to cross-examine the person giving the evidence."*

19. Accordingly any fact which the Claimant wishes to prove pursuant to this application is to be proved by witness statement, and if the Defendants had wished to cross-examine the maker of a statement, they could have applied to do so. They did not.

20. In relation to the surveillance operatives, Miss Cawdron made two witness statements and Mr Brookes made one. Both came to court and were made available for cross-examination but the Claimant declined to cross-examine them.

21. The Claimant neither served updating expert evidence from Dr Fleminger nor made any application for further directions in relation to any other medical evidence. I have no evidence about whether Dr Fleminger was shown the surveillance evidence and, if so, whether and how that changes the opinions given in his report. Mr Hunjan told me in the course of his submissions for the Claimant that the Claimant's previous

solicitors wrote to Dr Fleminger informing him of the surveillance evidence, following which he declined to have anything further to do with the case, but I do not have any evidence about this exchange. The Defendants submit that I may infer that there is no updating evidence from Dr Fleminger before me, because any evidence he would or may have given would not support the Claimant's case. I do draw that inference which I consider may properly be drawn.

22. Chirag Patel has attached to his witness statement a letter dated 10 May 2017 from a treating consultant neurologist of the Claimant, Dr Nikfekr. This notes that Chirag Patel reported to him in medical consultation that Claimant has good days and bad days. Dr Nikfekr records: *"On a good day he is able to function, get up, walk around, talk to different people even answer the phone and then on the other days he would just sit around not talk, look in agony, being lethargic and perhaps confused… I think most of his symptoms are non organic and related to conversion disorders… I had a detailed and fine conversation with him and his son explaining that I believe his main problems are psychology and he needs to be referred to the Psychiatrist and remain under the care of the Psychiatrist".*

23. Mr Hunjan for the Claimant submits that this is important evidence that a conversion disorder is compatible with some variability in presentation, however I note that:

    i) the Claimant has not sought to call Dr Nikfekr;

    ii) Dr Nikfekr is a treating clinician and not an expert in this case;

    iii) the court has no information about Dr Nikfekr's expertise in conversion disorders, save that he says that the Claimant should be referred to a psychiatrist which suggests that he does not consider that he has the necessary expertise;

    iv) the court cannot speculate about what Dr Nikfekr's opinion would be and whether it would change if he was shown the experts reports and the surveillance evidence; and

    v) the Claimant has not sought to adduce any further medical evidence to consider this letter, the experts reports and/or the surveillance evidence, although he was permitted to make such an application pursuant to the directions of Master Brown.

24. In his witness statement Chirag Patel stated that:

    i) he does not challenge the factual accuracy of anything the two doctors say in their reports (para 25);

    ii) for the purposes of the Defendants' s57 application, he does not challenge what Dr Fleminger and Dr Schady record that they observed; what they say they were told or what they found on examination during their visits to the Claimant's home (para 39);

    iii) he does not challenge what Dr Schady observed from the surveillance footage (para 39).

25. Accordingly the Defendants did not call the medical experts to give evidence.

The Parties' positions

26. It is the Defendants' case that the overwhelming inference to be drawn from the circumstances of this claim is that the Claimant and those speaking for him have acted dishonestly in relation to the claim. In doing so, the Defendants submit, they have substantially affected the presentation of his case on quantum in a way which goes to the root of the claim, and adversely affects the Defendants in a significant way, judged in the context of the particular facts and circumstances of this litigation (*London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 (QB); [2018] P.I.Q.R P8). They ask for a finding of fundamental dishonesty and dismissal of the claim.

27. It is the Claimant's case that the accident has had grave implications for his health and for his family members, in particular Chirag Patel who has given up his career to act as his father's carer. Chirag Patel denies that he or his father has been dishonest, saying merely that he did not *"communicate as effectively as he should have done"* with the medical experts.

28. The Claimant focuses his submissions not on the substance of the s57 application, but whether it can be determined justly by the court at this stage of the proceedings. He submits that it cannot: that the litigation should be allowed to proceed to quantification of the claim; and only after hearing all the evidence and making appropriate factual findings, will the Court then be in a position to determine whether the claim is fundamentally dishonest and whether it can be dismissed without substantial injustice to the Claimant. The Claimant seeks dismissal of the application and an award of indemnity costs.

Law

29. Section 57 provides:

> 57 Personal injury claims: cases of fundamental dishonesty
>
> (1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim") –
>
> a. the court finds that the claimant is entitled to damages in respect of the claim, but
>
> b. on an application by the defendant for 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 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.

(6) If a claim is dismissed under this section, subsection (7) applies to –

a. Any subsequent criminal proceedings against the claimant in respect of the fundamental dishonesty mentioned in subsection (1)(b), and

b. Any subsequent proceedings for contempt of court against the claimant in respect of that dishonesty.

(7) If the court in those proceedings finds the claimant guilty of an offence or of contempt of court, it must have regard to the dismissal of the primary claim under this section when sentencing the claimant or otherwise disposing of the proceedings.

(8) …"

30. It is common ground that helpful guidance for courts grappling with allegations of fundamental dishonesty pursuant to s57 can be found at [62] - [64] of the judgment of Julian Knowles J in *LOCOG v Sinfield*:

> "[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 s57 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 consider 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 s57(3), any element of the primary claim in respect of which the claimant has not been dishonest unless, in accordance with s57(2), the judge is satisfied that the claimant would suffer substantial injustice if the claim were dismissed."

31. I will follow that guidance, but add to it a final step, required by s57(4):

d) If the judge dismisses the claim, the judge must then assess and record the amount of damages that the court would have awarded for any element of the primary claim in respect of which the claimant has not been dishonest.

32. Although he did not put the authority before me, Mr Hunjan draws my attention to the note at para 3.4.3.6 of the White Book 2019 on page 92 in relation to the case of *Summers v Fairclough Homes* [2012] UKSC 26 (in particular the section I have emboldened below), in support of the Claimant's submission that a s57 application should not be determined until the court has assessed both liability and quantum at trial:

> "That case concerned an accident at work in which the claimant was found to have fraudulently exaggerated the extent of his claim. It was common ground that deliberately to make a false claim and to adduce false evidence is an abuse of process. **The Supreme Court held that the court does have the power to strike out a statement of case under r3.4(2) and under its inherent jurisdiction for abuse of process even after the trial of an action in circumstances where the court has been able to make a proper assessment of both liability and quantum. However, it was held that, as a matter of principle, it should only do so in very exceptional circumstances. The Supreme Court considered whether the possibility in such circumstances was so theoretical that it should be rejected as beyond the powers of the court, but concluded that it would be unwise to limit in advance the kinds of circumstances in which sufficient abuse might be found. It was stated that in deciding whether or not to exercise the power the court must examine the circumstances of the case scrupulously in order to ensure that to strike out the claim is a proportionate means of achieving the aim of controlling the process of the court and deciding cases justly.** The draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. The Supreme Court stated that it is

> very difficult indeed to think of circumstances in which such a conclusion would be proportionate. Such circumstances might, however, include a case where there had been a massive attempt to deceive the court but the award of damages would be very small."

33. The note after the emphasised section is a summary of [49] of the judgment of Lord Clarke in *Summers*. He went on to say at [50]:

> "[50] It was submitted on behalf of the defendant that it is necessary to use the power to strike out the claim in circumstances of this kind in order to deter fraudulent claims of the type made by the claimant in the instant case because they are all too prevalent. We accept that all reasonable steps should be taken to deter them. However there is a balance to be struck. To date the balance has been struck by assessing both liability and quantum and, provided that those assessments can be carried out fairly, to give judgment in the ordinary way".

34. Of course, this is not an application for strike out under Rule 3.4. It is an application under s57 for dismissal of the claim on the basis of fundamental dishonesty, which is a statutory provision which was not in force at the time of *Summers*. Julian Knowles J considered *Summers* in his discussion of the law in *LOCOG v Sinfield* and I respectfully agree with his analysis at [54]:

> "[54] From 13 April 2015, s57 has provided defendants with the means of having a personal injury claim dismissed or struck out on the basis of "fundamental dishonesty". It therefore represents a Parliamentary response to the problems caused by fraudulent claims which were identified by Moses LJ [in *South Wales Fire and Rescue Service v Smith* [2011] EWHC 1749 (Admin)]. Although in *Summers*, supra, at para 61 Lord Clarke said that it is in principle more appropriate to penalise a fraudulent claimant as a contemnor than to relieve the defendant of what the court has held to be a substantive liability, by enacting s57, Parliament has taken a different view. In *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2017] A.C. 1, [95] – [96], Lord Hughes… referring to the 'fraudulent claims rule', ie, the rule that a genuine insurance claim supported by fraudulent evidence should fail even if valid in law, said:
>
> > "[95] The need for such a rule, severe as it is, has in no sense diminished over the years. On the contrary, Parliament has only recently legislated to apply a version of it to the allied social problem of fraudulent third party personal injuries claims. Section 57 of the Criminal Justice and Courts Act 2015 provides that in a case where such a claim has been exaggerated by a "fundamentally dishonest" claimant, the court is to dismiss the claim altogether, including any unexaggerated part, unless satisfied that substantial injustice would thereby be done to him. Parliament has thus gone further than this court was able to do in *Summers v Fairclough Homes*.""

35. Thus Parliament provided, by s57(1)(a), that the court could only find fundamental dishonesty once it had first found that the claimant was entitled to damages on the claim, but it did not provide that the court must first carry out a quantum assessment

of the full claim before fundamental dishonesty could be found. It could have done so, if that is what it intended.

36. Despite that, Parliament was not silent as to quantification in s57. It imposed an obligation on the court in s57(4) to *"record the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for dismissal of the claim"* (which, for shorthand, I will refer to as damages for the 'honest part' of the claim), but only after: the court has found fundamental dishonesty; it has determined that dismissal of the claim would not cause substantial injustice to the Claimant; and it has decided to dismiss the claim. The reasons for this can be seen, I suggest, in ss 57(5), 57(6) and s57(7): so that credit is given for the lost 'honest part' of the claim when a claimant is ordered to pay the defendant's costs (s57(5)); and so that any court sentencing a claimant for a contempt arising out of the fundamental dishonesty, or in any related criminal proceedings, can take into account the lost damages for the 'honest part' of the claim and so avoid punishing him twice for the same behaviour (s57(6) and s57(7)). For neither reason, in my judgment, is a quantification of the full claim, including the 'fundamentally dishonest part' of it, necessary.

37. For those reasons I am satisfied that as a matter of law, a s57 application *may* be determined at any time after the claimant's entitlement to damages is established. Whether, in any case, it *should* be determined before a quantum trial will depend on whether it can be determined justly at that time. This will depend on all the circumstances of that particular case. I can see the force in the Claimant's submission that by considering a s57 application after the liability trial but before full quantification of the claim the court is effectively embarking on a summary process. For that reason I consider it is necessary for a court considering a s57 application in these circumstances to think carefully whether there are real grounds for believing that a fuller investigation will add to or alter the evidence relevant to the issues that it must determine, per Asplin J at [73] of *Tesco Stores Ltd v Mastercard Inc.* [2015] EWHC 1145.

38. Turning to the assessment of dishonesty that the court must carry out, the relevant test is that set out in *Ivey v Genting Casinos Limited (T/a Crockfords Club)* [2017] 3 W.L.R 1212, in which the Supreme Court confirmed at [72] of the judgment of Lord Hughes (with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Thomas agreed) that the test of dishonesty is as set out by, inter alia, Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 W.L.R 1476 at pp 1479 – 1480, namely:

> "Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards".

39. Lord Hughes explains how a court should approach the test, later in [72]:

> "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".

Evidence

The Claimant's Expert Neuropsychiatrist

40. Dr Fleminger's report makes clear that at the time of his visit to the Claimant's property to conduct the examination and interviews, on 19 January 2015, he had no further information than his instructions from the Claimant's solicitors. Afterwards, and before writing his report, he had access to the Claimant's medical records including those from his hospital admission.

41. Dr Fleminger found the Claimant in bed and described the following presentation:

> "At no stage during the interview did Mr Patel acknowledged [sic] my presence, with the exception of one occasion when he briefly made eye contact (see below). I found him lying in bed with his eyes closed. His lips would sometimes move. At times his eyelids flickered. When I tried to interact with him by introducing myself and asked him to look my way this caused no immediate reaction. However after a minute or two of talking to him his eyes opened a little. To start with he started blankly in to space without any eye contact. However with a little bit of further stimulation from both me and his son, he did open his eyes and look around, and at one point made eye contact with me lasting a second or two. Blinking rate was generally reduced, but he did blink on occasion. His facial expression was entirely blank. By and large there was very little movement of his face and no movement of arms or legs. At no time did he speak.
>
> When I approached him and put my fingers in his left hand, which was lying limply by his side, and asked him to grip my hand, there was no movement. There was no movement when asked to raise his hand, or asked to open his eyes. The muscle tone in his arms was not increased. I did not undertake a physical examination."

42. Dr Fleminger noted that the hospital records showed that in the days immediately following the accident, the Claimant had appeared to be making a good recovery: he was alert and aware, making conversation, able to walk with and later without assistance, independently move from sit to stand.

43. Dr Fleminger tried to ascertain from Chirag Patel and his mother Mrs Patel *"at what stage following the injury was Mr Patel at his best, given that I had been told his father had deteriorated over the last year or two"*. He notes that Chirag was *"not a particularly good historian and would often answer my questions around the point rather than him giving me a straight answer".* Nonetheless he reports that he was told:

i) That Mr Patel's speech within a few weeks within a few weeks of the injury was better than it is now. So for example he was able to talk and indicate that he knew he was in hospital;

ii) While he was an inpatient on the rehabilitation unit he was able to walk with 2 staff supporting him, using a frame and able to take a few steps next to his bed;

iii) In terms of eating, at his best he was able to use a spoon to feed himself. Nevertheless he was shaky and would spill food.

44. In fact I am satisfied that the hospital notes show that the Claimant was doing somewhat better than that, as Dr Fleminger identified in his report.

45. In relation to the Claimant's then current state, Dr Fleminger notes that he was told:

i) Mr Patel never spoke about how he was feeling. He never spoke about what was happening in the world. He seemed totally uninterested in what was happening around. He never expresses any choices. He never indicates what he wants.

ii) In terms of speech, the Claimant uses occasional short phrases, for example saying "the phone is ringing". He gives the impression of listening to what people are saying. However there is very little, if any, rational conversation.

iii) He never indicates his needs, for example by indicating that he wants to go to the toilet.

iv) He tends to respond with eye opening and engaging in eye contact when family members visit. However he never speaks to them.

v) He spends most of his day in bed.

vi) Sometimes he will sit with his son watching television. He stares blankly at the screen and is never seen to engage with what is going on. For example he never reacts to any news items or comedy.

vii) When he is sat out in a chair he tends to sit with his legs and torso extended in what appears to be a very uncomfortable sitting position.

viii) He is generally entirely passive, he has to be offered and given drinks and food.

46. Dr Fleminger opined that the Claimant had suffered a catastrophic deterioration in his disability over time since the injury of 26 January 2-13, which started one week after the injury; that there were no neurological or other organic reasons for it; and that the majority, possibly almost all, of his then present disability was caused by psychological factors. He diagnosed *"a severe conversion disorder (synonymous with dissociative disorder, and classified alongside the somatoform conditions) with motor and cognitive symptoms"*, after carefully considering, and ultimately rejecting, the possibility that the Claimant's condition was feigned:

> "Mr Patel's presentation is very unusual and is not explained by organic disease, and the description of his condition rests heavily on the report of family members; it is reasonable to ask if his presentation is in some way false or feigned. I think this is very unlikely because the deterioration in his condition, and therefore the development of what I think is a conversion disorder, started early in the course of his recovery and in the context of evidence of emotional distress associated with anxiety, and was witnessed by the clinical team looking after for him… Mr Patel's conversion disorder is not unlike that in other patients I have seen, in whom there was no obvious secondary gain (e.g. they might gain financially by being disabled) and in whom intensive observations by clinical staff (for example while they are in in-patient care) indicates that the disability is constantly present".

The Defendants' expert neurologist

47. Dr Schady attended the Claimant's house in August 2016, examined the Claimant (including carrying out a physical examination) and interviewed Chirag Patel. It appears from Dr Schady's report that the Claimant presented to him in a very similar manner to how he had been found by Dr Fleminger:

> "He lay in bed and made no eye contact. Indeed, his eyes were half closed and his gaze was averted. He lay quietly… there was no spontaneous movement. He nodded briefly in response to some of my questions but there was no attempt at verbal communication… There was only a flicker of lateral neck movement on request. He seemed unable to stick out his tongue. There was no response to a loud clap. He blinked to a puff of air but not to visual threat. He rolled his eyes round when I lifted his eyelids… There was no voluntary movement in his arms. Muscle tone and bulk were normal. When I raised either arm he held it up for less than a second before dropping it onto the bed. The best he could achieve on request was a slight flicker of his fingers… He did not show any voluntary movement of his feet. When I raised either leg it flopped back onto the bed and when I drew up his toes he kept them briefly extended… I asked Chirag to sit his father up, as he usually does. Mr Patel did not contribute to his son's efforts to get him to sit on the edge of the bed. Once he was positioned like this he sat without support but he held himself slumped and did not show full control over his trunk…. When I tried to get him to say goodbye he opened his lips but made no sound".

48. Chirag Patel provided a very similar history and description of the Claimant's current condition to Dr Schady as that which he had provided to Dr Fleminger. Dr Schady records that he was told that:

> "at best [the Claimant] cannot walk… when standing he has to be held by his son since otherwise his legs will collapse… Chirag could not remember his father being able to walk across the room at any time since discharge from hospital… Attempts were made to get him out of the house in 2014 but not since… He does not converse… he is equally mute with his family as with strangers… his condition on the day I saw him was said to be typical i.e. neither better nor worse than average".

49. Dr Schady notes the contents and conclusions of Dr Fleminger's report. He then concludes (my emphases):

> "His presentation when I saw him was extraordinary. **He was mute, unresponsive and virtually unable to move any body part.** To the untutored eye his appearance was that of profound disablement. However, there were clinical markers of a non-organic disorder. He did not move any limb on request, yet when I raised either arm he held it up briefly before letting it flop back onto the bed. There was no muscle wasting, which would have been a virtually inevitable consequence of a bed-bound state. From his son's account, he is able to control his sitting posture in a chair without armrests, which would be surprising in someone so disabled…
>
> **The clinical picture indicates that his presentation is either feigned or the result of a conversion disorder**. Dr Fleminger has opted for the latter, but the distinction cannot be made confidently based on the clinical picture alone. Dr Fleminger pointed out that he has seen similar cases in whom "intensive observations by clinical staff indicates that the disability is constantly present".
>
> Based on my examination alone **I cannot make a distinction between feigned disability and a subconscious conversion disorder. I agree with Dr Fleminger that the hallmark of the latter is consistency**, **i.e., unchanging disability regardless of circumstances and whether or not the patient is aware that he is being observed.** In Mr Patel's current state it is equally impossible to say whether there may be a small core of organic cognitive impairment. Bearing in mind the rapid recovery of a normal GCS and the resolution of the radiological abnormalities, I would not have expected any permanent brain damage and I would therefore say that no such damage has occurred in Mr Patel's case.
>
> **I conclude that there is no neurological basis for Mr Patel's apparent disability or any need for care, assistance, therapy or case management**. His ability to engage in the standard activities of daily living and his potential to return to employment depend on non-neurological factors."

Surveillance Evidence

50. I have viewed the surveillance footage. It consists of video images, but no sound. In my judgment it shows the Claimant:

i) leaving his house, walking along the road unaided, without difficulty and with a seemingly normal gait.

ii) getting into and out of the front passenger seat of the car on multiple occasions, on each occasion unaided and apparently without difficulty.

iii) walking around the various tyre suppliers, through car parks, and in and out of customer service areas and work areas. For example, at one garage he walks from the car approximately 20-30m into the customer reception, back out 20m to the car, he stands around the car for some time, and then returns to customer reception and walks back, all apparently without difficulty;

iv) seeming to talk to his son, at one point making his son laugh, and also apparently participating in conversations with various workers at the tyre shops;

v) seemingly interested and engaged in what was happening, walking around the car and looking at the tyres with a tyre worker, bending over the boot of the car to look at what later transpires to be a wheel and tyre in the back of the car, etc.;

vi) reacting appropriately, for example: by stepping back out of harm's way when the tyre worker puts up his arm to shut the boot; by shaking the tyre worker's hand when it is held out to him in farewell;

vii) negotiating roads, pavements and car parks safely without assistance, including at one point waiting by the road checking the traffic until it was safe to cross, then crossing;

viii) looking at, and apparently reading, some documents or perhaps a catalogue;

ix) returning with his son to his house for a break before going out again a little while later to visit some more tyre shops and, on the second return home, displaying manual dexterity by using the house keys to open the front door to his property.

51. In my judgment the video surveillance also shows the Claimant's son Neil give almost no guidance or assistance to his father during the hours that they were out. For example: on every occasion, Neil leaves it up to his father to open his own car door and get in and out of the car; he often walks some distance ahead of or behind his father without looking to see if he is following or if he is negotiating roads and pavements safely; and at no point does he take his arm or provide him with any physical support.

Witness evidence of Claimant's witnesses filed in response to the s57 application

Chirag Patel

52. Chirag Patel now describes his father's condition as variable. He says *"On most days my father is unresponsive. He needs help and support to get him into a chair. He spends virtually all his time in the living room on the first floor. He sleeps there as well as sitting there. He will interact occasionally, sometimes on the phone. He will tell people he is unwell. On some days when he is more responsive, we try to push him to walk. On one occasion he was taken out to get some fresh air. He was reluctant but we still encouraged him. He fell over… My father rarely leaves the house, often not for months; Most of the time my brother Neil and I would carry him on a chair down the stairs. On a very few occasions he just about manages to get down himself when encouraged. He would go down holding the rails on both sides and moved slowly."*

53. In relation to his interaction with Dr Fleminger and Dr Schady, Chirag Patel says *"I was simply emphasising my father's disability as he was at the time and on most occasions i.e. unresponsive, rather than some of the better days when he is more co-operative in doing some activity. I wanted to get the attention of these two doctors to*

the fact that my father clearly had problems which were not being recognised or properly treated by the medical profession. I was hoping they would shed light on what was the matter with my father … In hindsight, I should have explained some of the better days of my father… I was simply trying to do my best."

54. Chirag Patel addressed some of the more obvious inconsistencies between what he told the doctors and what can be seen on the surveillance report at para 25: "*I don't recall saying to Dr Schady that my father cannot ever walk across the room, what I was trying to say is that he often struggles to walk in the room. I never meant to say he never goes out, what I was trying to say is that he hardly goes out. It would really be ridiculous to suggest that, because my father had occasionally gone out… Nevertheless I do not challenge the factual accuracy of anything the two doctors say in their reports.".*

55. And again at para 27: *"The reason why I probably mentioned my father always needs two carers is because my father was on many occasions hoisted out by the carers initially and I was specifically told by the hoist supplier that even if one person can manage, there must be at least two people for the use of equipment for health and safety reasons. So when my father cannot manage and needs assistance I said he needs two carers."*

56. He concludes by saying *"My father's presentation to Dr Fleminger and Dr Schady was in no way fundamentally dishonest. That is how he very often is… I accept that I may not have effectively communicated as I should have to the doctors but that was for the reasons set out above and was also in no way intended to be dishonest".*

Neil Patel

57. Neil Patel's evidence is that his father is *"very different"* now to how he was before the accident and *"not like himself at all".* He says at para 7 that *"many times, he seems just like he was in hospital 5 years ago. He often seems very depressed and anxious"*. He says that a lot of the time his father can be very uncooperative, but describes great variability. He says that on some days he manages to do things for himself, to sit himself up etc., and other days *"he becomes very unresponsive and significantly reliant on us in terms of doing almost everything for him"*. He describes his father being forgetful and frustrated, refusing help, speaking inappropriately, getting overly emotional and distressed or alternatively showing no emotion or interest. He says that on the day that the surveillance saw his father out with him, his father *"seemed to be more compliant and receptive as usual"*, but complained and said he was in pain during the course of the day.

Mrs Patel

58. Mrs Patel says that the Claimant's *"physical health, personality, emotions and capabilities have changed significantly as a result of the accident"* but *"he is still the same person to me"*. She says: *"Many times his behaviour has been challenging as he is often unresponsive. It is not always easy to get him to cooperate or participate in activities. Whenever he is cooperative my sons try to take him out."* She says that it is incorrect to say that there is nothing wrong with him: *"There is a significant difference in his condition on a day-to-day-basis."*

The friends

59. Anita Patel says that she has known the Claimant since 1980 and has visited him at least once a month since his accident. She describes him as having changed so that he is like a different person. *"He used to be chatty and more independent than he is now… He is very depressed and in no mood to do anything. He has become very dependent"*. She describes him as unresponsive a lot of the time depending on his mood. She says *"sometimes he does chat but certainly not as much as he used to"*. She says he is not just pretending to be ill.

60. Sushil Tailor says that before his accident Mr Patel was socially active and outgoing, but since the accident his physical and mental health have worsened: *"He no longer has that same enthusiasm and determination for life. He spends a lot of time in his room and he is often reliant on his family… Sometimes he does not acknowledge me or talk to me, but occasionally he does talk"*. He, too, says that it is not true to say that Mr Patel is just pretending to be ill.

Submissions and discussion

The Claimant's Capacity

61. I remind myself that the Claimant is currently a protected party. In the course of submissions I indicated that my preliminary view was that: he had been assessed by Dr Fleminger as having no capacity; that I was not being asked to make any different capacity assessment, and did not have the medical evidence before me to enable me to do that; and accordingly I should treat him as not having capacity unless and until he was assessed otherwise. On further reflection and specific focus on the terms of Dr Fleminger's capacity assessment, I have reached a different view. However, if the parties wish to make additional submissions on this point at handing down, I will hear them.

62. Section 1 of the Mental Capacity Act 2005 ("MCA"), provides that a person must be assumed to have capacity unless it is established that he lacks capacity. This presumption of capacity is a key principle of the MCA. Dr Fleminger's assessment was: *"Whether or not he can understand what information he is given and use and weigh this information in the balance to make decision, he is unable to communicate any decision he has made. Whether or not he regains capacity in the future depends on the outcome of his conversion disorder"*.

63. I am satisfied on the balance of probabilities that Dr Fleminger's capacity assessment was made on the basis of incorrect information gleaned from the Claimant's presentation and from what he was told by Chirag Patel of the Claimant's disabilities, namely that the Claimant was unable to communicate any decision he has made. This cannot be correct in the light of: (i) the witness evidence of the Claimant's witnesses which describe that the Claimant is able to communicate, although say he is often unresponsive. In particular Anita Patel says *"sometimes he does chat"* and Sushil Taylor says *"occasionally he does talk"*; and (ii) the evidence of the surveillance footage, which appears to show the Claimant talking to his son and others, and reading documents. In those circumstances, in my judgment Dr Fleminger's capacity assessment cannot establish a lack of capacity pursuant to section 1(1) MCA, and the Claimant must be presumed to have capacity unless it is later established, on the basis

of a full and true understanding of the Claimant's condition and abilities, that he lacks it.

64. In addition, Dr Fleminger's capacity assessment ties the Claimant's capacity to the outcome of his conversion disorder. If I were to accept Dr Schady's post-surveillance opinion that there is no conversion disorder, I am satisfied that Dr Fleminger's assessment of the Claimant's lack of capacity could not stand. For reasons which will become apparent later in this judgment, I do accept Dr Schady's opinion. Once again that leaves the Claimant with a presumption of capacity.

Timing of the Application

65. The Claimant submits that in the facts of this case, the s57 application has been made too early, and should not be determined until all matters relating to quantification of the claim are tested and ventilated, and findings made, at a quantum trial. I note from the costs judgment of Mr Derek Sweeting QC that the Claimant's case in March 2018 was that the Defendants' s57 application was made too late, not too early, because it should have been made before the trial on liability. That argument was rejected as being counter to the requirement in s57(1)(a) that the entitlement of the claimant to damages must be established first.

66. In any event, it seems to me that this submission should properly have been made at the directions hearing before Master Brown, who was setting the timetable for the s57 application to be heard. I do not know if it was or not, but if it was, it did not succeed before him. Nonetheless the Claimant has not sought to appeal his directions order, nor has he made an application to vary the directions or seek different directions.

Witness evidence

67. The Claimant submits that it is impossible for the court to make a finding of fundamental dishonesty on the basis of untested witness statements from family members and friends stating that the Claimant has serious difficulties and that those difficulties are variable, i.e. he has good days and bad days. To do so, Mr Hunjan argues, the court must be satisfied and find that all of those witnesses are lying, without testing the evidence.

68. I do not accept this submission. Those witnesses describe a picture of the Claimant's condition which is, in my judgment, wholly at odds with how the Claimant presented to Dr Fleminger and Dr Schady, and what they were told by Chirag Patel. Accordingly even if I take their evidence about the Claimant's condition at its highest, and assume that it is true, it does not answer the inconsistencies between what those experts saw and were told when they visited the Claimant, and how the Claimant appears on the video surveillance. In my judgment it supports the Defendants' case.

Need for full expert evidence

69. The witness evidence of Chirag Patel and the other family and friends asserts that the Claimant is in some way very ill as a result of the accident, and that any suggestion that he is pretending to be ill is incorrect. Neil Patel refers to depression and anxiety, for example. The Claimant submits that the court cannot make a finding of fundamental dishonesty without hearing from and testing at trial the full range of

expert evidence that the Claimant seeks to rely on for quantification of his claim, which Mr Hunjan lists as: (i) psychologist or neuropsychologist; (ii) psychiatrist; (iii) care expert with expertise in functional disorders; (iv) occupational therapist; (v) physiotherapist; and (vi) cardiologist. He also says a capacity assessment with a view to appointing a deputy is required. The Claimant further submits that the court cannot determine the issue of fundamental dishonesty without an updating review of his medical records, which will show that the Claimant continues to be referred on for medical investigations.

70. I respectfully disagree. I accept the Defendants' submission that whether or not the Claimant is ill is not the issue that the court needs to address. The issue is whether the Claimant has been fundamentally dishonest in relation to the claim as pleaded. That claim is for, *inter alia*, a severe conversion disorder. This is the sole diagnosis that the Claimant has been given following his discharge from hospital. His medical records show that there are no ongoing cardiological issues. Indeed the cardiologist he was referred to questioned why he was referred at all. Mr Fleminger, Mr Schady (and, it appears, also Mr Nikfekr) can find no neurological or other organic issues. In my judgment, whether or not the Claimant continues to be investigated medically is not in itself relevant to the specific issue of dishonesty. It is not disputed that he continues to see specialists, but it is the case that none of those specialists have provided any other diagnosis.

71. Dr Fleminger's reasons for coming down on the side of a conversion disorder rather than finding that the Claimant's disability is feigned include *"that the disability is constantly present".* Dr Schady agrees that the *"hallmark"* of a conversion disorder is consistency i.e. unchanging disability regardless of the circumstances and whether or not the patient is being observed. This is inconsistent with Dr Nikfekr's reference in his letter to being told that the Claimant had *'good days and bad days'* and that on the good days the Claimant was able to "*get up, walk around, talk to different people even answer the phone".* It is also inconsistent with the recent witness evidence of Chirag Patel and the other family and friends of the Claimant, who describe that the Claimant's condition is variable, i.e. he has some days when he is able to converse, walk, go out, negotiate the stairs etc., and some days when he cannot. Of course it is also inconsistence with the surveillance footage.

72. Dr Schady's opinion after viewing the surveillance video is clearly expressed: the diagnosis of a conversion disorder is no longer tenable; the Claimant's disability is feigned; there is no medical condition either physical or psychological to account for it.

73. The Defendants submit that I am entitled to rely on Dr Schady's opinion, as there is nothing before me to gainsay it. Dr Fleminger, apparently wants no further involvement with the case; the Claimant has made no application for further directions to rely on any new or different medical expert; and Chirag Patel does not challenge Dr Schady's observations on the surveillance footage.

74. The Claimant submits that to do so, the court must reject without proper consideration by the medical experts the view expressed by the consultant neurologist Mr Nikfekr in his letter that, despite variability in the Claimant's condition, his problems appear to be psychological and relate to conversion disorders. The Claimant submits it would be wrong to do so.

75. As I have already stated, I consider that the Claimant has had ample opportunity to obtain further expert evidence to support Dr Fleminger's original diagnosis and the Claimant's pleaded case that he has a conversion disorder, and/or that a conversion disorder can display the great variations in capability and presentation that the Claimant's witnesses describe and that the Claimant says the surveillance evidence shows, and to seek to rely on it at the hearing of this s57 application. He has known of the surveillance evidence since September 2017 and of this application since March 2018.

76. I have also drawn the inference that the reason that the Claimant has not put forward any updating evidence from Dr Fleminger following his consideration of the surveillance footage is because any evidence he may give would not support the Claimant's case.

77. It is unclear to me how obtaining the range of expert evidence that Mr Hunjan has outlined at, no doubt, great cost and significant delay, will assist me in determining the discrete issues that I must decide. It seems to be no more than a fishing expedition to see if any experts can be found, now that (I am told) Dr Fleminger is no longer willing to be involved, who will contradict the clearly expressed and agreed view of the experts in this case that (i) a hallmark of conversion disorder is consistency; and (ii) if this is not a conversion disorder, the Claimant's disability is feigned. In my judgment, the costs of full quantification (both to the parties and in terms of the call on the resources of the court) are likely to be both unnecessary and disproportionate, in breach of the Overriding Objective.

78. For those reasons I accept Dr Schady's post-surveillance opinion that the diagnosis of a severe conversion disorder is not tenable, the Claimant's disability is feigned and there is no medical condition either physical or psychological to account for it.

Fundamental dishonesty

Was the Claimant dishonest?

79. The Claimant's litigation friend does not challenge the factual accuracy or record of the medical experts observations, what they were told and what they found on their visits to the Claimant's property. I accept the Defendants' submission that the difference in presentation of the Claimant to the experts on two separate occasions, on the one hand, and as observed over the course of a day in the surveillance evidence, on the other, is not simply a marked difference, but is completely and wholly inconsistent with the Claimant's presentation on those visits.

80. When determining whether the Claimant was dishonest in his presentation, I first have to consider what was the actual state of the Claimant's knowledge and belief as to the facts, before going on to consider whether his conduct was honest or dishonest by the objective standard of ordinary decent people (per *Ivey v Genting*).

81. I have no evidence from the Claimant himself. Given the evidence of the Claimant's witnesses and the surveillance video that the Claimant can talk and communicate, I am satisfied that it would have been possible for the Claimant's solicitors to take a witness statement in his own words to answer this application, no matter how brief.

This was his opportunity to provide an explanation to the court. He has chosen not to do so.

82. I am satisfied from the evidence before me that it is more likely than not that the Claimant knew at the time of each of the visits by Dr Fleminger and Dr Schady that he could sit, stand, support himself, walk, talk, communicate and manage for himself, but that he presented to those doctors that he could not. The conversations between Chirag Patel and the doctors took place at the Claimant's bedside at a time that he was awake, so I am also satisfied that it is more likely than not that the Claimant knew and could understand that his son Chirag Patel informed the doctors that he could not communicate and could do nothing for himself, being unable to walk, largely immobile, requiring complete care and confined to a bed or a chair. I am satisfied that both he and Chirag Patel knew that this was not true.

83. I have accepted Mr Schady's opinion that the diagnosis of severe conversion disorder is not tenable and that the Claimant's disability is feigned. However, even if I were to accept the evidence of Chirag Patel and the other witnesses for the Claimant that the Claimant has good days and bad days, and Chirag Patel's evidence that the visits of the experts were both on bad days and the surveillance evidence was obtained on a good day, the Claimant still could and should have contacted his solicitors either himself or through his litigation friend to correct the untrue information about the Claimant's disabilities given and presented to the experts, set out clearly in their reports, and repeated by the Claimant in his pleadings. Although he might not have been able to do that on a bad day, he should have done it on a good day, but he did not.

84. Considering all this evidence, I have no doubt that the Claimant, with the participation of Chirag Patel, presented an egregiously untrue picture of the Claimant's disabilities to the experts in this case.

85. The question is whether the Claimant's conduct was, by the objective standard of ordinary decent people, dishonest. I have no doubt that it was.

Fundamentally dishonest?

86. However, is the Claimant's conduct fundamentally dishonest for the purposes of s57? As Julian Knowles J in *LOCOG v Sinfield* puts it, has the Claimant *"substantially affected the presentation of his case… 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"*?

87. Mr Hunjan puts before me two cases in which, on the facts, following a full trial, it was held that although there were inconsistencies or exaggeration of symptoms by the claimants, they were not fundamentally dishonest. Those are *Wright v Satellite Information Services Limited* [2018] EWHC 812 (a first instance decision of Mrs Justice Yip) and *Smith v Ashwell Maintenance* (an unreported county court decision dated 21st January 2019 of Her Honour Judge Hampton). Both of these decisions turn on their own facts, in my judgment, as is the nature of assessments of dishonesty. However Mr Hunjan asks me in particular to consider carefully HHJ Hampton's discussion in *Smith v Ashwell* at [40] and [41]:

> "[40] There is an interesting quote in the report of Dr Luscombe (page 367) referring to an article in the learned journal Clinical Medicine published in November/December 2002 written by a Dr Christopher Bass, Consultant Psychiatrist and Dr Tim Jack, Consultant Anaesthetist in which they state:
>
> > "Outright faking of pain for financial gain is rare, but exaggeration is not, especially if the patient is involved in litigation. It is often difficult to determine whether this represents an attempt to convince or deceive the clinician".
>
> [41] That observation succinctly sums up the court's own experience. I do not find in the present case that there has been outright faking of pain. I do however find that there is an element of exaggeration. It has been necessary to consider carefully whether the exaggeration represents an attempt to convince or deceive the medical witnesses and indeed the court".

88. HHJ Hampton found on the facts of that case that the claimant's exaggeration and overstatement of his difficulties was the result of an attempt by him to convince, rather than deceive. But she continued in [42] to say *"Faking pain, as described by the learned authors referred to above, would almost undoubtedly amount to fundamental dishonesty. Exaggeration, with mixed motives of attempting to convince or deceive, is not"*.

89. To the extent that Mr Hunjan seeks to submit for the Claimant that this is a case of exaggerating disability and not faking it (and I am not sure that he did go so far as to put his case in those terms), I cannot accept it. I have accepted Mr Schady's opinion that his conversion disorder is feigned. This is a case of the Claimant presenting himself, with the assistance of Chirag Patel, as mute when he is not, immobile and unable to walk, stand or support himself when he is not, requiring constant care and attendance by two carers at all times when he does not.

90. In relation to the point about whether there are mixed motives of attempting to convince or deceive, the Claimant asks me to consider very carefully Chirag Patel's witness evidence that in providing the information that he did to the experts, he *"was simply emphasising my father's disability as he was at the time and on most occasions i.e. unresponsive, rather than some of the better days when he is more co-operative in doing some activity. I wanted to get the attention of these two doctors to the fact that my father clearly had problems which were not being recognised or properly treated by the medical profession. I was hoping they would shed light on what was the matter with my father."*

91. My response is that, firstly, I have no evidence of the Claimant's motives and it is the Claimant's dishonesty I need to assess as either fundamentally dishonest or not. Secondly, I consider that it is difficult to accept Chirag Patel's evidence at face value when the letter from Mr Nikfekr he attaches to his own witness statement appears to show that he provided a more accurate picture to that treating neurologist than he has done to Mr Fleminger and Mr Schady, whose only involvement with his father is as experts in this litigation. In my judgment that leads inexorably to the conclusion that the dishonesty which both he and the Claimant participated in was aimed at supporting the claim, and not on obtaining proper treatment for the Claimant. How could Chirag Patel expect these experts to shed light on what was wrong with his

father when he participated, together with the Claimant, in providing an entirely inaccurate picture of the Claimant's condition and abilities to both of these doctors, on two occasions over a year apart?

92. The dishonest presentation has led to a diagnosis of severe conversion disorder which I have found is not tenable. This is the 'fundamentally dishonest part' of the claim and in my judgment, although the claim is unparticularised, it must be the bulk of the pleaded claim by value. Mr Hunjan in closing submissions suggested that the Claimant requires lifetime care (although there is no evidence before me to support such a submission). What is left of the claim, i.e. the honest part, is a cardiac arrest at the scene from which there appears to have been a swift and full recovery, a brain bleed and a hypoxic brain injury from which the Claimant, again, appears to have been making a good recovery in the days after the collision and which the experts agree has caused no discernible neurological damage. Accordingly, I am satisfied on the balance of probabilities that the Claimant's dishonesty has substantially affected the presentation of his case which potentially adversely affected the defendant in a significant way, and so the Claimant has been fundamentally dishonest in relation to his claim.

Substantial injustice.

93. As I have found fundamental dishonesty to be made out, I must dismiss the entirety of the claim, including the 'honest part', unless I am satisfied that the Claimant would suffer substantial injustice in so doing.

94. The Claimant submits that the court cannot assess substantial injustice without a full quantification of the claim as otherwise it cannot understand the extent of the claim that it is dismissing. I have already set out that I am satisfied that the 'dishonest part' of the claim is the bulk of the pleaded claim by value.

95. The Claimant further submits that the court cannot deal with substantial injustice without hearing witness evidence, but is not clear to me that the Claimant has raised any real argument that dismissal of the claim would cause substantial injustice to the Claimant, beyond losing his entitlement to damages for the lesser, 'honest' part of his claim. Mr Hunjan submits orally and in his skeleton argument that Chirag Patel has had to give up his career to look after his father, but I am satisfied this detriment to the son (if detriment there is) cannot in law amount to substantial injustice to the Claimant in the dismissal of the claim.

96. I have mentioned the Claimant's submission that he will require substantial care for the rest of his life, and if the claim is dismissed it will cause substantial injustice as the family do not have the funds to provide for commercial care. However is difficult to understand on what basis that submission is made, given that the only diagnosis is of a conversion disorder which I have found is not tenable. To the extent that the submission is founded on a need for care arising from another diagnosis or potential diagnosis, this is both unpleaded and unevidenced, and so cannot raise issues of substantial injustice arising from dismissal of the pleaded claim, in my judgment.

97. Finally, the Claimant submits that a court cannot without substantial injustice dismiss the claim of the Claimant, a protected party, because of the dishonest conduct of his litigation friend. In my judgment that submission cannot succeed in the circumstances

of this case as I have found them to be. Firstly, I have found that the Claimant himself has been fundamentally dishonest in relation to his claim. He has done so by his presentation alone, as well as by not correcting the false impression of the Claimant's disabilities given by his litigation friend to the doctors or his solicitors at any time during the course of these proceedings. Secondly, I have found that the Claimant must be presumed to have capacity in this case.

98. For those reasons I dismiss the entirety of the claim.

Assessment of damages for the 'honest part' of the claim

99. Accordingly, I must go on to consider the amount of damages that the court would have made for the 'honest' part of the claim.

100. Mr Jeffreys for the Defendants submits that all I am able to award is general damages for pain, suffering and loss of amenity resulting from the cardiac arrest, subarachnoid haemorrhage and anoxic brain injury, as the Claimant has not particularised the amended provisional schedule of loss. He submits that the appropriate category to consider in the Judicial College Guidelines is 3A(e) for a Minor Brain or Head Injury, with an uplifted range from £1940 to £11,200. I agree this is the correct category. The narrative is as follows:

> "In these cases brain damage, if any, will have been minimal.
>
> The level of the award will be affected by the following considerations:
>
> a) the severity of the initial injury
>
> b) the period taken to recover from any symptoms
>
> c) the extent of continuing symptoms
>
> d) the presence or absence of headaches
>
> The bottom of the bracket will reflect full recovery within a few weeks."

101. Mr Hunjan for the Claimant submits that the Court cannot determine the s57 application at all, as it cannot carry out the quantification of damages required by s57(4) because the amended schedule of loss is unparticularised. He asks me to dismiss it for that reason.

102. In my judgment it sits ill for the Claimant seek to shield himself from a dismissal of a claim where fundamental dishonesty has been found simply by his own failure to produce any meaningful schedule of loss during the many years that these proceedings have been afoot. Mr Hunjan concedes that the Claimant *"could have had a stab"* at particularising already incurred losses, but he submits that no direction has been made for an updated schedule of damages, and the Claimant cannot further particularise the claim without assistance from the whole gamut of experts listed above.

103. The importance of a properly quantified and narrated schedule of loss is set out by Yip J at [27] of an authority which the Claimant relies on, and I have already referred to: *Wright v Satellite Information Services Limited*.

> "[27] It seems to me that the importance of the schedule of loss is frequently overlooked. This is, or should be, the document that draws together the presentation of the claim. It ought to be presented in an accessible and easy to follow format. The fact that the schedule of loss is required to be supported by a statement of truth highlights the need for it to be readily understandable by the claimant. It also sets out the claim for the defendant and for the trial judge who will come to the case afresh and ought to be able to follow the case from the schedule…".

104. In relation to quantification of the claim, the court would have a much greater idea of the scope of the 'honest part' of the claim had the Claimant filed a schedule of loss which *"draws together the scope of the claim",* as Yip J puts it, rather than a blank schedule of headings. I consider that the Claimant has had ample time since the s57 application was made in March 2018 to file even a partly particularised provisional schedule to cover the 'honest part' of the claim. The Claimant knew that this application might result in the court quantifying damages for the 'honest part' of the claim. If he has not done so, then I agree with the Defendants' submission that the court cannot assess anything other than general damages for pain suffering and loss of amenity. I cannot speculate on what the other losses may be.

105. Mr Hunjan has made no submissions for the Claimant in relation to quantification of general damages so I will do the best that I can in a rough and ready way. Perusal of the hospital medical records (usefully summarised in Dr Fleminger's report) shows that immediately after the accident the Claimant put into a medically induced coma for 2 days. Upon coming out of it he was assessed as aware, and then there are references to him being alert and aware in the succeeding days. There is no doubt that he was able to speak almost immediately after regaining consciousness as there are references in the notes to conversations with the Claimant. Within a week he appeared to be perfectly able to make himself understood, as the notes record numerous conversations, including those in which he expressed concerns and fears about being a burden on his wife, and how he was going to manage on his return to his home, which is a flat accessed by stairs, and also complaining about pain. Accordingly I am satisfied on the balance of probabilities that his ability to communicate was affected very little or at all by the accident after the first few days.

106. In terms of mobility, he again was described as being able to sit to stand within the first 24 hours of regaining consciousness. Before he left the ward for rehabilitation he was able to walk 40 yards without assistance. It is difficult to know what happened after that because it is not clear when his dishonest conduct started, so I am not able to assess how long his mobility was impaired. Similarly I accept that he appears from the medical records to have been complaining of pain within the first week of recovery, and was prescribed analgesics which appeared to relieve the pain, but I do not know how long this pain continued. The best I can do is to assume that honest symptoms of lack of mobility and associated pain, decreasing over time as his rehabilitation continued, lasted for about 2 months until he was released from rehabilitation. The heart attack I will assess as an aggravating feature to the brain injury. I assess the damages at £5,750

Conclusion

107. To summarise:

i) The Claimant is presumed to have capacity.

ii) The court finds that the Claimant has been fundamentally dishonest in respect of his claim, and his litigation friend Chirag Patel has participated in this dishonesty.

iii) The entirety of the claim is dismissed, the court being satisfied that no substantial injustice would be caused in so doing.

108. The court assesses damages for the 'honest part' of the claim at £5750