CLAIM NO D00CM446

IN THE NORWICH COUNTY COURT
SITTING AT CAMBRIDGE

B E T W E E N:

GAVIN ALEXANDER

CLAIMANT

AND

GARY WHEELER

DEFENDANT

JUDGMENT
HANDED DOWN AT CHELMSFORD
18 OCTOBER 2019

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1. On 15 June 2014 the claimant was working as assistant manager at the Barleylands farm shop ("the farm shop") in Billericay, Essex. At approximately 1:50pm he asked the defendant to move his car out of the staff car park and into the customer car park. In carrying out the request the defendant negligently reversed his car the wrong way down a one-way designated lane between cars in the car park. He reversed into the claimant, knocked him over and in doing so drove onto his right ankle, stopping when the claimant shouted out in pain, with the car stationary on top of the claimant's foot and ankle. The defendant got out of his car, saw that it was parked on the claimant's foot, got back in and drove off the foot, in the process twisting the ankle further and causing further injury.

2. A full admission of liability has been made.

3. The claimant suffered a tri-malleolar fracture of the right ankle. He was taken to Basildon University Hospital by ambulance, and was then examined and admitted to the trauma ward. He had a lot of swelling in his right leg. The leg was put into a reasonable position and he was told that surgery would be required. The right ankle was operated on the following day. He underwent open reduction and internal fixation. He remained in hospital until 18 June when he was discharged in a non-weight bearing plaster cast.

4. Following discharge it is agreed that the healing of the wound was not straightforward and he was required to take antibiotics on several occasions after the initial surgery including admission for intravenous antibiotics. A decision was made to remove the metalwork from the by then healed fracture and this was carried out as an inpatient in

May 2015. Thereafter he developed a haematoma over the wound which was removed in an in patient procedure in May 2015. He states that he was then off work until July 2015 during the healing of wound which required regular dressing.

5. Unconnected to this claim in September 2017 the claimant suffered a right hemisphere stroke which affected his left arm and left leg and he lost his eyesight in the right eye. It would appear that he has made a good recovery, following a major operation on the left side of his neck where his left carotid artery was replaced, being severely furred up. He had a further period of time fully off work following this incident.

6. This is the claimant's claim for damages arising out of the accident. The damages claimed arise under a number of heads.
   (1) General Damages for pain, suffering and loss of amenity in respect of the physical injury.
   (2) General Damages for pain, suffering and loss of amenity in respect of depression caused by the physical injuries. There was a difference between the experts whether this constitutes a major depressive disorder (within the moderate range of severity) or whether this aspect can best be conceptualised as an adjustment disorder which started June 2014 and continued until August 2015, and I heard evidence from the psychiatrists called on behalf of the claimant and the defendant. I will have to resolve that difference of opinion.
   (3) A claim for loss of income as a result of the accident. That claim is substantial not because of loss of pay during absences from work (there is little if any dispute about the sum arising in this manner) but by reason of a claim that the claimant would have been promoted to shop manager with a substantial increase in pay over what he actually earned as assistant manager.
   (4) A claim for gratuitous care and assistance which is disputed. At the outset this was an ongoing claim but that aspect has now been abandoned. The past claim remains, and is disputed in part.
   (5) A claim for paid services (dog walking, car washing, home decoration etc). As with (4) this started as an ongoing claim and is now only in respect of past paid services.
   (6) A claim for cost of future therapies/rehabilitation. This claim depends on my assessment of the psychiatric evidence.
   (7) A claim for other miscellaneous and incidental expenses including pain management costs and travel expenses.

7. The defendant's case is that the claimant's presentation of his claim is fundamentally dishonest. The defendant relies on video footage of the claimant promoting the sale of farm shop stock on social media, video surveillance footage taken clandestinely of the defendant, and the comments on that evidence made by the orthopaedic (and to a lesser extent psychiatric) medical experts when comparing what they observe on the videos with the account they were given by the claimant. The defendant submits that the conflicting accounts given by the claimant demonstrate that he is a dishonest and unreliable witness. The defendant's case goes further, and asserts dishonesty by the claimant's partner, his employer and fellow employees in respect of his case that but for the accident he would have been promoted and received substantial increases in pay, and in respect of his case generally concerning the effect of the accident on his ability to work.

8. For the claimant it is submitted that there is no dishonesty and that any discrepancy in the evidence is a matter of difference of recall. The video evidence is of short duration and filmed on only a few days. In respect of the substantial change in schedules of loss put forward following disclosure of the surveillance and Facebook evidence the claimant accepts that he has altered his claim in accordance with the conclusions drawn by the experts but does not accept that there was dishonesty in the claim as previously advanced. The adjustments made in the final schedule are adjustments made to be consistent with what his own expert evidence can sustain, and is evidence of prudent preparation for trial and not fundamental dishonesty. The result of the agreed orthopaedic report dated 20 December 2018 was that regardless of the claimant's own position as to what was required by way of on going care and services, prudent preparation for trial required that the schedules be trimmed in accordance with the agreed medical evidence.

9. The contrast between the schedules prepared before and after disclosure of the surveillance video is substantial. The pre-disclosure schedules were dated 16 March 2017 (approved by the claimant on 10 April 2017), in the total of £683,420.70, and 16 January 2018 (approved by the claimant on 4 February 2018) in the total of £818,846. The post disclosure schedule totals £408,936. The main reason in money terms for the change in the total amounts is the removal of claims for ongoing post trial care and paid services.

10. The claimant has been represented before me by Mr Laughland and the defendant by Mr McLaughlin. Both have provided me with helpful skeleton arguments and full written closing submissions for all of which I am very grateful. I heard the evidence in this case over three days, and there was not time at the conclusion of the case for the parties to make oral submissions. Initially consideration was given to adjourning to a further date for those submissions and judgement but in the event that proved difficult to agree and arrange, and by the conclusion of the third day I made the decision that the parties should submit written closing submissions and that I would then provide a reserved written judgement. It was agreed that the closing submissions would be exchanged and that thereafter each party would be entitled to reply to the other's submissions. I have been provided with a 31 page closing submission by the claimant together with a nine page response to the defendant's submission, and a 44 page submission on behalf the defendant together with a 14 page response to the submission made by the claimant. I have been referred to a number of authorities in addition to those to which I was referred in the skeleton arguments. Apart from the skeletons and submissions there were in excess of 2500 pages of documents in this case not all of which were referred to in evidence but the volume of which has made preparation of judgement more onerous than would normally be the case. I apologise to the parties for the delay providing this written judgement.

BACKGROUND

11. the claimant is aged 58 being born on 31 March 1961. At the date of the accident he was aged 53. He has been in a relationship with his partner, Sue Brown, for approximately 10 years and they each have children from previous relationships and young grandchildren. The claimant has three grown-up children and two grandsons,

his partner has three grown up children and four grandchildren. They live together in a substantial property with a 120 foot garden and an ornamental pond. They also have a holiday home (it may be a caravan) in Walton on the Naze, and a Labrador dog.

12. The claimant started out in life as a baker. He told me that he had worked in that capacity for 24 years. He had worked to become head baker for a local supplier to the farm shop. Thereafter he set up his own bakery and himself supplied bread to the farm shop. At its peak his business comprised a number of shops in the area, and about 137 employees. His business failed and closed in about 2006 and he was made bankrupt, and was discharged in 2009. He had always got on well with the owner of the farm shop, Peter Assenheim, and as a consequence of their relationship he was offered what he described as the lifeline of a job working for the farm shop.

13. The claimant has worked continuously at the farm shop, apart from a short gap in 2008, from the date he started in 2006 until today, and will continue to do so. The pattern of his work and the type of work carried out did not alter significantly from the start of his employment until the date of his accident. Following his accident there is substantial dispute about the amount that he was able to work, and the type of work that he was able to do, as a consequence of his injury.

14. Although it is a family business the farm shop is a sizeable enterprise and has a significant number of employees. The accounts of the business are in the bundles provided to me. The business is (or was in the years for which I have seen accounts) actually owned by Peter Assenheim, his wife and his son Ross in virtually equal (almost 33.3% of the shares each) shareholdings (Peter in fact has one more share than either of the other two) but it is clear from the tenor of the evidence that I have heard that it was a business that was run by Peter, who was in effect the chief executive. In his statement he describes himself as having owned Barleylands Farm Shop for 41 years, and states that there is a garden centre at the farm shop, and also a wholesaler which he also owns. It was and is a family business. For the five years to 2017 the turnover has been fairly consistent, although falling slightly in 2017, but with an average each year of £3.85m, and an average profit before tax of £330,000 pa. The description of the business given by the witnesses is not just of a retail farm shop. It is of a business with a wholesale side which supplies local restaurants, hotels and other catering businesses with their food as well as being a retail outlet. The business also has a garden centre with plant and garden sales.

15. In December 2014 Peter Assenheim retired. Until December 2014 the farm shop was being run by Peter Assenheim, assisted by his son Ross Assenheim. The business had (and I understand continues to have) a system of work which required very long hours to be worked by key personnel. Peter Assenheim would start work at around midnight, and travel to the fruit and vegetable markets to purchase produce. The lorries containing his purchases would then deliver to the farm shop from 0300 onwards. He would remain working until early afternoon the next day. The claimant's usual pattern of work pre accident would commence at about 0300 and work through until the shop closed at about 1730. Thereafter he would assist around the shop closing it up until around 1800 and sometimes as late as 1830. He described his day is being between 15 and 16 hours long. His work before the shop opened would consist in unloading lorries, sorting out orders for delivery to wholesale and other clients, and loading those onto the vehicles for dispatch and then actually delivering them. During

the day other vehicles would arrive with deliveries for example of compost, plants for sale and other items, and his job would involve unloading sacks of compost, sacks of potatoes and other heavy items. It was he told me a hard job and one involving very long hours in order to ensure that customers needs were met. Peter Assenheim was asked about the hours that the claimant worked and said that he more than likely told the claimant that his hours were between 0600 and 1730, but he would arrive at 4am, and even if told that he could leave at 1400 or 1500 he often would not. As Peter Assenheim said in evidence, "If an order came in and it was your time to leave then you didn't leave and you dealt with the order". I had less detail about the hours worked by Ross, but they appeared to me to be broadly similar to those worked by the claimant although the emphasis with Ross was on the management of the shop itself, and of being in overall charge after Peter stopped work each day, which was some time around 1400 or 1500. Ross had responsibility for closing up the shop and cashing up at the end of the day.

16. From the evidence I heard and from the impression that I gained from Peter Assenheim's evidence he ran a tightly controlled business where a very important consideration (it is fair to say a primary consideration) was to the profitability of the business. As he said at the close of his cross-examination when asked why when the claimant had been given a manager's jacket he had not also been given a pay rise "if it is not bust then you don't fix it". Family were regarded differently with respect to pay. When giving evidence about the entry of his son in law Jonathan Keith to the business (something I will deal with in more detail later) he said: "Jonathan would not have come in at a higher position (*than the claimant*) but he would have come in at a higher wage. He was family".

17. Peter Assenheim has owned the farm shop for over 40 years and retired on 22 December 2014. He told me that his wife had been pressing him to retire for some time, but that until then he had not been ready or able to hand over the business. Before his retirement his son Ross had been manager of the farm shop and he had been overall manager of the whole business. Since retirement he has spent about six months of the year in Spain, Ross has taken over his role and his son in law has taken over Ross's role as manager of the shop. A central issue in this case is whether the claimant would really ever have been promoted to manager, whether his promotion was discussed before his accident and if so when and with whom, and whether, if he had been given the role of manager he would also have been given an increase in pay. Within this issue lies the reason that John Keith came into the business, and whether or not his rates of pay are comparable to what the claimant might have expected if he had been promoted.

18. All employees are apparently paid in cash rather than through bank accounts, and so far at any rate as the claimant was concerned, he told me his payslips were provided electronically to his partner's email address. The slips produced (a full run) were produced by the farm shop. The rates of pay corresponded with the minimum wage for the number of hours that the claimant was working. There is no dispute that the claimant has always earned at or around the minimum wage each week for the number of hours that he worked.

19. The parties have both instructed and relied on separate medical experts in two specialties. The claimant on Professor Briggs, Consultant Orthopaedic surgeon, and

Dr Michael Spencer, Consultant Psychiatrist; the defendant on Mr A. G. Cobb, Consultant Orthopaedic surgeon, and Dr Philip Steadman, Consultant Psychiatrist.

20. As part of their investigation of this case the defendants instructed surveillance operatives to film the claimant at work and also undertook a search of social media to establish what evidence was available to corroborate or disprove his account. The evidence gathered was disclosed in April 2018 following the exchange of witness statements and the second schedule of loss. The video evidence gathered was then provided to the orthopaedic (and psychiatric) medical experts and they have provided updating reports in the light of that evidence. There is an agreed conclusion by the orthopaedic experts. Both psychiatrists gave evidence before me following disagreement between them on the claimant's diagnosis, but agreed in respect of the video evidence that they needed to defer to the experts in physical medicine in regards to the physical issues as these are outside their area of expertise. Their reports contained accounts of the history given them by the claimant in respect of his injury and the effect it had on his life. The accounts given by the claimant to those experts is called into question by the defendant relying on the content of the video evidence and the impression that that evidence has made on them. Ultimately as a question of fact the interpretation and determination of the weight to be given to the video evidence is a matter for me.

21. On 27 April 2018 the Defendant gave Notice of Intention to rely on the hearsay evidence of Miss Jessica Allen as set out in her statement signed and dated 29 March 2018. Her evidence was the surveillance evidence and the results of her social media searches, both first disclosed to the claimant at this time.

THE LAW

22. This is a civil claim so the burden of proving his claim is on the claimant to the civil, balance of probabilities, standard. If he fails to do so in respect of any items then his claim must fail in respect of those items.

23. The burden of proof on the issue of fundamental dishonesty is on the defendant. Although both parties are in agreement that the civil standard of proof applies, there is a difference between them as to how high that standard should be. For the claimant it is submitted that in a case of this type it is for all practical purposes not far short of the criminal standard (citing Teare J in *UK Insurance Ltd v Gentry* [2018] EWHC 37 QB at para 21). For the defendant Mr McLaughlin submits that the standard is the usual civil balance of probabilities and "Nothing approaching beyond reasonable doubt".

Fundamental Dishonesty

24. The law is governed by s57 Criminal Justice and Courts Act 2015:

Personal injury claims: cases of fundamental dishonesty

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

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

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

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

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

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

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

(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) In this section—

"claim" includes a counter-claim and, accordingly, "claimant" includes a counter-claimant and "defendant" includes a defendant to a counter-claim;
"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.

(9) This section does not apply to proceedings started by the issue of a claim form before the day on which this section comes into force.

25. Both parties have referred me in the authority of *London Organising Committee of the Olympic Games (LOCOG) v Sinfield* [2018] EWHC 51 (QB), a decision of Knowles J. That authority sets out at paragraph 54 the old law on a dishonest presentation and the new law to be applied in compliance with s57 and the reason (a Parliamentary response to the problems caused by fraudulent claims) for the enactment of the section.

26. In considering "fundamental" I am guided by paragraphs 62 and 63 of that judgement:

> "62. In my judgement, 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 s57(8)), and that he has thus substantially affected presentation of his case, either in respect 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 Ltd* [2017] 3 WLR 1212. (*[2017] UKSC 67)*
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> 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 £9,000 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 multibillion pound insurer to whom £9000 is a trivial sum."

27. I was also referred to, and have in mind the passage from the judgment of HHJ Moloney QC sitting in the Cambridge County Court in *Gosling v Hailo* (29 April 2014), as set out at paragraph 16 of Newey LJ's Judgment in *Howlett v Davies* [2017] EWCA Civ 1696, which Newey LJ agreed was a common sense approach.

28. The test of Dishonesty is set out in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67 at paragraph 62:

> "62…The test now clearly established was explained thus in *Barlow Clowes* by Lord Hoffmann, at pages 1479-1480, who had been a party also to *Twinsectra*:
>
> > "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. The Court of Appeal held this to be a correct state of the law and their Lordships agree."

The steps that a fact-finding tribunal should go through are set out at paragraph 74:

> "74. …When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individuals 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 the 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."

29. Burden and Standard of Proof:
Mr Laughland referred me to the speech of Lord Nicholls in *Re H and others* [1996 AC 563 at 586-587, set out fully in his skeleton, and particularly to the following passage:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability……. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

30. Mr Laughland then refers me to the passage in *UK Insurance Ltd v Gentry* [2018] EWHC 37 QB where Mr Justice Teare, dealing with this point, stated at paragraphs 19-22:

> "(19) The claimant has brought this claim for damages for deceit and therefore bears the burden of proving that Mr Gentry dishonestly represented to the claimant that his car had been struck by Mr Miller's car in a genuine collision….. That burden must be discharged on the balance of probabilities but since the allegation against Mr Gentry is of criminal behaviour, which is inherently unlikely, particularly cogent evidence is required before the court can properly be satisfied on the balance of probabilities that he acted in the manner alleged. The need for cogent evidence in this context is apparent from other cases where a party alleges criminal conduct in a civil case" ……*and the passage continues with reference to one case involving arson by the assured and another where an allegation was made that a shipowner had scuttled his ship in order to make an insurance claim for loss of the ship….*
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> (20) The standard of proof required in care proceedings (where a parent is alleged to have assaulted his or her child) has been considered by the House of Lords. Lord Hoffmann and Lady Hale have observed that the probabilities must be borne in mind "to whatever extent is appropriate in the particular

case" and that where it is clear that a child has been assaulted and that one of the two parents looking after the child must have been responsible the improbability that a parent had assaulted his or her child ceases to be of relevance; see *In re B* [2009] 1 AC 11 at para 14 per Lord Hoffman and at paragraphs 62 and 68-73 per Lady Hale.

(21) by contrast the present case is one where there is a dispute as to whether a fraudulent misrepresentation was made. It is therefore appropriate to bear in mind the improbability of a person acting fraudulently in the manner alleged of Mr Gentry. It follows that particularly cogent evidence is required in order to discharge the burden of proof. In short the nature of the allegation makes it appropriate to apply a standard not far short of the criminal standard. In *In re B* Lord Hoffmann accepted that that can be so in some circumstances (see paragraph 13) as did Lady Hale (see paragraph 69). Thus in order to discharge the burden of proof the claimant must be able to exclude any substantial, as opposed to fanciful or remote, possibility that the collision was genuine. The court must have a very high level of confidence that the claimant's allegation is true; see *The Atlantik Confidence [2016]* 2 Lloyds Reports 525.

(22) there is rarely direct evidence of fraud. Where there is no direct evidence of fraud it can only be inferred from circumstantial evidence. Thus it is necessary for the court have regard to all the relevant evidence and to the story as a whole. Having considered the evidence it is necessary to stand back and consider whether the alleged fraud has been made out to the required standard."

31. Mr McLaughlin submits that the test remains the straightforward balance of probabilities and nothing approaching the criminal standard. He submits s57 does not require the criminal standard of proof, and that there is regrettably nothing unusual in this type of litigation of a substantially exaggerated claim. He submits that on dishonesty I must ascertain the actual date (*I understand "date" to be a typo for "state"*) of the claimant's knowledge or belief of the facts and then consider whether his conduct was honest by the standards of ordinary decent people. The defendant does not have to prove that the claimant appreciated that what he has said or done was dishonest.

32. Turning to the standard of proof he submits that there must be a clear evidential basis for a finding of dishonesty by the claimant, but the defendant need only prove that it is more likely than not (that is on the civil balance of probabilities test) that he was dishonest, and this is something to be established (by inference) from the totality of the evidence.

33. I have read the speeches in *In re B* [2009] 1 AC 11, and especially those of Lord Hoffman and Baroness Hale referred to by Teare J in *Gentry*. Lord Hoffman at paragraph 13 confirms that there is only one civil standard of proof, which is whether the fact in issue more probably occurred than not. He expressly does not disapprove the test applied in what he described as category 1 cases, which allows a more searching balance of probability test where the consequences are the more serious.

34. I rely on paragraph 15 of Lord Hoffman's speech in *In re B*, where he says, with reference to the passage from Lord Nicholls in *Re H* which I have set out at para 29 above:

> "I wish to lay some stress upon the words I have italicised (" *to whatever extent is appropriate in the particular case")*. Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

Baroness Hale, having reviewed the authorities in the section headed "Standard of Proof" beginning at paragraph 62 states, at paragraph 69, when commenting on the judgment of Butler Sloss LJ in *In re U (A Child) (Department for Education and Skills intervening); In re B (A Child) (Department for Education and Skills Intervening)* [2004] EWCA Civ 567,:

> 69. "My Lords, I entirely agree. There are some proceedings, though civil in form, whose nature is such that it is appropriate to apply the criminal standard of proof. Divorce proceedings in the olden days of the matrimonial "offence" may have been another example (see *Bater v Bater* [1951] P 35). But care proceedings are not of that nature. They are not there to punish or to deter anyone. The consequences of breaking a care order are not penal. Care proceedings are there to protect a child from harm. The consequences for the child of getting it wrong are equally serious either way.

35. The allegation being tried in this case is not primarily a claim for damages for deceit as in *Gentry*. In this case there is not presently an application to commit the claimant for contempt (as there was in *Gentry* as referred to in para 3 of that judgment). The factual situations are otherwise very similar in that in each case what is being alleged by the insurer is a fraudulent claim to recover damages in excess of those that would be recoverable if the claim were honestly advanced, and in this case there is also the added allegation in relation to the promotion aspect of the case of what is effectively an allegation of a criminal conspiracy to defraud.

36. I have not found the submission made by Mr Laughland on behalf of the claimant that I need to find on a near criminal standard of proof (so that I am sure) in this case an easy one to reconcile with the authorities of *in Re B* and the straightforward civil standard applied in *LOCOG*. I am satisfied however that the standard referred to by Teare J in paragraph 21 of his judgment in *Gentry* is still the ordinary civil balance of probability standard albeit it may suggest a more rigorous application of that test, and that is therefore the standard of proof which I apply in this case. I intend to apply the test set out by Teare J (slightly rephrased for this case) as follows:

> "In order to discharge the burden of proof the defendant must be able to exclude any substantial as opposed to fanciful or remote possibility that the claim as advanced is genuine. The court must have a very high level of confidence that the defendant's case is correct".

Within the determination that I will carry out in this case I can take into account to the extent appropriate the submission made by Mr McLaughlin that dishonesty in presentation is no longer a rarity and that it is not therefore "improbable"

37. In requiring proof to that standard in my judgment I am still applying the civil balance of probability standard. If substantial as opposed to fanciful or remote possibilities remain open on my view of the evidence then on a balance of probability the test will not have been satisfied. It avoids the descent into "cogency" and other phrases, which have been warned against by Lord Lloyd and Baroness Hale, who in her speech in *Re B (Children)* quotes Lord Lloyd in *In re H at pp 577-578* , and says at paragraphs 63 and 64:

> 63. " In my view the standard of proof under [section 31(2)] ought to be the simple balance of probability however serious the allegations involved. . . . mainly because section 31(2) provides only the threshold criteria for making a care order. . . if the threshold criteria are not met, the local authority can do nothing, however grave the anticipated injury to the child, or however serious the apprehended consequences. This seems to me to be a strong argument in favour of making the threshold lower rather than higher. It would be a bizarre result if the more serious the anticipated injury, whether physical or sexual, the more difficult it became for the local authority to satisfy the initial burden of proof, and thereby ultimately, if the welfare test is satisfied, secure protection for the child. . .There remains the question whether anything should be said about the cogency of the evidence needed to 'tip the balance'. For my part I do not find those words helpful, since they are little more than a statement of the obvious; and there is a danger that the repeated use of the words will harden into a formula which, like other formulas (especially those based on a metaphor) may lead to misunderstanding."
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> 64 My Lords, Lord Lloyd's prediction proved only too correct.

38. The award in respect of past and future loss of earnings in this case depends on my findings on the claimant's case that but for the accident he would have been promoted to become the manager of the farm shop on the retirement of the ultimate boss, Peter Assenheim. It is the claimant's case that if the accident had not occurred when Peter Assenheim retired his son Ross would have walked into his shoes, and that he would have walked into Ross's shoes. Peter's son in law would never have been employed as part of the team, and the claimant's earnings would have increased commensurately.

39. The case on that basis, it was argued in opening on behalf of the claimant, is a case based on loss of a chance, and Mr Laughland therefore directs me to Kemp and Kemp (volume 1) at 10-028 and following, and, and in the same textbook at 4-020 where extracts from the case of *Doyle v Wallace* [19998] P,I.Q.R. Q147 are set out. I set out parts of the passages relied on in his skeleton with the sources:

> "where a claimant can demonstrate a real prospect that an injury led to a missed promotion or career development the court seeks to estimate the chance that the claimant would have obtained the job he had not been injured, and assesses his loss on that basis.
> In cases involving the loss of a financial opportunity, the court must determine whether and when he might have been promoted. If there is said to be a 40% chance of a loss being suffered, the claimant's loss is likely to be assessed as 40% of the full loss." Kemp 10-028

"Some chances will be so remote that the court can properly put no value upon them and no award is made. Speculative possibility should be ignored on the de minimis principle….. But providing the prospect can be estimated by taking all significant factors into account then an award should be made: an award or a 14% prospect was made in Langford v Hebran [2001] EWCA Civ 361" Kemp 10-039

I have read in full the passages set out from the Judgment of Otton LJ in *Doyle v Wallace* applying the Judgment of Stuart-Smith LJ in *Allied Maples v Simmons and Simmons* (1995).

40. The way that a case should be approached where an issue of fundamental dishonesty is raised is set out in *LOCOG* at paragraph 64:

"a. Firstly, consider whether the claimant is entitled to damages in respect of the claim. If *the judge* 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."

THE CHRONOLOGY

41. For a full chronology of the medical events and GP notes the chronology of the accident submitted by the claimant as revised and handed up on 22 March is appended to this Judgment. The following is only a shortened version setting out some of the timetable. Also added in Italics are the dates when video or photographic evidence is available together with comments on those entries which are my comments having seen and heard the evidence:

2014

15.6.14 Accident. Admission. Operation on 16 June.
18.6.14 Discharged following surgery on ankle.
3.7.14 Reviewed in clinic by Mr Hussein: Stitches were removed and the wound, still slightly open, was swabbed.
8.7.14 Reviewed in clinic by Mr Hussein: Wound looked satisfactory, and was re-dressed.
10.7.14 Reviewed in clinic by Mr Hussein: Wound better than it was last week.
17.7.14 Reviewed in clinic (Mr Chaudhuri): Below knee plaster removed and replaced with an Aircast boot.
19.8.14 GP notes: Feels depressed, tearful and emotional. Diagnosis: depressive disorder (new episode) citalopram prescribed.

28.8.14 Reviewed in clinic by Mr Hussein: Two weeks previously his ankle swelled and he started getting inflammation over the lateral side of the ankle. The lateral wound had by then healed completely, but he spent quite a lot of time on his feet at his son's wedding which the claimant thinks may have contributed. Admission for intravenous antibiotics. Informed that if things do not settle down he may require wound washout and perhaps may have to remove the metalwork. Also warned that it is likely if debriding of wound was required the wound would not be able to be closed and it is likely that plastic surgeons would become involved. Hope is that antibiotics will resolve the problem.

29.8.14 Admission for infected wound and IV antibiotics. On examination tender over lateral malleolus, no swelling, wound dry, mild erythema. All symptoms improved on IV Augmentin..

1.9.14 Discharge after 4 day admission with intravenous antibiotics for infected surgical scar. Continue antibiotic at home for further 2 weeks. Ankle had settled down nicely.

4.9.14 Reviewed in clinic by Mr Hussein: I am pleased to say his ankle has settled down nicely. He still has some erythema around the wound and should continue with his antibiotic for another couple of weeks. He knows to contact me if he runs into trouble. I will review in 2 weeks in clinic and at that stage he should have an xray.

18.9.14 Reviewed in clinic by Mr Hussein: Ankle much better. No tenderness over the wound although there is still some induration in the upper part. Continue antibiotics for at least 2 weeks. X-rays today show the fracture to have united. There is no overt evidence of osteomyelitis.
"I need to keep an eye on him and I am going to see him back here in 2 weeks time at which stage, if the wound has completely recovered and there is no concern we can consider stopping the antibiotics but we will need to monitor him afterwards".

1.10.14 Photo of Claimant with 2 Savoy Cabbages one in each hand. There is no sign of stick or crutches in the photograph. Photograph is outdoors and in area where cars are parked.

9.10.14 Reviewed in clinic by Mr Hussein: Am pleased to say his ankle looks quite good. Wound satisfactory and has stopped antibiotics and there is no flare up of infection. Still wearing boot but in evenings he takes this off although at work due to the long hours he prefers to keep it on for protection. Suggested that he contacts the physiotherapist, continue with his physio and gradually wean off the boot as comfort allows. Told him he would be best judge for when he can get rid of the boot. Due to the history of wound infection, the mechanism of injury, history of diabetes and being an ex-smoker think we ought to keep an eye on him and have given him a clinic appointment in 3 months time with an x-ray of his right foot on arrival.

11.10.14 Photo of Claimant with Pumpkin. He carries a substantial pumpkin at head height in his right hand so on the injured side of his body. No sign of any crutch or stick. Photograph is outdoors and not inside the shop.

21.10.14 GP Notes: Tablets not working he is very unhappy in general feels unsupported by workplace. Sicknote remain off work as he does not feel able to work in a concentrated manner. Med 3 statement issued: not fit for work - valid from 21 October 2014 to 21 November 2014.

6.11.14 Reviewed in clinic by Mr Hussein: Has developed some soreness over lateral side of the ankle over the lateral wound. X-rays showed the fracture has united. Discussion about removal of metalwork as the only way to rid him of any infection. Appointment made to see him to check the ankle and antibiotic prescribed.

Review of MRI and Xrays 2015
The review of imaging in the report of Professor Briggs shows a fracture which has been fixed with screws and a lateral side plate. The 2014 imaging (the last image reviewed being in August 2014) reveal a fracture which appears to be uniting and has a satisfactory appearance.

2015

6.1.15 Note of message to consultant's secretary from claimant: "foot feels a lot better, he wants to speak to you as he doesn't want to have metalwork removed if things settle down, but would value your advice and opinion on this…….. 16 hour days - could do with letter to say reduced hours or one day less a week."

9.1.15 Reviewed by Consultant. Ankle has settled down a lot. Wound looked satisfactory. Some discomfort in the cold but apart from that managing well. Is going to drop his work load by one day. Decision not to remove metalwork provided no flare up. Claimant not keen on having metalwork removed at the moment.

3.2.15 GP Attendance re blue disabled badge. Able walk up surgery stairs. Due further operation but told 8+ weeks non-weight-bearing, job in jeopardy. Drinking a lot to help sleep. Can't sleep due to worry with job. Advised counselling. Libido gone. Co-Codamol 30/500 insufficient, consultant mentioned morphine if necessary.
Diagnosis: Grief reaction for previous life and lifestyle.

11.2.15 *Photo of Claimant with 2 Melons one in each hand at chest height. No sign of any crutch or stick. Photograph outdoors and Claimant dressed for exterior.*

2.3.15 GP Visit: Feels depressed and unmotivated. Has gained weight. Is watching what he eats so has lost ½ stone.

23.3.15 GP Visit. Request by Claimant to alter sleeping pills. "He is due for surgery on 24.4.2015 when he hopes that he will be out of pain sufficient to sleep"

26.3.15 Reviewed in clinic:. Attended because quite a lot of pain in right ankle over the lateral plate. Clinically no evidence of infection but decision that in view of past plans and problems plate should be removed as soon as possible. X-rays show fracture united. On waiting list for plate removal and sampling for microbiology.

11.4.15 *Photo of Claimant holding up large (massive 26 packet) bag of Walkers crisps carried at chest height one hand on each side of the bag. Clearly not heavy but no sign of any crutch or stick. Photograph is taken outdoors.*

5.5.15 Admitted (Discharged 11 May, after 6 days) for removal of his right ankle metalwork following recurrent cellulitis and pain. Intra operatively there were no overt signs of infection or collection and screws, tissue and swabs were sent for culture. The screws from the medial side grew Acinetobacter

haemolyticus and he was given 5 days Co-Amoxiclav. He will remain on prophylactic dose of Clexane until fully able to mobilise.

14.5.15 Reviewed in clinic. Unfortunately, after discharge he went out and walked from the car park to the pub and some bleeding occurred in the wound. Sizeable haematoma over the wound was expressed. It does not look infected. I have told him to stop his Clexane to stay non-weight-bearing, to continue with his antibiotics, mobilise his ankle, and elevate the foot.

26.5.15 Reviewed in clinic by Mr Hussein: One week after washout of haematoma from the lateral aspect of his right ankle. He had significant pain after the procedure and it took him a long time to recover. He is currently mobilising and weight bearing but is using crutches. No signs of infection or any discharge. Advised to weight bear as pain allows.

3.6.15 Reviewed in clinic: Still experiences pain over lateral aspect right ankle however has discontinued using an Aircast boot as feels that it is pulling his dressing off. Has been on antibiotics for the last week and has a few doses left.
Wound appears more healed than last week. No obvious signs of inflammation or oedema or puss. Some stitches removed.

8.6.15 Reviewed in clinic by Mr Hussein. Wound is static at the moment. There is some slough in the centre of the wound but no overt signs of acute infection. We have removed the remainder of the sutures and I have dressed the wound with Alginate to try and get rid of the slough. I have kept him on antibiotics and will see him back on Thursday for another wound check.

11.6.15 Seen in Clinic by Mr Hussein. Cleaned the wound and removed some slough. He has a small cavity in the mid wound which again I cleaned and packed with alginate. He should continue non weightbearing and I will see him on Monday. We may consider sending a new culture swab and if the wound does not settle down then he may need to be referred to the plastic surgeons for any further surgery that needs to be done to the wound.

15.6.15 Reviewed in clinic by Mr Hussein. Wounds re-dressed with alginate. There is some improvement, although this is slow. I took a swab, review in Orsett on Thursday for further wound dressing.

18.6.15 Reviewed in clinic by Mr Hussein. The wound does look a bit better today and we have redressed it with alginate as before. Wound swab is not back as yet. We will continue dressing as before, and will see him back Monday in Basildon for a change of dressing.

18.6.15 *Photo of Claimant with 2 packets of Granola, one in each hand. No crutch or stick. Photograph appears to be (although not definitely) outdoors.*

22.6.15 Seen by Mr Hussein for change of dressings. There is not much in the way of change in the wound, and today I have dressed this with a Betadin soaked gauze to allow the alginate to soften up and we will review him back in my clinic on Thursday for a further wound check. The swab taken showed only skin flora.

25.6.15 Seen by Mr Hussein for a dressing change. The wound over the lateral side of the ankle is improving. We are continuing with Betadine soaked dressing stop review on Monday by our clinic sister for change of dressing and again on Thursday and I will see him the following week.

6.7.15 Reviewed in clinic by Mr Hussein: I am pleased to say that the wound is improving. We have dressed this with Betadine gauze again today and I will see him on Thursday.

9.7.15 Reviewed in clinic: Remaining stitches removed. Wound dressed. Wound looking very nice now. Virtually closed. Kept on antibiotic.

10.7.15 Professor Briggs first examination of Claimant. See Appendix II for summary.

13.7.15 Reviewed in clinic by Mr Hussein: I am pleased to say that the wound is looking very good. He is going to keep his dressing and we will review him in Orsett by our surgical practitioner the change of dressing. The dressing applied today was Betadine soaked gauze.

3.8.15 Reviewed in clinic: Ankle wound is looking very good now.

3.9.15 Reviewed in clinic by Mr Hussein: Superficial ulceration of three days duration anterior to lateral wound on ankle. Looks like an abrasion. Continues to have some pain in his ankle and I have suggested an MRI scan to check for any deep seated infection.

10.9.15 Reviewed in clinic: I am pleased to say the wound has settled down. See back in clinic after MRI scan.

3.10.15 Photo said to be of claimant balancing Pumpkin on his head and wearing ghost mask.

10.11.15 GP records show complaint re left leg problems since accident and sciatic pain LHS with loss of sensation in left foot. Referred to physio for Left leg and foot.. Given Tramadol for problem but reacts badly after 3 pills.

1.12.15 Referral by Mr Hussein (treating orthopaedic consultant) to Mr Tiruveedhula for second opinion. The letter sets out the history of the accident and medical procedures and that the initial wound settled down over time but did take its time. Because the claimant continued to get pain over the lateral side and episodes of cellulitis the metalwork was eventually taken out. Nothing was growing from the lateral side although there was some growth from the medial side which was thought to be insignificant. Post operatively after removal he developed a haematoma on the lateral wound and had to go to theatre to have this evacuated, the wound did eventually heal but this took quite a long time.

The claimant continues to have pain in the ankle which seems to be anterolateral and also over the medial side. Recent MRI scan has not shown any definite evidence of osteomyelitis. Due to the fact that he is still quite troubled with his ankle I was wondering whether there is anything else we could do for him. I am a bit concerned about suggesting an arthroscopy particularly with the history of diabetes and the quite significant history of wound problems in the past. I have made referral to the pain team to see if they can help and would be grateful for your thoughts about his management. He has also been referred to the orthotist. (*see below 26/1/2016 for response from Mr Tiruveedhula*).

7.12.15 GP notes that he has been given Buprenorphine 5microgram patches which he says are not helping and asks if he can have anything stronger to help as in pain constantly and feels it is becoming a problem.

9.12.15 Photo of Claimant holding chillies in his hand. Inside shop, no stick or crutch apparent.

Review of MRI and Xrays 2015

3.6.15 X Rays demonstrate a well healed fibular fracture. Metalwork moved. Ankle mortice satisfactory on AP and lateral views. Medial malleolar fracture is satisfactory. Articular surface reasonable and the Talus sitting within the mortice.

10.10.15 MRI scan of right ankle demonstrates on the sagittal views some articular surface damage to the distal tibia in the posterior third. The fractures appear to have united. On the fat suppression sequences there is inflammation and increased signal around the articular defect on the distal tibia. The talus is intact.

2016

26.1.16 Mr Tiruveedhula responds to the letter of referral from Mr Hussein having seen the claimant that his present symptom is pain centred in the dorsal surface of the right ankle joint, radiating to the right fourth toe which gets worse with walking. He finds walking on an uneven surface more difficult. His sleep is regularly disturbed due to pain.
As his symptoms are ongoing for two years, he lost out on a promotion in his workplace and risks losing the present job. He was a keen walker before this injury but is now very limited.
On examination he walks without support but holds his right ankle stiff and avoids putting weight through the fore foot. On the couch assessment he has tenderness over both the Malleoli but significantly over the lateral gutter. Movements of the ankle are painful and get worse on attempting to move the subtalar joint. He is locally tender over the fourth metatarsal but there is no swelling to note he has normal vascularity in the foot but sensations are difficult to examine.
Review of x-rays and MRI show evidence of cyst formation in the subchondral bone in the right distal tibia but no evidence of osteomyelitis.
I have today requested CT scan of the ankle and subtalar joint to look at evidence of osteoarthritis. I have requested MSK (*Musculoskeletal*) radiologists to inject the ankle joint with steroid and local anaesthetic to localise the pain. We will discuss further in our foot and ankle MDT (*Multi Disciplinary Team*).

Note after Foot and Ankle MDT - there is a bony fragment lodged in the lateral recess possibly secondary to ATFL (anterior talofibular ligament) avulsion. This explains his symptoms on the anterolateral side of the ankle joint which could be due to impingement when walking. The foot and ankle consultants including Mr Hussein agreed that the best course of action would be to fish the fragment out with an arthroscope +/- open procedure. There will be a risk to wound healing as has happened before, but he has significant symptoms to warrant the procedure. We agreed to proceed with the plan of CT scan and guided injection before I review him in the clinic to discuss this further.

4.2.16 Professor Briggs second examination of the Claimant. See Appendix II.
Review of MRI 2016 (from Professor Briggs Report 4 Feb)
The 2016 MRI shows a well preserved ankle joint and therefore I think it unlikely that he is currently going to require an ankle fusion but may need to consider this over the next 15 years. However, with all the problems with

his wound he should try and avoid any further surgery. He was due have an arthroscopy of his ankle but this did not happen.

17.3.16 Photo of Claimant present during filming for TV programme at Farmshop.

17.5.16 Big Plant delivery just arrived.
The video is approximately 1 minute and few seconds in duration and shows the claimant wearing the manager's jerkin, moving plants from a trolley to their display benches. Although he does not walk far he walks up and down a 2-3 metre long aisle approximately 13 times carrying a tray of plants on each journey (empty handed on return). He is seen to walk freely, with no stick or crutches, his feet are visible and there is no airboot, at times he bends over to place trays, and appears to do so freely on his legs, and with no apparent restriction on his movement or limp. He does not walk slowly or with the appearance of a man in pain. He walks brusquely and (to a non expert) without a visible limp.

19.5.16 Video of New Plant delivery.
The claimant is filmed wearing the manager's jerkin, promoting the arrival and prices of newly delivered plants. The photography is mainly of the plants and not the claimant but he is seen to walk freely, with no stick, crutches or airboot, and to bend and move freely on his legs with no apparent restriction of his movement. He lifts trays of plants from full stretch above head height and bends to place them on the floor in order to show them. The video lasts 3 mins 36 seconds.

30.6.16 Photo of Claimant crouched with Begonias and Geraniums.
The claimant is photographed smiling in a crouched position behind 4 Begonia/Geranium plants. There is no visible crutch or airboot (which would make the crouch in the photograph problematic if not impossible). The photo may be inside the shop. He appears to be wearing his manager's jerkin.

11.10.16 Photo of Claimant promoting pumpkins.
Claimant and another promoting pumpkins. They are obviously outdoors. No stick or crutches visible. He appears to be wearing his manager's jerkin. No appearance of wearing an airboot.

20.11.16 Photos of Claimant at Cromwell Manor Christmas market
The claimant is visible in 4 of the photographs. He is not wearing an airboot, and not carrying a stick or crutches. The photos are all outdoors.

1.12.16 Photo of Claimant among Christmas Trees.
The photo is outdoors and of the claimant apparently in his manager's jerkin. There is no stick or crutches.

8.12.16 Video of Claimant among Christmas Trees.
Video outdoors in December and no stick or crutch, wearing manager's jerkin.

A one minute video of the Claimant apparently (there was no sound) promoting the availability of Christmas trees. He is seen walking apparently without a limp and wearing the manager's jerkin. He is not using a stick or crutches and is not wearing an airboot.

16.12.16 *Video of Claimant with delivery of Poinsettias.*
Delivery of Poinsettias just arrived. The claimant is outside, wearing the manager's jerkin. He carries a tray of poinsettias and promotes them. His right leg is only visible to knee level. A short 15 second video with little movement visible (a few steps) but no impression of restriction of movement is apparent, there is no stick or crutch..

2017

18.2.17 *Video of Claimant promoting broccoli sales*
Short 22 second video of claimant promoting sale of broccoli. Little movement and legs not visible. Wearing the manager's jerkin.

10.4.17 **The Claimant's first schedule of loss**.
Narrative with schedule:
Following initial discharge from hospital the claimant was considerably immobile with a below knee cast. He required assistance mobilising in the bathroom and transferring back to bed. He was unable to prepare any meals for refreshments and required assistance with all aspects of personal care. His partner helped change his dressings. She would funnel wash him as he had to keep his cast dry. She drove him to medical appointments and to work when he returned to work in August 2014.
He underwent further surgery in May 2015. Following the surgery he was in severe pain as he developed further infections stop he required a similar level of care to that required following his initial surgery in June 2014.
The claimant became more independent in July 2015 but still required general assistance. His partner continues to look after him and to drive him around.
Paid Services
the claimant has required assistance with household maintenance and gardening.
His car is his pride and joy and he would clean his car on a weekly basis prior to the accident. Following the accident he has been unable clean his car and his car has been cleaned externally.
The claimant would take his dog for walks almost every day prior to the accident. Due to his ankle fractures he has been unable to do this and requires assistance.
His garden has required extensive renovations since the accident. As a result of his injuries the claimant has had to engage the services of contractors to carry out the works had the accident not occurred would have done these renovations himself.
The claimant will require ongoing care and assistance part of the accident he would take his dog out for a walk twice a day. Each walk would last one hour. He is unable to do this due to his injuries and will pay someone to walk the dog once a day and his partner will walk the dog as well.

He will require assistance with DIY as he is unable to use ladders or stand a long period of time or trim the hedges. He will need to engage the services of others to carry out tasks.
There is a step leading into his shower which needs to be removed and are steps in the garden also need be removed by reason of his ankle injury.
The claimant had his partner would go on holiday once a year and booked them at the last minute so it was cheaper. Since the accident he finds it difficult for on uneven or steep ground and will need to pay a travel agent to determine whether locations are mobility friendly. He will no longer be able to book last minute holidays and will need to purchase additional legroom flights due to his injuries.

(1) Promotion Lost and consequent financial loss of earnings.
(2) Personal Care and support

June to August 2014	6 hours a day
August 14 to May 15	2 hours a day
May 15 to July 15	6 hours a day
July 15 to December 15	2 hours a day
December 15 to Apr 17 and continuing	1 hour a day

(3) Future Care and Support
7 hours per week for life

(4) Paid Services to date of schedule

Garden Maintenance	50 weeks
June 2015 complete tidy up	£895
Window Cleaning	Monthly
Home Decoration	
Car Maintenance and cleaning	Weekly for 50 weeks
Dog Walking £20 pw for 50 weeks	

(5) Future Services
Gardening for life at £500pa
DIY painting and decorating for Life at £500pa
Removal of shower step
Removal of Garden steps
(6) Increased Holiday costs £2,000 pa for life

15.4.17 *Video of Claimant in Farm shop promoting Pink Lady Apples.*
The claimant is taking apples from a layered box and putting them into bags of 10 for sale in the shop. The video is indoors, lasts about 24 seconds, and the claimant only actually walks a few steps. He is not using a stick or crutches and is wearing the manager's jacket. Although the video does not show substantial movement he does not appear to be limping or saving his ankle or to be restricted in the movements that are shown. The right leg is visible to just below the knee and although it is not possible to say definitely that he is not wearing an airboot it does not appear that he is. He smiles and does not appear to be in pain.

7.5.17 *Surveillance Video no sighting of Claimant.*

No relevant video except that claimant's vehicle is at home (it is Sunday).

9.5.17 *Surveillance Video. Claimant walking and working.*
Claimant walking to shop from his car at 0841. Not wearing airboot or using stick or crutches. Thereafter seen walking in the outside sales area, collecting and pushing shopping trolley. Walks up to employee and speaks to him. Wearing Manager Jerkin. No airboot, crutches or stick or other aid. No apparent problems with movement or bending or pushing a supermarket trolley or bending to pick up litter. Filmed continuously until 0850.
0920-0924 Walking in and about the shop. No apparent restriction on walking. Carrying empty box and on phone. No noticeable limp.
1040- 1044 walks back to parked car (some distance) apparently with no problems walking. Observed until 1044 walking around the farm shop outside.
1113- 1114 Walking around outside.
1247- 1248 walks a distance into car park with another employee.
1253 -1257 walking around outside, and fetches trolley for customer. Walking without stick or crutch or airboot, no obvious limp visible to unprofessional observer. Unclear what he is doing, but continuously walking around external shopping area (compost bags etc)
1304 walking externally in car park area and external store area. Fetches trolley. Walks around stands and speaks to customer. Seen directing employee on work and seen going into shop at 1308. Last sighting 1308 when he re-enters shop. Observation continued until 1400. Time at work at least 5hrs 20 mins.

10.5.17 *Surveillance Video.*

Observation commenced and the claimant was first seen at 0851 in outdoor area of farmshop (plant and garden sales). Wearing manager jerkin. Bending and walking unaided by stick, airboot or crutches. During the day he re arranges the plant display including bending, lifting trays of plants from overhead and carrying using both hands. Walks from shop to his vehicle, and bends to reach inside. Thereafter, still arranging the plant display, is assisted by another to move wooden pallets and on more than one occasion moves a pallet without assistance. He uses and drives a forklift truck with no apparent restriction, and no apparent slowness in mounting or dismounting from forklift or getting into and out of the driving seat. Seen pushing a very large tray of plants at 1115am. At 1149 he is observed to push a tree pot into alignment using his right foot (and he then uses his left leg on another tree pot).Whilst the pots do not appear heavy the use of his right foot in this way is not what I would expect if it was painful.
At 1155 he is observed dragging (and at one point lifting) empty half wooden barrels. He really does not appear restricted in what he can do. Despite a day of work the pace of his work does not appear to slacken by the time that the last surveillance of him is seen at about 1630. When surveillance ceased at 1649 the claimant was still working. Time at work (not all observed) 8 hours.

21.5.17 *Surveillance Video. Claimant working.*
The claimant's car is already at the store when the observation is commenced at 0730. The claimant is observed inside and outside the farmshop pushing trolleys and working. Initially he is not wearing his manager's jerkin which he has put between 0925 and 0942. He is observed in and just outside the shop in the plant display area on and off during the morning, and is walking without stick, crutches or airboot. He walks apparently normally. At one point he is seen lifting down a tray of plants from above his head. Observation ceased at 1530 following his entry of staff only part of shop at 1505. He has apparently not left because if he had I infer that the surveillance would comment on his car moving. At work for at least 8 hours and probably longer given that he was there on arrival and had not left by the time surveillance discontinued.

23.5.17 *Surveillance Video. Claimant walking and working.*
On arrival he is already at work, his car parked in car park. He is first seen at 0930 to the front of the farm shop. He is seen on and off walking about and later arranging displays. He walks back to his car and returns to the shop at several times during the day. He has apparently not left when observation ended at 1545 because if he had I infer that the surveillance would comment on his car moving. At work for at least 8 hours and as above probably for longer given he was already at work at commencement of surveillance and remains there after discontinued.

21.4.17 Claim Issued

25.4.17 GP Visit complaint of ongoing pain and that ankle feels unstable. Plan: Orthopaedic Review.

26.5.17 *Photo of Claimant promoting Haribos sales.*

15.7.17 *Video of Claimant driving fork lift truck*
He is reversing a truck apparently loaded with nectarines.

17.8.17 GP Record: "History of periodically uses sleepers when has time off work to increase length of sleep.

8.9.17 Dialled 111 following loss of vision and advised to attend A and E within one hour. Decides not to go to A and E and following morning wakes 0300 and goes to work, where employer states he is having stroke and suggests he attends hospital.

9.9.17 Arrived at A and E at 0451, Suspected (and diagnosed) Transient Ischaemic attack. Admitted as in patient.

14.9.17 Discharged from Hospital. Diagnosis that surgery required on left carotid artery.

18.9.17 Readmitted for surgery on artery.

20.9.17 Discharged following surgery (endarterectomy) on left carotid artery

25.11.17 *Photo of Claimant promoting Christmas Tree sales.*

Claimant is working outdoors and wearing manager's jerkin. No stick of crutches and he is not wearing an airboot.

29.11.17 Dr Michael Spencer First examination of the Claimant. See Appendix II.

10.12.17 Video of Claimant promoting Christmas Tree sales
Video of Claimant in wintry scene when it is actually snowing walking up and down a line of Christmas trees (it is difficult to estimate distance but at least 15 yards in each direction so walking at least 30yds) outside on a wet slushy surface. He does not have an airboot, crutch or stick and walks seemingly without any problem.

15.12.17 Video of Claimant in shop.
Claimant packing bags of Brussel sprouts in shop.

16.12.17 Photo of Claimant carrying 2 Poinsettia, 1 in each arm.

2018

4.2.18 The Claimant's Second Schedule of Loss.

The narrative is the same as for the April 2017 schedule except that:

(a) In respect of personal care and support it is stated that the claimants care needs reduced from January 2016. The claimant's partner has had to take on extra dog walking duties since the accident.

(b) The claimant asserts that he has recently renovated his en-suite bathroom to remove the step into the shower and estimates this aspect cost £1,500. He has removed the steps at the back of his house to the conservatory, the French doors and the side doors at a cost of £1,505.

(c) The claimant gives more particulars of the dog walking claim stating that part of the accident he had his partner would show the dog walking duties. The dog requires two walks a day and each walk is approximately 90 minutes. Following the accident the claimant was initially unable to walk the dog due to his injuries and the claimant's partner paid someone to walk the dog once a day for two days and she would do the remaining walk. That arrangement is likely to continue.

(1) Promotion Lost and consequent financial loss of earnings.

(2) Personal Care and support

June to August 2014	6 hours a day
August 14 to May 15	2 hours a day
May 15 to July 15	6 hours a day
July 15 to December 15	2 hours a day
December 15 to Feb 18	9 hours a week

(3) Future Care and Support
9 hours per week for life
Dog walking £40pw for life.

(4) Paid Services to date of schedule

Garden Maintenance	50 weeks
June 2015 complete tidy up	£895
Window Cleaning	Monthly
Home Decoration various	
Shower and garden step removal carried out	

Car Maintenance and cleaning Weekly for 50 weeks
Dog Walking £40 pw for 67 weeks

(5) Future Paid Services
Gardening Future for life at £500pa
Home Decoration for life at £500pa

(6) Future Increased Holiday costs
£2,000 pa for life

10.2.18 Mr AG Cobb first examination of the Claimant. See Appendix II

15.2.18 Claimant's First Witness Statement

24.3.18 Dr Philip Steadman first examination of the Claimant. Appendix II.

12.4.18 Professor Briggs third examination of the Claimant Appendix II.

30.4.18 Defendant serves surveillance Footage and social media material.

21.5.18 NHS 111 record "since accident suffers from constant pain in ankle. Today tripped and jarred. On morphine but a while since taking and does not know whether to take 1 or 2 at a time"

21.5.18 GP "pain in rt foot and ankle. Ongoing chronic problem from past injury. Wanting advice and referral to ortho team for increased pain for which he has taken morphine today with little effect.

2019

22.1.19 The Claimant's Third Schedule of Loss.
The narrative differs from the second (Feb 2018) schedule as follows:

(a) The sentence in the personal care section that "The Claimant's partner has had to take on additional dog walking duties since the accident and she continues to do this" is removed.

(b) In place of the above removed passage is an account that prior to the accident the claimant and his partner would take the dog on two 90 minute walks a day, 7 days a week. Since the accident the claimant has struggled to take the dog for walks and his partner has taken on additional dog walking duties. Until March 2018 they paid for someone to walk the dog twice a week as well. All dog walking is now done by the claimant's partner.

(c) A passage is added in explanation of the change to the personal care and support claim following the joint orthopaedic expert report: "no claim is made personal care support after 1 January 2017. Although care and assistance has been provided after that date as described in statements served by and on behalf claimant the claimant acknowledges the implications of the opinions expressed in that joint report."

(d) The past paid services narrative has been altered and the removed items from the previous schedule are in Strikethrough.

(1) Promotion Lost and consequent financial loss of earnings.
(2) Personal Care and support

June to August 2014	6 hours a day
August 14 to May 15	2 hours a day
May 15 to July 15	6 hours a day
July 15 to December 15	2 hours a day
December 15 to 31 Dec 16	9 hours a week

~~(3) Future Personal Care and Support~~
~~9 hours per week for life~~
~~Dog walking £40pw for life.~~

(4) Paid Services to date

Garden Maintenance	50 weeks
June 2015 complete tidy up	£895
Window Cleaning	Monthly
Home Decoration	
~~Payment to John Reynolds~~ *(gardens steps removal)*	
~~Payment to Hadleigh Bathrooms~~ *(shower step removal)*	
Car Maintenance and cleaning	Weekly for 50 weeks
Dog Walking £40pw for 50 weeks	

~~(5) Future paid services~~
~~Gardening Future for life at £500pa~~
~~Home Decoration for life at £500pa~~

~~(6) Increased Holiday costs £2,000 pa for life~~

THE ISSUES IN THIS CASE

42. In the closing submissions the claimant sets out the issues as follows:
    (a) The nature of the injury suffered.
    (b) The persistence of the disability caused by that injury.
    (c) The effects of that injury on the claimants need for care and assistance.
    (d) The extent of associated losses including loss of promotion with consequent pay rise.

(e) whether the claimant's presentation to the court (both in witness statements and in oral evidence) and two medical witnesses is such that there has been fundamental dishonesty on his part.
(f) whether the witnesses called by the claimant in support of his case have also lied in support of his claim.

The defendant submits that I am faced by two tasks:
(a) assessing the level of damages to which the claimant is entitled in relation to the heads of claim he has advanced.
(b) Assessing whether the defendant has proved on the balance of probabilities that the claimant has been fundamentally dishonest in relation to his damages claim.

The two approaches are not in fact different but the claimant's approach is a more detailed version of that put forward by the defendant. In fact even those issues do not particularise the substantial difference between the claimant and the defendant on the issue of the ongoing alleged problems within the ankle, and the extent to which these are resolved.

43. The psychiatric evidence is agreed to be very substantially dependent on my findings of honesty. The same applies to the evidence of Promotion, and the ongoing effects of the injury.

MY ASSESSMENT OF THE WITNESSES

THE CLAIMANT

54. I listened to the claimant in evidence for over a day in total. He came into the witness box wearing his airboot and in the course of his evidence stated that he would not be able to walk the length of the corridor outside the court (about 20 yards) without the airboot, or assistance from someone else, or using a stick. There is no suggestion in the agreed expert medical evidence that his condition has deteriorated during the course of these proceedings, and I found this part of his account difficult to accept. It was at odds with the joint orthopaedic report, which plainly sets out (and was agreed, and neither of the experts cross examined) that the claimant has made a good recovery and will be able to continue at the present level of activity as seen in the video film without any deterioration of ankle symptoms in the future, that he will be able to continue working as in May 2017 with normal duties and hours, until normal retirement age. It relied on the claimant's oral assertions in evidence, assertions which had not been put to, nor covered in any questions asked of, the expert orthopaedic witnesses.

55. The claimant at the outset of his evidence told me that he understood when he signed the statements that if any of them were not true he could be subject to proceedings for contempt of court. He responded that the statements were true. He was asked about the three schedules of loss and whether he understood that those schedules also were similar and that if untrue there would be a liability for contempt proceedings. He stated that he understood that the case. He was then asked whether he had seen four experts who had asked him about his symptoms and he responded that that was correct and that he knew it was for the purpose of providing reports to the court and understood the importance of him having given truthful answers and of not misleading them.

56. The overall impression that I received from the claimant was of a man who was justifiably upset by what had happened to him and who rightly considered that he should be compensated for the injury that he suffered. It is inevitable that as part of that impression I look to the various video clips of the claimant, and an important part of my final determination in this case will be whether and if so to what extent I find that he has exaggerated his claim, a matter about which I will make specific findings. I can say at this stage that from his oral and written evidence I was not impressed by his accuracy of recall or the account that he gave of his situation. He was not an impressive witness.

57. I have no doubt at all that the claimant is a hardworking man, and that his injury has caused him pain and considerable difficulty and frustration whilst it has (over a longer period of time than would normally be the case) healed. The lengthy healing process is because there was a substantial soft tissue injury as well as the fracture, and also because of his own medical conditions. He is diabetic and a smoker or former smoker.

58. The impression made on me by his evidence apparently partly coincides (although I am sure she is less critical than I am) with the impression that his evidence seems to have made on his partner Susan Brown. Whilst she agreed with his oral evidence, when asked about his response to questions and her impression thereof she replied "to the best of Gavin's limited articulation I accept his responses". His own counsel, at para 36 of his closing submissions, when inviting me to reject the suggestion that the

claimant has deliberately concealed or deliberately misdescribed the extent of his past accident work habits in order to make a fundamentally dishonest claim for damages, submitted that he could at worst be characterised as a man who perhaps was not as eloquent or as concerned with accuracy as might be thought desirable; even to the extent of some degree of carelessness.

59. The impression that he made on me was formed by his account to the various experts in respect of his medical history, and his account given orally to the court and my viewing of the photographic, Facebook video and surveillance evidence. I deal with the reasons that I am troubled by his evidence in detail in this section but he seemed to feel that he could edit and leave out background information as he chose when answering questions put to him in the course of his examination by the medical experts. He must (or certainly should) have appreciated that the questions he was being asked were asked for reason, and his excuse for not answering questions (that he did not like the intrusion into his life, and that he preferred not to go back into certain parts of his past) whilst in one sense understandable was in my judgment in no way an excuse to justify the failure to answer questions which were relevant to the case but which he found intrusive. He has brought this claim. As part of that process the defendant is entitled to ensure that the claim is justified and to probe and investigate it.

60. His credibility was examined closely in the course of his evidence, with questions on a number of inaccuracies, not just concerning the accounts to the medical experts, but also between some accounts on his medical notes that he disagreed with. For reasons that I will set out when examining reviewing his evidence I conclude that I have to look at his evidence with great caution, and to look for independent pointers to back up the assertions that he makes. The evidence however which inevitably makes a considerable impression on me is the evidence of the video/surveillance, and the interpretation placed on that by the two orthopaedic experts. They are not either of them unused to looking at a person moving to establish whether and to what extent he is disabled or his movement appears restricted. The unanimity of their expressed opinion is a factor which I cannot ignore.

61. When examining the evidence however I remind myself that this case concerns a man who suffered a problematic injury which certainly initially caused ongoing problems with regard to healing, and an injury in respect of which the experts considered that further surgery might be justified but in the end are agreed that because of problems with healing, it should be avoided if possible. The initial injury is not in doubt. The problems with regard to healing are not in doubt. The issue of credibility arises in this case around the ongoing consequences to the claimant's life arising out of the accident. The question that I have to ask myself is whether the claimant establishes that the ongoing effects (and there are some ongoing effects) are as bad as he asserts, and if not, whether the defendant establishes that there is fundamental dishonesty in the presentation of his claim. In this respect, given that much of the defendant's scepticism is founded on the video evidence, I have to bear in mind the dictum of Bell J in *Roger v Little Haven Day Nursery (*30 July 1999, unreported, referred and quoted by Spencer J in *Aviva Insurance Ltd v Aleksandar Kovacic* [2017] EWHC 2772(QB) at para 39), a case where Bell J considered that the video evidence

undermined the Claimant's assertion that her right wrist was completely useless but concluded

> ".. The exaggeration which I have described falls within the bounds of familiar and understandable attempts to make sure that doctors and lawyers do not underestimate a genuine condition, rather than indicating an outright attempt to mislead in order to increase the value of her claim beyond its true worth."

62. Finally on the question of the video surveillance evidence I remind myself in accordance with Mr Laughland's submissions that it is over a relatively short period of time and that except for one day the periods over which the claimant is himself observed are short. Whilst that certainly applies in respect of the surveillance evidence the other social media evidence and videos cover a greater number of days over a longer period. They are inevitably much shorter, but they also reveal the claimant doing things that he has said he cannot, and not showing signs of a limp.

JONATHAN KEITH

63. He is married to Peter Assenheim's daughter. I did not find his evidence impressive. He was a man who had started out working for his father's diamond cutting and polishing business. When it was realised there was insufficient work for him he decided to start in business himself as a Jeweller, working from the same premises as his father. He had not bothered to keep accounts, and had ended up with problems with the Inland Revenue leading to a tax bill of £19,000 which he was unable to pay himself, and he had to borrow the full amount from Peter Assenheim to pay the tax.

64. The case put forward by Jonathan Keith in his statement implies that the first approach to him to work in the farm shop was after the injury suffered by the claimant. His oral evidence revealed that that was incorrect and that he had been approached on a number of occasions in the past. In order to support the case that he only came to work in the farm shop as a consequence of the injury suffered by the claimant he maintained in his oral evidence that although he had been asked on a number of occasions to join the shop his intention was really to make a go of his jewellery business and secure more consistent income from that source. It was put that by 2014 he had spent five years trying unsuccessfully to build the business and he was asked how he was going to improve his income from sales of jewellery. He said he was going to meetings, he was going to advertise and he was going to go into the wedding business. When pressed as to which of these steps had actually been taken he accepted they had not. He was then asked how, and what practically he was going to do to make his jewellery profitable and a source of consistent income and he really had no idea. His accounts did not show he had ever advertised, he had no ideas about what advertisements to place, or how they were really going to improve his business. I find that there was no realistic prospect of his business providing a more consistent income described in paragraph 2 of his statement and am satisfied that having heard him in evidence that the only place from which at that time the consistent income was likely to come was from the farm shop.

65. I am satisfied and find that far from him supporting his wife with his business, he had been supported during his marriage by his wife who had earned a good wage and bonuses as a partner in a theatrical agency. She had stopped that work upon the birth of her baby in 2012, and by 2014 her savings were running out. The tax bill of £19,000 (which was that large because he had clearly not submitted proper or timeous

or adequate accounts (I am not sure which, he said he had had accounts prepared in the end by accountants and accepted by the revenue) over a number of years and the bill had required settlement. I find that his taking up employment with the farm shop was principally linked to two things. First his need for money to support his wife and child with a consistent income, second Peter Assenheim's need to find a family member to work in the farmshop, and finally his wish to retire. Also present I am satisfied was what I infer was his recognition (contrary to the evidence that he gave) that the jewellery business was not going to be the source of a consistent income. I accept that in this mix of reasons the injury to the claimant will have played a small part but I am satisfied that from Jonathan Keith's point of view the main reason for his move will have been income security, and that when looked at this way his move to the farm shop was inevitable given the desultory income from his Jewellery. It was suggested that his wife did not want him working for the shop because of the long hours. I was told however that she did not want to go back to work herself, and I am satisfied if that was the case there really was no other option but the farm shop. I find that from the beginning of his difficulties he was inevitably going to end in the farm shop. He accepted in cross examination that Peter Assenheim had approached him on several previous occasions to work in the business. I find that there was an inevitability about it, Given that he had just borrowed the money from Peter Assenheim to clear the Inland Revenue debt, and even if repayment was not immediately being pressed, he needed to support a family, repay the debt at some point, and I am satisfied that claimant's injury or not there was an inevitability he would work in the family business. The timing, I find, was dependant on Peter Assenheim's retirement date and Jonathan Keith's requirement for money. The claimant's injury was but a small factor in the equation which has been magnified for these proceedings into the main reason.

66. ROSS ASSENHEIM

Ross, who has known the claimant and his ability for a very long time, said in evidence that the claimant was not able to carry out the managerial duties that he would have been carrying out had he not been injured. I found that difficult to understand. It appeared to me that the job of a manager would have been less heavy lifting and labouring than the job that the claimant was doing before his injury. Ross then described the sort of things that he was talking about and it appeared that those were precisely the same jobs that the claimant been doing before his accident except possibly cashing up at the end of the day. It involved the heavy work of lifting by hand in loading and unloading lorries and ensuring that the shop shelves were always stocked. It involved carrying customers purchases to their cars. None of the jobs described seemed to me really to be "manager's" jobs. I was told that everyone carried out every job. That may well be true, but the physical limitations on the claimant (and he can no longer heavy lift heavy loads by hand) would not necessarily have to be carried out by him, and the role one would expect a manager to fulfil (some customer phone calling, ordering and other paperwork and supervision of the workforce) did not appear to be on the list of manager's responsibilities, but were the things that I would expect the claimant to be doing as manager and to be capable of doing. There was a good reason it did however seem to me why the claimant's management duties were described in this way. The claimant admitted that he struggled with computers, and with paperwork generally and does not enjoy office work. He is not good at it, and really wanted to carry on his previous existence face to face with customers and dealing with heavy work. Ross was asked what part of the

shop the claimant would have taken over and stated that he would have continued with much of what he did previously but also taking on the role of going to purchase fruit and vegetables previously carried out by his father. I find that with a manager as limited in office ability as the claimant, and with Ross alone, that the shop could not have continued running as it had previously. It needed two people involved in paperwork (Jonathan and Ross, previously Ross and Peter) and one person who was able to be around the shop managing it to make sure that its shelves were stocked, and to front the customers, and assist with deliveries and supplies. I find that what the claimant was in place to do (but could not do as he had before because he is restricted in his lifting) was his old job. This I find was the reason that Peter Assenheim, whose wife had for some years been urging him to retire, was not able to do so previously.

67. So far as Ross Assenheim's evidence was concerned I did not feel that I was being told the truth about how much the claimant wore the airboot. I was told that the claimant had worn the boot for about 50% of the time since the accident, that it was put on and left on all day. I was told that in 2018 it came and went but that in the last six months it had been used a lot more (Nov 18 to March 2019). I felt that Ross was accentuating the problems that he stated that the claimant suffered, describing him as always limping, grimacing with pain and rubbing his face and the effect of the injury on him. Inevitably the impression made by the video contrasts with the evidence given by this witness and suggests that he is pointing out the worst rather than giving a more balanced account. If his evidence about the airboot was true then I see no reason why the claimant would not have been wearing it in the social media videos or in the surveillance videos. If he was going to be grimacing in pain and rubbing his face then I would expect such to be seen on the surveillance video especially when he was viewed for a considerable period of time working outside without the airboot. It was not.

68. I also note also that the restrictions on movement that Ross speaks of when the claimant is not wearing his airboot are not apparent on the surveillance video when he is not wearing it.

69. Finally I did not accept his evidence that he had not known that his father had approached his brother in law to work in the shop previously. In a family as close as this was I am sure that he knew that Peter had approaching John Keith.

70. PETER ASSENHEIM
Having heard him give evidence and listened to his replies I have no doubt as I have said in this judgement that he is a tough successful businessman who looks to the bottom line. He accepted when it was put that the business does not comply with the law in that the employees do not have written terms and conditions (contracts), His attitude to increases in pay was made clear in his oral evidence. He does not give money away and so far as he is concerned this business is for his family. He described it as his obsession. I am satisfied that is why he was so concerned to get Jonathan Keith working in the business and I am satisfied that he would not have paid the claimant anything approaching what he was paying his own family. I find support for this by the fact that the claimant has never had an increase over the minimum wage during the whole period that he claimant has worked for this business, and from the fact that when he was promoted manager in 2016 this was said by Peter Assenheim simply to be a peace offering with no increase in pay.

71. Peter Assenheim was asked in detail what work the claimant would have done when Ross took over Peter's job on his retirement. Although he spoke of his becoming "manager". He first described that Ross would do all the ordering for the shop, that he would carry out what had previously been his own role of buying the fruit and vegetables in Spitalfields, and that Ross would continue to do all the paperwork. Asked then what the claimant would be doing he said that he would not have done the payroll, that he would not be doing paperwork although he might have done some, he could have dealt with the occasional representative (salesman) but his main role would have been to direct staff. It was suggested that he was doing that now and had always done that and Peter Assenheim replied that he had, but that he and Ross had also been there. He said that he would have expected the claimant to work until about 1730 and that he would not really be doing any extra jobs over what he had always done. The only new thing would be to hold the fort until the shop closed. Probably the only new thing would be cashing up the tills.

72. I also accept the defendant's submission that the attempts made by Peter Assenheim to get Jonathan Keith to work for him on a number of occasions over a number of years should have been contained in Peter and Jonathan's respective statements. It was misleading for the statement to say that due to the claimant being unable to fulfil the role of manager he persuaded John Keith to take role on. It was even more disingenuous not to disclose the financial pressures on John Keith arising out of his daughter having ceased to work on birth in in 2012 of their child, and also having had to borrow £19,000 from him for his tax bill. Of course there was a chance that he would have increased the pay to the claimant after he had retired but it appears to me that what he really wanted was to get a sensible secure income for his daughter's family, and while I can see that he might have increased the pay to the claimant it is very much a case of actually he did not when he was made "manager".

73. SUSAN BROWN
I find she was fully supportive of claimant as would be expected. I'm concerned she remembers and gave evidence of the worst parts of the claimants situation rather than a more balanced version of what he can do and when he is restricted. My first impression was that she is genuinely upset by what she sees as a change in the person she lives with bought about by this accident. I was then brought back to her account of him with the airboot and on crutches at times when I am not satisfied that he was. Her account, like his, I am satisfied, was not accurate as it should have been. I do not accept her account of how little he was working when all the documents contain (as appears in the husband's cross examination) references to longer working hours. I am concerned that she exaggerates the care that she has provided and am also concerned by the contrast between the account she gives in her statement as opposed to the recorded video evidence which shows such a different picture. The wedding and walking down the aisle was another such example. When I look at the video evidence I can see nothing to prevent the claimant from walking down the aisle without a limp or any problem. Likewise when I watch him walking around the farmshop and outside area with no grimacing or show of pain the contrast with her evidence of his condition is enormous. What I am being asked to do is effectively to reject the evidence of the two experts without cross examination, and also of the video surveillance. Her evidence can be summed up by what she said to me. "I describe him as disabled and I am his carer. He could manage a supermarket with a boot and a trolley". Why then I

ask can he manage to walk around outside in the car park, and the garden centre area of the farm shop. Even when it is cold and there is snow on the ground, and one would expect him to be less good, still on social media there he is, walking up the lines of Christmas trees. Her evidence is that he is limited to walking up a step or two with a handrail. The video of him getting on and off a forklift without effort gives a very different picture.

THE EVIDENCE OF THE CLAIMANT

74. The Skeleton argument filed on behalf the claimant states that this case was initially to be about assessment of damages without any issue of fundamental dishonesty, which only became apparent on delivery of the counter schedule dated 4/2/2019. While that may technically be the case it seems to me that it must have been at the very least very likely from the date when surveillance evidence was served in April 2018 that the issue of dishonesty would be at the forefront of this case. Until that evidence had been obtained and served the case was one of assessment of damages. Following service of that evidence, and especially following the expert interpretation placed on it by the joint orthopaedic experts (the November 2018 reports and the joint report dated 20 December 2018) the case opened up and put the credibility of the claimant and his witnesses at the forefront of the issues in the case.

75. The claimant completed and signed his first statement on 15 February 2018. His partner Susan Brown completed and signed her statement on 3 February 2018. Peter Assenheim signed his statement in September 2016. These statements were made prior to the disclosure of the surveillance and social media evidence. Following that disclosure the claimant has signed a second witness statement dated 26 June 2018 and has obtained statements from Ross Assenheim (26 June 2018) and Jonathan Keith (27 June 2018).

Return To Work

76. In his February 2018 statement the claimant asserts that he went back to work in August 2014. At para 20 he states for 2-3 days a week, but mainly two days, and at para 24 he says 2 days a week for a couple of hours a day.
In para 25 he states that he had 10 weeks off work and returned to work in July 2015 working 5 hours a day 3 days a week. This continued to September 2017 although some weeks he managed 4 days.

Crutches and Plaster/Airboot

77. He was discharged in below knee plaster cast non weight bearing. While in a cast he was unable to have a bath and had to shower, and his partner had to assist him getting in and out of the shower.
The plaster cast was removed after 6 weeks on 17 July 2014 and replaced with an airboot and he states he was advised not to weight bear for 2 weeks.
In paragraph 28 he states that he was mobilising using crutches between June and August 2014.
In paragraph 18 he states he was on crutches from August to December 2014 and used the airboot from January to May 2015.
In para 19 he states that following the May 2015 surgery he was told not to weight bear for 8 weeks. He carried on using the airboot until November 2015 but found it rubbed the side of his wound. He used crutches as well until November 2015.

Stairs

78. At paragraph 27 he describes getting up and down stairs by sliding on his bottom at first.

Dog walking, Windows, Gardening, Car cleaning and Driving and Holidays

79. Prior to the accident he enjoyed spending time with grandchildren, taking them swimming, enjoyed maintaining the garden, cleaning and maintaining cars, walking the labrador and cooking and baking and one foreign holiday a year. (Para 3)

He really enjoyed dog walking and is unable to do this much as the dog pulls at the start of a walk. Sue takes the dog and they additionally pay someone (Para 37)…Prior to the accident Sue and I used to walk the dog twice a day. Each was for around 1½ hours. They now pay someone 2 days a week to walk the dog. If he does take the dog he cannot stand up for a long time and therefore just sits down and lets the dog roam free. (para 42)

He used to clean windows at home but cannot do so and employs someone to clean the conservatory windows.

He is unable to tend the garden and employs a friend to help who also works in the farm shop and is paid £60 approximately each time he comes.

Initially he was unable to drive, but as and when this became possible he could only drive short distances, and struggled with longer journeys.
He has sold his Mercedes GLK (his pride and joy – I wonder if it really was a GLK which is akin to a Range Rover) in March 2016 for £2,000 as it was impracticable and he bought a Range Rover which was easier to get comfortable in, with a more comfortable sitting position and he suffers less pain when driving it. He applied for and obtained a blue badge from Essex in 2016.

He is reluctant to book holidays because there is no way of knowing whether the destination will be mobility friendly. He states he has missed out on holidays in Cornwall and Majorca as they were too hilly for him to cope with.

Contrast Pre and Post Accident Work

80. Prior to the accident he would work 6 or 7 days a week and the change is difficult to deal with. He was working about 15-16 hours per day 6 days a week.

Post accident he takes morphine every day and his mood has been affected. He has a lot of pain to deal with and walks with a limp. He continues to work part time and has not been promoted as a result. He is on a short fuse and very anxious.
Since the accident his back has hurt a great deal (Para 38)
He describes his post accident work as going in on days when he felt up to it, sitting in the office and answering the telephone in contrast to his normal pre accident role when he had almost always been on his feet and doing physically demanding and heavy work.

Ankle Fusion and Ongoing Pain

81. He states that he was referred to Mr Tiruveedhula in relation to the proposed fusion operation. He spoke to Mr Hussein about it on 14th July 2016 and was told that a fusion would require a lot of thought because of the trauma and the previous healing problems, which meant he was not the best candidate. He states that keyhole exploratory surgery was organised to have a look at the arthritis and the piece of dislodged bone, so that an informed decision could be made. This was then cancelled on 2 occasions and thereafter he suffered his stroke and determined not to go ahead.

In March 2017 he found it difficult to stand on his leg, which was very painful and he therefore obtained a referral to Mr Hussein however he has not received an appointment.

Prior to the stroke, in June /July 2017 he was really struggling at work. His employer was pushing him to work harder but his leg was painful and was starting to get the better of him. In September 2017 both bosses were on holiday and they were understaffed. He was pushing himself too hard and suffered at night. He was fatigued and distressed whilst carrying out tasks which would have been run of the mill before the accident.

The effect of the accident has been life changing. His stroke has not really impacted. He will not be able to work full time because of his leg injury and didn't get the promotion that he expected. Because of the accident he has to pay others to do work around the house and had to sell his Mercedes. He does not want to have an ankle fusion, and states that it is frustrating to know that the lack of function and pain is permanent.

82. All the evidence shows that his ankle was slow to heal, and that he suffered from infections in the site of the operation, and he was therefore advised to have the metalwork removed. This operation was due to take place in February 2015 but was delayed (on his account) because he was training a member of staff to cover his position and he was not granted annual leave by his employer until March 2015. The metalwork removal took place in May 2015 following which he asserts he was off work for 10 weeks returning to work in July, working five hours a day three days a week until September 2017 although sometimes he managed four days.

83. He describes a need for care by his partner between June and August 2014 of approximately six hours a day, and thereafter until May 2015 he estimates a requirement for two hours a day of care. Following the operation to remove metalwork in May 2015 he estimates his need for care reverted to six hours a day until early July 2015, then reducing to two hours a day from July until December 2015 and finally to one hour a day from January 2016. Following that operation he was non-weight bearing for eight weeks and carried on using the airboot outside until November 2015 but this rubbed the side of his wound. He used crutches as well until November 2015.

84. He describes having had a stroke (unrelated to the claim) on 9 September 2017 and that on being admitted to hospital he was advised he had suffered a heart attack which had caused the stroke. He remained in hospital. He underwent surgery (endarterectomy) on 11 September to unblock his carotid artery and was discharged

on 21 September. He returned to work on 16 October 2017 on a phased basis working two hours every other day and states that his hours slowly increased and he should return to pre-stroke hours in due course. As the hospital notes show even this account, which is not in issue in these proceedings, is inaccurate. He was in fact discharged from his initial admission on 14 September and re-admitted for the surgical procedure on 18 September and discharged on 20 September.

85. The claimant was cross examined in detail about his account to the court, in statements and to the expert witnesses. I set out that cross examination and the conclusions that I draw from it, from which my conclusions about the reliability of his evidence are drawn.

86. There were a number of instances where his account was demonstrably inaccurate. Giving evidence is not a test of memory and different people have different powers of recall, but the significance or otherwise of the inaccuracies will require examination in the light of the evidence.

87. His account was demonstrably inaccurate when stating that he had worked continually in the farm shop since 2006. He accepted that in 2008 he had moved back to work in the baking business. He was asked why he had failed to provide this information and stated that it had only been for three months. He said he had left to earn more money for less hours, but that when he had started in the baking job he had found he was not happy because of the sad memories that he had from the failure of his baking business.

88. His evidence was that for the first two years at the farm shop he had worked 7 days a week without a holiday, and that before his accident he had been working 15-16 hours a day 6 days a week, earning £590 gross per week. This he accepted was around the minimum wage per hour. Asked then why he had returned to work at the bakery he said that his boss at the farm shop had asked him to return. Asked why he had gone back when he had left because of having to work long antisocial hours for low wages he explained that he returned to a different role, for better money and without night work. This explanation was questioned and he was asked what the difference in wages had been. He responded that he did not know what he was paid but that it was better than before. It was then put that having gone back to work at the farm shop he was on his account still working nights and he responded that he returned to the farm shop from the bakery to do a day job but that he had still worked some nights if someone was on holiday. That hardly tied in with his account of working 6 or 7 days a week and working 15 or 16 hours a day starting at 0300 or sometimes earlier and ending at 1730 or sometimes 1800.

89. I was troubled by his assertion that the reason he had gone back to the farm shop to a different role, where nights were only to cover for the absence of other employees, so not the norm; when his account of his pre accident day was of a 3am start. The fact that he had not referred to the break in work did not particularly trouble me, it was the justification for going back and the assertion that the type of work had changed, which did not appear to me from his evidence to be the case. As his evidence progressed it appeared to me as yet another "off the cuff" response to a question, which was unlikely on balance of probabilities to be true and where the true answer

was in this case that he was unhappy in his better paid baking job because of past associations.

90. I do not accept his reply that he had been paid more when he returned to work. He was unable to give any indication of how much more he was paid. At this point he altered his evidence about his working day saying that he only worked 90 hours a week at the busiest periods, that the work was seasonal to an extent and that after Christmas it was not busy so he would be working 5 days a week 11 or so hours a day. He accepted that when he became an assistant manager his pay did not increase, saying he had not asked for an increase.

91. These answers do not at first appear that important, but as his evidence developed the lack of accuracy became a feature of his evidence.

92. He was asked about walking the dog, and washing his car. It was suggested that if he was working the hours he was (0300 -1730) 6 days a week, that he would have no prospect of also walking the dog daily for 1 ½ hours morning and evening

93. He was asked whether he had received statutory sick pay. He denied ever having been in receipt of sick pay and said that his pay had continued throughout at the same rate. This was shown to be an inaccurate answer and he was taken to the wage slips where sick pay was shown for four weeks. He sought to explain this by saying that he never received paper wage slips, that his were sent by email to his partner, and that the only person who could answer would be Ross. He was taken to his schedule of loss where credit was given for £396.38 received during the period 16 June to 13 July and asked why if this was incorrect he had not corrected the figure. He responded that he was paid in cash, that his payslips came to his partner's computer, and that he had received the same payments from the date of the accident until today.

94. It was put that he had gone back to work in late July on crutches and that the reason he had done so was because he could not survive on statutory sick pay. He denied this was the case, stating that the reason that he had gone back to work on crutches was not because he was short of money, and that he would not have returned to work unless he was able to do so, because his health was more important. The reason he had gone back was because Ross, his boss, was off work because of the birth of a baby and he had to do Ross's job to the best of his ability. Apart from the cessation of sick pay there is no consensus in the evidence of the date when he returned to work. His partner, in her written evidence had said that he returned to work on 3 August 2014, and then in her oral evidence said he had only returned to work part time before her son's wedding (end August 2014). There is an entry (19 August C1201) in his GP notes stating that he is not able to go to work. His own written evidence stated "in August 2014". His employer Peter Assenheim told me that he dealt with the employees pay and that after 3 days off sick the employee would go on to statutory sick pay, and that that was always the case. He said nothing about any different or special arrangement made in the claimant's case. The claimant's loss of earnings schedules show an absence from work (absence of payment of wages by employer) between the date of the accident and 13 July 2014. I am left with no consensus on this issue. On balance of probability it I find that he did not at this stage return to work full time but that he was going to work from some time in the middle of August 2014.

95. He was asked in detail about the accounts given to the various experts and taken to paragraphs in their reports and his statements. He was taken to the following references:

(a) Paragraphs 38 and 39 of his first statement dated 15/2/2018 (**A139**)
Where he stated that since the accident his back had hurt a great deal and he had gained weight as a result of reduced activities and inability to exercise, to paragraph 39 where he stated that he used to work six or seven days each week and that the change since the accident has been difficult to deal with, that he has struggled with low mood, and his sleep has been affected by pain.

(b) To Professor Briggs in the report 9 July 2015 (**A268**)
where he said he went back to work in August 2014 two days per week in a very limited manner and was only working a couple of hours a day. He had further surgery on the right ankle in May 2015. He has become very depressed as a result of the index accident and its effect on his ability to work and enjoy life……. He has also developed pain in his left hip, low back and right thigh. He has been using crutches for a long time.

(c) To Dr Spencer: report dated 27 February 2017 (examination 29 November 2016) (**A318**)
He was prescribed antidepressant medication (although he could not remember its name) but he stopped it as he did not think it was helping and did not want to become "hooked".

(d) To Mr Cobb in report dated 10 February 2018 (**A357**).
Before the accident he was fully fit and working long hours full time six days a week. After the accident he managed to get back to work on crutches and wearing his ankle supporting boot in September 2014 and has continued ever since on reduced hours and amended duties.

(e) To Dr Philip Steadman in report dated 24th March 2018 (**A405**)
Where he told me him had never had a problem with alcohol, he drinks socially. Asked (**A407**) if there had been anything else important psychologically in regards to his case or his life ever which had not been covered he said that there had not been.

It was put to him that on the basis of the above accounts he was describing himself as fully fit before the accident but that he had had back problems since, that he had no psychiatric history before and that he had no alcohol problems and only drank socially. He was then asked detailed questions in relation to his account and the difference between the account given and the records as disclosed in the reports.

96. He was taken to the detail in the report of Dr Spencer dated 27/2/2017:
(**A324**) That in 2006 he had been drinking to excess when going through a divorce that in 2008 he was suffering from depression.
(**A325**) That the depression was provisionally diagnosed as due to symptoms of acute stress reaction and alcohol induced depression. That the depression had led to purchase of four packets of sleeping tablets of which one packet had been taken before he was interrupted and paramedics called.
(**A327**)In October 2008 he wrote a letter to the fines officer stating he had suffered severe depression since December 2007, and another letter to his GP referring to is ongoing battle with depression and inability to work full time.

(**A328**) In September 2009 that he was feeling depressed his partner having ended a long term relationship three weeks previously and suffering poor sleep. He agreed it was emotional hurt rather than illness depression.

97. It was put to him that looking just at the psychiatric evidence that there had been major problems including a suicide attempt in 2008/9 and problems with sleep in 2012, 13 and 14. He accepted that this was the case. Asked why he then did not tell the psychiatrist anything about this, and why he had said there was nothing in his past he responded that at the time of his interview he told Dr Spencer that there was nothing wrong with him at that date. Taken to the specific question about past psychiatric history in the report (**A318**) he responded that that was in his past and when he was seeing Dr Spencer he had got over his past problems. Put that he was deliberately misleading the psychiatrist he responded that he was not deliberately misleading. Put that this was deliberately concealing his past he responded that he was not misleading anyone but that some things you block out. At the time he did not have a drink problem and was not an alcoholic. Asked again what was his explanation for misleading the psychiatrist he responded that he was not trying to conceal anything.

98. He was then taken to references in the medical notes dealing with the physical account relating to his back:

(**C1121**)A letter in January 2000 from a consultant neurosurgeon to a consultant orthopaedic surgeon concerning his back and left leg problems which are described as quite severe. The letter gives his weight as 15 stone.

(**C1118**) A letter dated 30 March 2000 from a consultant in pain management to his GP relating to bilateral facet joint injections and lumbar steroid epidural given in February, because of the problems with his back and left leg.

(**C997 and 999**) References in his medical notes to attending his GP for acute back pain in March 2010, October 2010 and November 2010.

(**C1001**) Further references in his medical notes in January 2012, refusal of an MRI scan in April 2012, sciatica in August and September 2013.

(**C1010**) Frequent and regular references in his medication records between 2010 and April 2014 to prescriptions for Co-Codamol and amitriptyline, in relation to pain.

The claimant was then taken to paragraph 38 of his first statement where he says that since his accident his back has hurt him a great deal and he has gained weight as a result of his reduced activity. He was taken to the reference in the July 2015 report of Professor Briggs stating that he has also developed pain in his left hip, low back and right thigh.

He was asked why he did not admit to Professor Briggs that he had suffered from back pain before the accident. He responded that he had not been asked. He was taken to the reference in the report about past medical history and asked why, if it was appropriate to inform the professor that he was a type II diabetic, had hypertension and had had a hernia operation it had not been appropriate to be open about and inform him about his back problems and that he had been taking Co-Codamol to relieve back pain. His response was that he did not tell him, but could not say why he had not told him.

99. In re examination Mr Laughland asked about the effect of his sciatica on his work situation. He responded that although he had had sciatic pain, and it had meant that he could not lift as much as he wanted to, he had still been able to go to work. Encouraged by this Mr Laughland asked about the episode of muscle spasm in October 2010 and whether this interfered with his work, presumably hoping for the response that it had not done so. He responded that it had interfered a lot. He was asked whether the footage seen on the surveillance video constituted heavy lifting and responded that that was not heavy lifting. He was asked about other episodes, and the effect that his back had (November 2010, January 2012) and his response essentially was that it had effected what he could do, but also that he just got on with it and was doing days going in and starting work at 2 - 3.30am and ending at 1730 or later, dealing with deliveries and orders.

100. He was then shown and asked about the account given to Mr Cox, set out in his report of 10/2/2018 (**A357**) to the effect that he had been fully fit before the accident. Asked why he had said this he accepted he had not been fully fit. He said that he was being asked to go back in his history and could not remember all things. His back pain had been a problem on and off and this was not about his back. It was put to him that he had nonetheless told Professor Briggs about his back pain following the accident.

101. He was then asked about his weight gain and it was put to him that his notes recorded his weight in March 2011 as being 13 stone 8 pounds and in June 2017 as being 13 stone 9 pounds and that this did not show any significant weight gain. He had no response to this. He was re examined about this issue and exercise generally and said that he had been a member of the golf club for about 5 years before his accident and had played definitely once and possibly twice a week, but had given this up since.

102. In his closing submissions and in his re examination Mr Laughland laid stress on the fact that the question asked is often determinative of the answer given, and that the claimant was not always asked specific questions but only general ones which might not have prompted the expected response by triggering the memory. I am satisfied that he was given the opportunity to disclose what he wished and thought appropriate to disclose. I can accept that certain parts of his life (the suicide attempt) would be things that would be painful to speak about, however this is a claim made by him and the history is inevitably relevant and important, and the experts need to know of it. It is yet another example not just of lack of attention to detail, it is also concealment of relevant facts. I will need to make a finding whether this was deliberate. The claimant had signed authorities for disclosure of his medical notes, must have known that these areas were likely to be covered in those notes, and if he had given the matter any thought would have known that the past would surface in these proceedings. Nonetheless he did not assist the medical experts and did not give a full and frank account.

103. There is no doubt that he did not give a full and account of his medical history to any of the expert witnesses. It inevitably makes me concerned about his reliability when he reports things and whether he realises the importance of telling people the full story. He is not a reliable witness. The omissions may not be that significant in themselves (the experts had full medical notes) but the fact of the omission is significant and concerning.

104. The claimant's account included a significant number of occasions when the account recorded in his medical notes and from other sources did not coincide with his evidence. The claimant explained some of these entries as being either wrong or misleading.

105. There was an inconsistency between the account given in the two letters from his treating surgeon to his GP dated 19 September 2014 (**C1161**) and 15 October 2014 (**C1163**) reporting what he had told the surgeon, and his evidence. The letters stated:

18/9/2014 (**C1161**)

> "Reviewed in my clinic today. I am pleased to say that his ankle is much better. He has no tenderness over the wound although there is still some induration in the upper part"

9/10/2014 (**C1163**)

> "Reviewed in my clinic today. I am pleased to say that his ankle looks quite good. The wound is satisfactory. He has stopped his antibiotics and at the moment there is no flare up of infection. He is still wearing his boot but in the evenings he takes this off although at work due to the long hours he prefers to keep it on for protection".

It was put to him that those letters (and particularly the letter of 9/10) were inconsistent with his account of having been on crutches from August 2014 until December 2014, and having used an airboot from January 2015 until May 2015 given in his statement at paragraph 18 (**A135**). He responded that he used both crutches and airboot. When it was suggested that he had in fact ceased using the crutches by October 2014 at latest, and asked why he was saying that he continued use them until December he responded that he used both, and that the crutches had been given to him to use and if the foot required it he used the crutches. Pressed again as to how he explained the contents of the letter he said that Mr Hussein must have misinterpreted what he was saying. Asked to be specific what he meant by this he said that he was not suggesting that Mr Hussein had made it up.
What was a simple point – that at latest by October the claimant had not been using crutches, contrary to what was said in his statement, was one that the claimant was unable to answer with any convincing explanation of why, had this been the case Mr Hussein had not mentioned that he was using crutches in his letter, and had only mentioned the airboot. I am satisfied and find that the explanations and reasons given in evidence by the claimant were not truthful, and that by October he was no longer using crutches, and that the true explanation was that Mr Hussein's reports and letters were accurate and the claimant's statement and evidence inaccurate on this point.

106. He was then pressed on the point that his statement said he was only working 2 hours a day two or three days a week and yet the letter said he was working long hours. He was unable to explain the reason for the difference between the two accounts and simply said that he was in the office most of the time. It was suggested to him that his account of only working in the office was untrue when the photographs at **A186** and **A188** were examined. These were photographs of the claimant holding savoy cabbages (1/10/2014) and a pumpkin (11/10/2014). The claimant suggested that these were recent photographs although he did not know how recent. I note that there are no crutches in any of the photographs. Had the claimant been, as his statement says, using crutches at this point in time I would not expect a sensitive and considerate employer to use him in a photograph which (by requiring him to hold a large cabbage

in each hand) meant that this was impossible. The same (although it was only one) is true of the very large pumpkin being held at head height.

107. When the claimant's counsel suggested that the date the savoy cabbages photograph was taken (as opposed to being posted online) was unknown the question was altered to the Pumpkin photograph as being for Halloween so obviously taken post accident (and in October 2014). Using this photograph it was suggested it showed he was not by then restricted to the office. It was put that he was certainly not using crutches and he responded he probably had the airboot on. He stated that he was the person selected and best placed to do the promotional videos and photos because he was well known and that he felt he had to do them.

108. On 6 January 2015 the claimant rang Mr Hussein's secretary requesting an appointment with him. It was suggested to the claimant that what he had said to Mr Hussein's secretary set out by her in a handwritten note of that conversation in his hospital notes (**E1889**) showed that he was recovered and fully back at work**:**

> "Foot feels a lot better, he wants to speak as he doesn't want to have metalwork removed if things settle down, but would value your advice and opinion on this…….Doesn't want to mess you around, you have been excellent…..16 hour days. Could do with a letter to say reduce hours or one day less per week"

It was put that the note also showed that he was back working full time. The claimant was indignant at this, asserting that the note was a complete misinterpretation of his conversation, that he was not seeking any letter and that the reference to 16 hour days was just a joke he had had with the secretary. He had no need of a sick certificate because the boss had told him he can only do what he can do.

109. He was then asked if the handwritten note of Mr Hussein's of the clinic appointment on 8/1/2015 **E1890**:

> "Ankle not causing much trouble and wound has settled completely. We discussed the pros and cons of removal metal, since not having any problems wondered whether could leave at present. Agreed, but warned there can still be infection in the background that could flare up. See 3/12 or earlier"

was accurate, and he agreed that it was. He was then asked why in that case if the ankle was not causing much trouble and the wound had completely settled was he not working 4-5 hours each day? He responded that he wasn't working more than 3 hours a day because he had the choice whether to do so, and he had no need to do so because he had been allowed to do what he was capable of doing.

110. He was then asked about the report letter written to his GP by Mr Hussein following the clinic appointment on 9 January 2015 (**E1166**):

> "Mr Alexander came up to see me today. He is due to have removal of metalwork from the right ankle and he came up to discuss the need for this as his ankle has settled down a lot. The wound looked satisfactory. He is going to drop his work load by one day…….. If his ankle is not causing him any trouble and providing he does not get any further flareup of infection then I think it would be reasonable to wait and see how things progress particularly as he is not keen on having the removal at this moment. We have both agreed on seeing him back here in three months time with an x-ray on arrival but he knows to contact my secretary earlier if he runs into trouble."

He was asked why he had said he was going to drop one day's work a week if he was only working 2-3 days a week for 2-3 hours or so a day. He responded (and his responses were becoming rather annoyed and petulant) that he could drop a day if he wanted to do so and that he might fancy dropping one day a week. It was put that the truth was that by New Year 2015 his ankle was better and he was back to working 16 hour days. He denied that was the case, and said that in fact following that appointment he had not dropped one day and continued to work 2 hours a day on 2-3 days a week, his boss was very understanding. He was also questioned why if he was any work two hours a day twice a week he could not have his operation to remove the metalwork without regard to farm shop. It was suggested to him that he was hardly key to training Jonathan Keith if he was any way that few number of hours each week, and that if he was really only working that amount of time the business would not miss him and would allow him to have his operation at any time.

111. It was put that this was not what he had said to other people and he was then questioned about the contrast between his assertion "my boss is very understanding" and the note at 21/10/2014 (**C1203**) in his GP notes "feels unsupported in the workplace" and at 3/2/2015 (**C1204**) "Job in Jeopardy". He was asked why, if his boss was so understanding, and there was no problem with taking time off and no need for sicknotes, he was giving this account of feeling unsupported and in jeopardy to the doctor. He answered that at that time he felt a bit out of it and that during that period Ross was asking when he would recover and he thought his job might be in jeopardy. It was put that Ross was not in fact as accommodating as he said and that he was being expected to do 16 hour days. He replied that he had never said he had to do 16 hour days.

112. Mr Laughland submits that it may be that the reason for the inclusion of the reference to dropping a day may be because of the secretarial note rather than anything Mr Hussein can himself remember, and that the note may be incorrect. I do not accept the explanation about 16 hour days being a joke. I have not heard the secretary but it does not seem likely to me that she would have missed a joke of that nature, and it also does not seem to me that the claimant would be likely to have been speaking to her on the telephone in that way when he was discussing something as serious as a consultation to determine whether to have his metalwork removed. I am satisfied that at that time, when his leg was on all accounts much better and not requiring removal of metalwork, that he was working 16 hour days, but that he felt that this was too long and would have liked to reduce by a day a week. I do not accept his explanation of the difference between what he was reporting to the experts as himself as working was that he was sitting in the office. He may well have been working in the office, or he may have been doing some other work elsewhere not within sight of the public (a significant part of the site is out of view of the public).

113. He was asked about the pain in his ankle. The medical notes (**E2055**) show it as being reported again on 26 March 2015 "during the last 3 weeks" so not prior to that. That is a note written by Mr Hussein so a note that is in my judgment a reliable report. He was then taken to the notes made when he was in Hospital for removal of the metalwork (**E1994**, May 2015) where he is reported as saying then that the pain was not acute or chronic. His response was that he was probably taking morphine, and

then asserting that he had been taking morphine. It was put that the morphine was just another part of the sham and he reacted angrily to this suggestion saying "you have no idea of the pain, or of the need for morphine". When it was suggested that this was incorrect and that he had not reported that level of pain, and had in fact informed the hospital he was taking Co-codamol He responded that that was incorrect, Co-Codamol was what the hospital had prescribed.

114. I have looked at his prescription records (exhibited to his statement at **A148** and also for longer period at **D1399**) and as confirmed by his own counsel in his closing submissions (Para 34.8) the GP records show the first prescription of opiate based analgesia (Tramadol) was in November 2015 so well after this admission. The exercise of giving evidence is not a test of memory, but the haste with which the claimant attempted to assert a reason for his report of pain at that time as not being acute or chronic, and to assert in the witness box that in fact the level of pain was extreme was that he was probably taking morphine. The claimant again shows a willingness to mislead without regard to accuracy. Had the pain been acute or chronic at the date of admission I find that the claimant would have said so when asked. This was yet another example of an inaccurate and exaggerated piece of evidence. Contrary to his outburst he was not prescribed or taking Morphine or any similar painkiller at the time.

115. I find that the notes assist me in showing when the pain in the ankle was present and when it was not during this period and the fact that it is noted as coming on 3 weeks previously in March in a note written by Mr Hussein is I find indicative that until the beginning of March there had been a period which was pain free or at most with low pain. Why else speak of the pain returning? I also take some support for the fact that the pain was not acute or chronic in May 2015 immediately prior to metalwork removal from the nursing notes, although I place less reliance on these as being compiled by someone who did not previously know the claimant and was no doubt unfamiliar with the history.

116. He was asked about his account that he had not returned to work after the removal of the metalwork until July 2015 (**A135**) and that he continued to wear the airboot until November 2015, also using crutches as well. He was taken to the letter dated 30 June about a clinic appointment on 3 June 2015 where it is apparent that he has discontinued use of the airboot as it is pulling off the dressing. He then accepted that he was back at work by 18 June when the photograph of the special K granola was posted (Caption "the Gavinator is back").

117. He was then asked about the failure to attend the physiotherapy that he was recommended to have following removal of the metalwork. This was another difference between his evidence and the letters and notes on this point. The Physiotherapist writes to the consultant (**C1192**) that they had tried to contact the claimant by telephone and letter but that he has not got back to make an appointment, therefore they are discharging him. The claimant in evidence said that this letter was wrong, and that he had been to the clinic but it was too painful for them to do anything therefore treatment had been discontinued. He was questioned whether this was correct, and taken to the physiotherapist notes at (**E1905**) which show efforts made to contact him via message on his mobile, on his home phone number and by letter, between 13th May and 19th May. Following no response to the letter he was

discharged on 4th June. The claimant in evidence stated that if he did not answer his mobile it had no answerphone facility, and in response to the question why not go once the wound had closed said that his consultant had not said that he should have physio. Pressed further we got what I am satisfied was nearer a truthful answer "I was so fed up maybe I did not bother".
What was revealing was the length of time and number of inaccurate responses that it took to get to the truthful answer that he was so fed up maybe he did not bother, while he tried to cover this up.

118. It was put to the claimant that the use of crutches to see Professor Briggs in London on 10 July 2015 was a further charade. He said he needed crutches to get to the consultation, which took place in consulting rooms in London. It was suggested that he had not been using crutches the previous day when he saw Mr Hussein otherwise his letter to his GP would have said so (**C1196**). He responded that there was no need for Mr Hussein's letter to comment on crutches because they were apparent and obvious to him. Whilst I do not accept that Mr Hussein would not have commented on crutches were these being used (I note that he comments on the cessation of use of airboot on 3 June), and therefore on balance of probability given the unreliability of the claimant's evidence I do not accept that he was using them or reporting use of them to Mr Hussein, I make no finding on whether or not his use of crutches at the appointment with Professor Briggs was all part of the sham. The explanation that he felt the need if travelling to London to use crutches I do not reject.

119. The claimant was asked why, if he was still using crutches until November 2015, as his statement alleged, there was no mention of them being used in the notes of the meeting on 2 October 2015 with Bush and Co (the rehabilitation providers). Indeed, the note (**G2532**) was that he was using a walking stick to mobilise and able to manage short distances. He said that he had not mentioned crutches to Bush and Co. I do not accept that if he was seeing Bush and Co as the note sets out with the goal of regaining previous levels of fitness and being able to mobilise for long distances (**G2530**) that he would not have spoken of using crutches if he was still doing so. I am satisfied that at the date of the interview with Bush and Co that he was no longer using crutches which is why he did not refer to them.

120. The claimant was asked about the recommendation that he undergo psychological therapy. He reported that he was no longer taking antidepressant medication and said in evidence that he was not interested in psychotherapy but, as the report made clear, wanted to focus on addressing his physical rehabilitation.

121. He was then asked about the passage concerning his employment. He denied having said that he managed a full-time role within the company and that he did not require vocational case management at this time and alleged that this was a mistake by the person writing the report. In re examination he said he thought that he was being offered counselling. Given that the report sets out his allegation of having missed out on promotion, and sets out accurately his allegation that he was unable to undertake physical tasks and could only carry out a managerial role I am unable to accept that he did not tell the rehabilitation providers that he was managing a full-time role within the company as the report sets out. I do not accept that he turned down the opportunity for vocational case management because he thought that this was psychiatric counselling and find that it was offered because of his account of having missed out

on promotion, and was turned down by him because he considered he had no need of it at that time because he was managing a full-time role.

122. It was put to him that the account given to Professor Briggs (at **A280**) in February 2016 to the effect that he was not working full time and only working 3 hours a day 5 days a week doing light duties was a very different account to that given to Bush and Co, and that it was untrue, which he denied. I am satisfied and find that the account given to Professor Briggs was indeed different and untrue.

123. The claimant was cross examined about his visit to hospital following his stroke. The documentary evidence shows that he was seen by a stroke nurse who took notes (**F2147**) and reported the account that he gave at around 0520 on 9 September 2017. The notes made by the nurse were not disputed by him except that in his evidence in chief he denied that he was planning to go to work that day as early as the notes state, and said that he did not wake up that day at 3am in order to go to work. He said that since he was awake he had got up and gone to work. The point was pursued and it was put that the reference in his medical notes (**A333**) where he was complaining on 8 September 2016 of poor sleep generally, but said this was not an issue because he got up early for work and so managed, referred to the fact that his working day in 2016 was also starting very early, as it had before his accident. He denied this was the case. This answer was in marked and total contrast to the response he gave to his own counsel in re- examination. To his counsel he said that he had rung 111 the previous evening when he had lost his sight in one eye and when he was told that he should go to Southend A and E immediately. He had told his wife that he was not going to hospital because it would be full of drunks. Thereafter he said he woke at 0300 and went to work at 0430 as he was on the early shift. His boss (Ross) had asked him what the matter was and sent him home. He drove himself home, and then his partner drove him to A&E.

124. This reply confirmed the case that had been put to him in cross examination (which he had been at pains to disagree with) to the effect that he was getting up at 3am to go to work. Even without that admission I would not have accepted his denial of intending to wake at or around 3 am preparatory to go to work. If he was unwell the previous evening (as he clearly was) the fact that he had been ill the previous evening makes his story that it was simply because he woke up that he decided to go to work even less likely. The reaction of someone who is or has been unwell to the extent of ringing 111 and making a decision not to attend A and E is in my judgement more likely to be to remain in bed until the time comes for going to work rather than going in to work ahead of the required time just because you have woken up. As a matter of fact I do not accept that he went to work as late as 0430. It seems unlikely to me that he would have had the time to get to work, assess his situation, come to a decision about it with Ross, then drive himself home, get his partner up to take him to hospital and get through A and E (even if, as I take to be the case, assessment by a stroke nurse would be a very immediate assessment, with little or no delay) all between 0430 and his arrival time at A and E of 0451.
I am satisfied that this was an example of him working at his pre accident timetable and getting to work very early in the morning – earlier than the 0430 time that he gave his counsel in re examination, and possibly as early as 0400.

125. I find support for the fact that he was going to work early according to plan rather than just because he woke up also in the evidence of John Keith. He was not in court during the evidence given by the claimant, and was asked what hours the claimant had been working since his accident. He responded that he started most days early – that 4am was a usual start for him. He went on to say that the claimant usually finished between 8 and 10am. So the day that he set out was a 4-5 hour day, but significantly at a very different time to that which the claimant said he worked. I find the difference to be very significant. I do not accept that the start times are something that John Keith, a manager of the shop, would be mistaken about. That was his evidence. It also ties in with the references to long days and hours in the disclosed documents. It is another example of the claimant attempting to show that he is not able to do as much as he actually is doing.

126. The Claimant's responses to the questions about the video evidence were also revealing of the claimant:
The claimant accepted that there was a clear view of his legs in the clip on 14 May 2016 and that he is not wearing an airboot, and that on 30 June 2016 he is seen working outside and crouching. He had no explanation of how given his version of his condition he was able to crouch, and why he chose to adopt this position which there was otherwise no need for. He was taken to the other photographs and videos originating from social media.
It was put to him that the videos and photos came from different times over 2016 which he accepted. It was then put that his account was that he was only working a 3 hour day in the office at that time. He replied as an explanation that he could not say to Ross he would not do the promotional videos.
It was then put that the Christmas market photos involved him being there for most of the day. He responded that the person who owned the market asked him to be there because he wanted someone responsible to man the stand.
I do not accept the claimant's evidence that spending a full day at the market was something that he would do if his leg had been in the condition that he alleges, nor do I accept that he would have carried out that work without wearing an airboot if that was the position. His accident was well known, his absence from work for the June 2015 operation was apparently well known and I am satisfied and find on balance of probabilities that by November 2016 his leg was in the condition shown in the surveillance videos and as outlined in the joint orthopaedic report, and that he was working far longer than the amount he accepts and asserts.

127. It was put to the claimant that he was capable of doing more than three hours a day and answering the phone and at which point his replies became annoyed and he asked why would he say that he was capable of doing longer? When it was put that he had lied to Prof Briggs saying he was answering the phone he responded " what answer do you want me to give ?".

128. At this point I asked why it was that there was no air boot shown in any of the photos or videos. The claimant's response was to ask what sort of image it would give if he wore a boot all the time. He stated he wore a boot in the office (which surprised me as one of the places where I would not expect him to need it) and when he walked around he wore a boot. When he drove to work he did not have the boot on and took

the boot off to drive home. He had also taken the boot off when the footage was taken. As a consequence of these answers he was asked why it was on 9 May and 10 May 2017 he was photographed without the boot walking with no apparent limp, stepping over pallets and working outside. His account to the effect that he wore a boot when outside except when doing promotional work was clearly inaccurate and could not be relied on. I have further concerns about the response. If, as he told the court, he wore the boot at least half of the time and needed to wear it I see no reason why he would not wear it in the promotional videos. The reason he was used in the promotional videos was because he was well known by customers at the farm shop, and from the comment on the photograph "the Gavinator is back" I infer that his absence and the reason for it would be known to the customers of the shop. To the extent that the shop had a regular set of customers (and I infer that it will have done) they are likely to have known of his accident, and to have seen him back at work wearing an airboot (and on his case using crutches). If, as he says, he was using an airboot much of the time I see no reason for that not to be shown in the promotional videos. I find that the reason that the boot and the crutches were not apparent in the photographs was because in respect of photographs where his foot can be seen and there is no airboot he was not wearing one. I also find on balance of probabilities that had he been wearing an airboot as often as he claims it is inevitable that it would appear in some of the photographic evidence. I do not accept his explanation of taking it off for the promotional videos because of the image it would present. I also bear in mind that at the dates of some of the videos he is not saying that he would have been wearing an airboot.

129. He was asked about the accounts given to the experts in the light of the surveillance and other evidence and maintained his denial that his evidence was untrue or exaggerated. He stated that as his circumstances changed he may have been able to do more one day or one week but that the account that he gave was true for the majority of time.

130. It was put that on every day of the footage on the surveillance video he was at work for more than the 3 to 4 hours that he spoke of to the experts. His response was that it was debatable. He may have been there for longer but his work input would not be the 6 to 8 hours that he is present at work, his work input would be 3 to 4 hours during that day. He might be on the premises but not doing anything. He explained that he needed to socialise, and could not sit at home doing nothing. He explained his lack of limping on the videos because of the amount of morphine that he took which took away the pain. He explained that he took morphine as and when needed it, and that he went two weeks tops without needing morphine. It was put that if he was at work and "not working" he was presumably in the office, which he agreed. He was then asked by me why the previous day he had said he could not remain in the office because it was a tiny place. His response was that there was no explanation but that he was not misleading.

131. I asked him why he did not say to the experts that because of the morphine he was taking he could and did work longer hours. He really had no response except that he had not done so.

132. I find that he was regularly working longer hours than he told the experts, and that his account to the experts was untruthful. The question that I will have to determine is the extent to which he was exceeding the hours given in his accounts to the experts.

133. The cross examination turned to what the claimant was capable of. He was asked about his use of a stick and said that he did not walk long distances or use a stick at work. He said you could see him getting on and off a forklift and that he did not use a stick. He was asked about using a stick to go up and down stairs and said that you could not do so. He stated that since November last year he been wearing an air boot and that by 2015 he knew that you could not use a stick to go upstairs. He was asked why in the circumstances he was telling Professor Briggs that he used a stick to go upstairs. He had no response, but said that he went upstairs every day on his hands and knees. Asked whether he told Professor Briggs that he did so he responded that he did not. Asked why not he had no response. I found his answers in relation to the stick use troubling. Having to go up and down stairs on your bottom or hands and knees would be something that in my judgment you would undoubtedly share with the writer of a report on your condition because it is such a basic limit on your life. The allegation that this was how he had to move about his home was so contrary to the impression made on me by the various videos (and especially his ability to crouch, to bend and to get on an off a fork lift) that I cannot accept this account except in the first few weeks when he was non weight bearing in plaster cast, and for the first few weeks after the June 2015 operation when he was non weight bearing.

134. Asked about how far he could walk without a stick he said a maximum of 50 yards. He was not able to say how far he could walk without a rest, and then said he did not know how far 100 yards was. He said that without an airboot he might need a stick to walk the length of the corridor and that on terrain he did not know he used a stick.

135. He was asked how he was able to stand up for 20 minutes at a time on the surveillance footage and he said that he would have taken morphine to do that job, and that the morphine was in the car or in the office. Once you took morphine everything goes away.

136. I have found it impossible to rely in the way that I normally would on his evidence of his situation when looked at in the light of both the surveillance videos and the facebook posts and videos and when comparing his evidence with the notes made at the time. There are too many inconsistencies between the account he gives and has given in the past and the filmed and photographed impression given by that evidence. Even when consideration is given to the valid points made by Mr Laughland on his behalf regarding the short periods of time that he was actually subject to observation except on 10th May, and the reasons given by the claimant for his doing the work he was doing on 10th May, the overall impression given by that evidence is one of a person functioning at a level in excess of the level that he puts forward, and well able to live his life without the level of care that his earlier schedules of loss were contending for. I caution myself however that on his case he is taking substantial amounts of powerful painkillers (morphine based), and that this is his explanation for his ability to function and work as the videos show.

137. He was asked about the level of morphine use and the gap in prescriptions. He told me that his employer did not like him taking morphine at work. Although his statements speak of taking morphine daily I am satisfied that that could not have occurred. The prescriptions obtained (and given that this is a very powerful drug I infer that the documentary lists are accurate and that it will not have been provided without a recorded prescription) are set out in the closing submission on behalf of the claimant at paragraph 34.10. The references he gives are to **D1370** et seq. I have checked these beside the comprehensive prescription printout at **D1399** et seq. The following is a table of the morphine type prescribed drugs and the length of time that they were intended to last:

Drug	Date Prescribed	Scheduled End
Tramadol	10/11/2015	10/12/2015
Buprenorphine	18/11/2015	16/12/2015
Buprenorphine	7/12/2015	4/1/2015
Oramorph	11/3/2016	12/3/2016
Zomorph	11/3/2016	10/4/2016
Zomorph	22/4/2016	22/5/2016
Zomorph	6/5/2016	5/6/2016
Zomorph	8/7/2016	7/8/2016
Zomorph	29/9/2016	29/10/2016
Zomorph	18/10/2016	17/11/2016
Zomorph	6/6/2017	6/7/2017
Zomorph	19/7/2018	14 days
Oramorph	4/9/2018	30 days
Zomorph	4/9/2018	c1 month

138. It was put to the claimant that the whole of his use of prescribed opiates was a charade and that he had only obtained them so that they appeared on his records and not in order to deal with pain. That was a case that it was reasonable to put, but I consider it unlikely. Had that been the case I would have expected that the prescriptions would have continued to trial regularly, and that the drugs so obtained would have been disposed of. What can be seen from the above list is a pattern of use or at least the obtaining of morphine prescriptions from time to time. From November 2015 until November 2016 he appears to use and continue to take morphine regularly. He then ceases to obtain prescriptions apart from one month supply in June 2017 until June 2018. The main period of the prescriptions (November 2016 – November 2017) includes some of the earlier facebook promotional videos and photographs. It ends just as the referral for 2nd opinion to Mr Tiruveedhula occurs. In February 2018 (A139) he states that he is taking morphine every day. He states that he has been prescribed oral morphine but that that upsets him, that he did have morphine patches, but now just relies on the tablets.

139. His evidence changes in his post video disclosure June 2018 statement, where he states (**A144/145**) that whenever he works extended hours he needs to take the tablets and that this would have been the case on 10 May video. His evidence changes from taking morphine daily to taking morphine tablets 2-3 times a week. He takes it when working longer hours or during the cold weather but avoids it when he can because it makes him ill (typically making him vomit) and tries to take it only when really

necessary. At paragraph 12 of that statement he explains the difference in accounts between paragraph 25 of his February 2018 statement where he says he worked 5 hours a day 3 days a week and the account he gave Professor Briggs in April 2018 of 3-4 hours a day at work. He says that when he did exceed his shorter hours it was at his employer's request and he suffered the next day, had to take morphine throughout the day and would be exhausted when he got home.

140. He was cross examined that his prescriptions for morphine based pain killers had ceased long before the surveillance videos. He stated that he had all types of morphine (patches, Oramorph and Zomorph) left over and therefore did not require prescriptions.

141. There are I consider three possible explanations regarding the morphine prescriptions.
(1) He needed and used the drug regularly and as prescribed during the period in question.
(2) He did not need or use the drug during the period in question but obtained the prescriptions for "show" for the purposes of his claim.
(3) He has used and needed the drug but not taken it as prescribed and has continued to obtain it when he had excess unused supplies far in excess of what was required for the next month until his next prescription was due.

The explanation given by the claimant in his June statement is closest to explanation (3). His evidence for the reason that he did not need to obtain any prescription between November 2016 and June 2017 was that he had "leftover" supplies from previous prescriptions. While that is obviously possible I find it surprising when the quantities required for it to be true are examined. I bear in mind his written evidence of taking morphine every day, subsequently changed in his June 2018 statement to taking morphine as and when he needed it and on average 2-3 times a week, as set out in paragraph 10 of that statement. I bear in mind his oral evidence that he took it as and when required, but that his employer did not like him taking it at work. I bear in mind my findings about the inaccuracy of his evidence generally, and that the June 2018 statement is produced in order to try to counter the effect of the surveillance footage. I also bear in mind the GP notes for 25 May 18 when he reports that he "is on morphine for ankle but some time since he has taken them and unsure whether he should take one or two". That report (of some time since he has taken them and unfamiliarity with the dose) I find extraordinary when looked at beside his witness statement of taking daily only 3 months before, and of his account in his June statement of a regular but not daily intake. I find it very surprising that he would have continued to obtain and "cash in" prescriptions for a drug which he was using in quantities far below the prescribed level. If his explanation is correct that is the only way that he could have been left with sufficient morphine in order for him to have had a surplus to allow continuing use and when required 17 November 2016 and 6 June 2017, so at least 6½ months. What is significant however is that the GP report clearly shows that he is not taking it at the time, to the extent that he has forgotten what the dose is.

142. The month's prescription obtained in June 2017 is as difficult to understand. It ties in with his "struggling" evidence for that month, but thereafter no prescriptions are obtained until after the disclosure of the video evidence. If he had enough to get through to June 2017 (his case) and then required a further one month's supply (from which I infer that by June 2017 he has used up any available excess supply and

therefore requires a further month's supply) how is it, if he is taking it regularly as he alleges, that he can go a whole year with no prescription until June 2018 – coincidentally shortly after the disclosure of the video evidence?

143. I conclude that his evidence of reliance on Morphine based painkillers is unreliable. I do not accept that it was overprescribed in the way that he alleges and do not accept that he built up reserves of the drug in the way he alleges. He would not in my judgment have continued to obtain and cash in prescriptions when he already had an excess supply. There may have been a short run off period, but I am not satisfied that he will have had a supply that would have taken him through to June 2017 without need for further prescription if as he alleges he was taking the drug regularly. The gap in prescriptions between June 2017 and June 2018 is then inexplicable. I conclude that although there is some element of genuine use this was in the period around the Tiruveedhula referral and ended in the November 2016. Thereafter I conclude that apart from a month's supply in June 2017 he was not using this form of painkiller, or certainly not with any regularity or in any substantial quantity. Of course he may have had the odd pill left over but not such a supply as would have permitted regular use. I am driven to the conclusion that his evidence in his statements about morphine is unreliable.

The Promotion Claim

144. I have already dealt above with some of the evidence about this claim. With regards to his claim for promotion he states that the owner of the farm shop, Peter Assenheim, retired in December 2014 and that his son took over his job running the business. The claimant's case is that as a long standing valued employee he was in line to take over the manager's role but was unable to do so because it was impossible for him to carry out the work fully. Another of member Peter's family, John Keith (son-in-law) was employed instead. Ideally a non-family member would have been preferred for this role so that they could all attend family holidays and functions together. I do not accept this evidence which is in direct conflict with the evidence of Peter Assenheim and also of Jonathan Keith as to Peter's requests that he work for the shop.

145. He states that he and Peter Assenheim had discussed his taking over (*as shop manager)* before his accident intervened – and that he had been expecting a significant pay increase of £15,000 and annual increases after that. This was at odds with the evidence of Peter Assenheim who said that no one knew he was retiring, and that he had not discussed it with the claimant. Even Ross Assenheim's evidence in his statement was that his father had been planning his retirement for many years, but in oral evidence he told me he only found out that it was happening a couple of months before, and that it was not "planned".

146. Peter Assenheim's statement, made in September 2016, stated that it was his intention when he retired for his son Ross to take over management of all of the businesses and for the claimant to become the manager the farm shop. The claimant's job title would not have changed but he would have received a substantial pay rise of approximately £15,000 a year gross. His salary would have increased by 10% in the first year. Any subsequent arises would have been dependent on the business profits. The business has never been busier and it is likely that the claimant would have received another

10% pay rise in his third year and annual 5% pay rises thereafter. Given lack of pay increases to the claimant in his previous years working for the company I simply do not accept that there would be first a 10% increase followed by two 5% increases, when inflation and wage inflation is well known to be running far below either figure (Between 3 and 4%).

147. In cross examination Peter Assenheim said that the plan to pay more had been in his mind in the course of the year before he retired. He had not told anyone and had never discussed it with the claimant. During the course of the year he had thought to himself that the claimant was only earning at the minimum wage rate and was worth more.

148. Ross Assenheim accepted in evidence that paragraph 5 of his statement which said that his father had been planning his retirement for many years was wrong. It was something that was just assumed and was a misleading statement. Nothing had been discussed, or organised. It was put that it was a misleading statement that there was a plan that the claimant would move into his (Ross's) role and he agreed that it was misleading, saying nothing was planned and nothing had been discussed. The evidence was that far from Ross reducing his role when his father retired he in fact took on the buying of fruit and vegetables in the markets overnight that his father had previously carried out and also continued to carry out the purchasing role for the shop.

149. Peter Assenheim said that when he did retire the claimant was on the waiting list for further surgery and definitely not in a fit state to take up the new role of manager. The type of work involved at the farm shop is very physically demanding and the claimant was unable to do a lot of tasks such as loading and unloading vehicles. Due to him being unable to undertake this role he persuaded his son-in-law John Keith to take the job instead. He explained that it is very hard to find committed members of staff which is why he persuaded a family member take the role.

150. Peter Assenheim's statement asserts that notwithstanding his retirement he is still a managing director of the business and in charge of pay, employing new staff and purchasing new equipment. His son deals with the day to day running of the business.

151. He was asked in cross examination about the claimant's pay and explained that the employees wanted to be paid as much as they could get and he wanted to pay as little as he could get away with. He had a very take it or leave it attitude with regard to the claimant, and asked whether he did not think that the claimant deserved more than a minimum wage for what he was doing he responded no not necessarily. If he wasn't happy he's got a choice to leave. Everyone got minimum wage except for family, who were not on minimum wage.

152. Peter Assenheim had been attempting for a number of years to get his son in law John Keith into the business. Jonathan Keith had had what was on any view an unsatisfactory jewellery business which he had tried to start. He was asked at some length about it and it was clear that after about 4 years it had not got properly off the ground. It was his wife, I am satisfied, who was the one who was the substantial earner in that household, as a partner in a theatrical agency. She stopped work not long after the birth of their first child in 2012, and by 2014 she had virtually used her savings. Peter Assenheim had then persuaded Jonathan to come into the business. He was paid £47,000 only because he was family. Peter Assenheim explained that he ran

the business for the family and not for the employees, and that he had wanted to get Jonathan and his daughter in as part of the business. Asked whether Jonathan would have come in at a higher position than the claimant he explained that he would not have come at a higher position but he would have been paid a higher wage.

153. The first question that Peter Assenheim was asked in re-examination was whether he was confident that the claimant would have accepted the promotion to manager, to which he replied that he was. He was then asked whether he was planning for any other person to go into that position to which he responded he was not. I find it very surprising that he had not raised the question of promotion with the claimant in detail in advance given that his evidence was that his wife had been pressing him to retire for some years, and given his plan to retire in the immediate future. I am also surprised that he sets a figure of £15,000 pa as the extra wage for doing what was essentially, when the answers given by the witnesses (and Peter Assenheim himself) are examined, and it is clear that the job was the same job as he was doing before.

154. I find that there were essentially 3 managers before the accident, Peter Assenheim, Ross and the claimant. I find that the claimant was undoubtedly not capable of functioning at the same level as Peter and Ross (and he would not himself suggest he was). He had different skills and enjoyed the outdoor, heavy lifting and shop floor work. In the absence of either of them (they rarely if ever went away together) he did whatever he could when one or both of the others was not available. He did not buy in Spitalfields, he did not order on computer, but he made sure that the shop ran and that the shelves were full. He took and processed orders and delivered. His IT skills are minimal or non existent, and my impression, and indeed his evidence was that he does not enjoy or want to do office work.

155. I find that the reason that Peter Assenheim was not ready or able to retire before December 2014 despite being pressed by his wife to do so was that he did not have the people available to hand over to. I do not accept his evidence that he regarded the claimant as being able to manage the shop whilst Ross managed the purchasing and the overall business. I do not consider that to hand over to Ross and the claimant alone would have been an option. There was too much paperwork and managerial work to be done that the claimant simply would not have been capable of doing or helping with, and that Ross would not have been able to carry out as well as travelling to Spitalfields and buying for the business. The business had got used to running with three key staff, and until Jonathan was persuaded to come into the business had Peter retired and left there would not have been the 3 key people. His entry into the business has meant that Peter could retire and the number of key staff remained at 3.

156. Everything fell into place around the date that he retired. I find that the claimant was much better by that point, and that Jonathan was learning the ropes, being trained by the claimant on the management of the shop itself (I reject the claimant's evidence of only working 2-3 hours a day 2- 3 or so days a week, why would be put an operation off for that); and by Ross on the paperwork side and no doubt also on shop management as well. I find that the reason for delay in the operation for removal of metalwork from the planned February date was in order to ensure that Jonathan could fully cover by the stage that that operation took place, and I am satisfied that the claimant came back (as he accepted) to work by mid June 2015 after the May operation.

157. Peter Assenheim was asked about the plan to pay the claimant an additional £15,000 pa and then to increase his wages by 10% the next year and 5% each year thereafter. It was put to him that this was untrue, which he denied. It was then put that previously there had never been any increases in pay even when he was given the title of manager in 2016. He accepted that this was the case. I am satisfied that the reply he gave, already set out above, "if it aint broke don't fix it" fully sets out his position. I am sceptical whether even if Jonathan Keith had not joined the claimant would have received a substantial pay rise. I think it likely he would have received some pay rise but the figures set out appear to me to be a shot in the dark, and pure speculation. The claimant and Peter Assenheim deny speaking about any figures but come up with the identical figure (£15,000pa). I find that rather a substantial coincidence.

158. I am however satisfied that there is more than a speculative chance that the claimant would have received some sort of promotion had the accident not occurred but I consider that there was also a substantial risk that but for his injury he would have continued as assistant manager or manager (which he effectively was) in a similar role to that which he was carrying out before. I find that there were regardless of the accident sufficient reasons for Jonathan Keith to come to work in the farm shop and take the job he did (these have been explored above but included that his business was going nowhere, that during the marriage his wife had supported him from her earnings and bonuses at the agency, that he had made a mess of his accounts and tax situation). I do not find that this was because of the injury. I am satisfied that he would have done so regardless of the injury to the claimant, as a job with which to support his wife and child.

159. I cannot therefore be satisfied so as to make a full award that but for the accident the claimant would certainly have received a promotion and a wage increase, With "three key personnel" continuing as before the risk is that the claimant would just have been treated as before. He would effectively have continued the same job as before. There was undoubtedly however a chance that had he been working flat out full time and able to do the heavy lifting that he would have received a pay increase to recognise his importance and possibly to soften the impact of Jonathan's arrival. I do not accept that it would have been as much as £15,000 but it might have been around half that figure. I do not consider that there would have been the 10% and 5 % increases built in,. I consider that there is certainly a chance that had the claimant been well and able to work he would have been given the manager's jerkin with that as a payrise, and that he has missed out on that. I deal with the assessment in the damages section.

160. The Claimant's case is further set out in his schedules of loss. The last schedule of special damage and ongoing loss produced by the claimant before disclosure of the surveillance evidence showed an ongoing claim which included:
<u>Care and Paid Services to Trial</u>
Care from 1 July 2015 to 2 December 2015 at 14 hours a week.
Care from 3 December 2015 to Trial at 9 hours a week
Gardening at £60 pw for a year
Regular window cleaning £16 per month
Car washing £15 per week
Dog walking £40 per week for 67 weeks

Future Losses
And future care at 9 hours a week for life
Dog walking at £40 pw for life
DIY painting and decorating for life at £500pa
Gardening for life at £500pa
Increased Holiday costs £2,000 pa for life
Future Psychiatric Therapy costs £18,907

161. The schedule produced following the disclosure of the surveillance evidence (dated 17 January 2019) showed a substantially reduced ongoing claim. To highlight the differences I set out the claim as in the previous paragraph with the changes set out in bold:

Care and Paid Services to Trial
Care from 1 July 2015 to 2 December 2015 at 14 hours a week.**Same**
Care from 3 December 2015 to Trial at 9 hours a week. **Same**
Gardening at £60 pw for a year **Same**
Regular window cleaning £16 per month **Same**
Car washing £15 per week **Same**
Dog walking £40 per week **Period reduced by 17 weeks to 50 wks.**

Future Losses
And future care at 9 hours a week for life **removed at saving of £162,349**
Dog walking at £40 pw for life **Removed at saving of £69,513.60**
DIY painting and decorating for life at £500pa **Removed at saving of £16,710**
Gardening for life at £500pa **removed at saving of £16,710.**
Increased Holiday costs £2,000 pa for life **Removed at saving of £66,840**
Future Psychiatric Therapy costs £18,907 **Reduced to £4,500 at saving of £14,407.**

162. The future element of care and paid services was therefore removed. The claimant says that this was not because he will not need such services but because he has taken a view on the basis of the joint expert reports.

163. The defendant's case is that the claimant has made a very good recovery from his accident and that the presentation of his case is not just inflated but is fundamentally dishonest, that the video evidence as interpreted by the orthopaedic experts shows a complete difference between the accounts in his statement and to the experts and the reality as depicted on camera. The reduction in the claim cannot, the defendant submits, remove the fact that the claim was made and maintained in the form that it was until the disclosure of the surveillance evidence, and the consequent reduction is probative of the dishonest presentation. The particulars of the defendant's position are set out in the counter schedule dated 4 February 2019 and can be summarised:

(1) the omission in the most recent schedule loss of significant heads of claim and the reduction in respect of other heads of claim has been forced on the claimant by the exposure of his dishonesty and the surveillance evidence.
(2) There has been a deliberate exaggeration and poor overstatement of the effect of the injury and the consequences thereof including in intake of medication, work, domestic and leisure capacity.

(3) The claimant's account in his witness statements, his schedules of loss and as related to the medical legal experts are to varying degrees untrue and or unreliable.

(4) The most recent schedule of loss admits that the claimant has not required care and assistance since the end of 2016 in contrast to previous schedule which asserted a need for nine hours a week throughout 2017 and until trial and thereafter.

164. The counter schedule also sets out the defendant's case on the promotion claim: In summary:

(1) the claimant was paid throughout at the same rate as he earned prior to the accident allegedly for only working on two days a week for about two hours a day, and following July 2015 for about five hours a day three days a week. It beggars belief that his earnings would remain at the same rate and it is more likely that his earnings did not increase because he returned to full-time work.

(2) Albeit the claimant asserts that but for the accident he would have been promoted and enjoyed a substantial (£15,000 gross per annum) pay rise together with annual substantial pay rises thereafter this is in contrast to his promotion to manager in December 2016 with no pay rise at all.

(3) The statements adduced by the claimant in support of this claim and the pay rises he would have earned are false, alternatively speculative, guesswork or wholly unreliable.

(4) He was already working as assistant manager and it is very unlikely that he would have been granted anything like the amount alleged had he been appointed manager at that time.

(5) It is unlikely that he would have enjoyed pay rises following promotion vastly stripping the rate of inflation.

(6) The probability is that Jonathan Keith the son-in-law of the owner would have become manager in 2014 on the owners retirement irrespective of the accident.

(7) It is clear Mr Keith was struggling financially in the years up appointment as manager whilst working in his previous jewellery business.

(8) Had the claimant been appointed manager instead of Mr Keith there would have been a vacancy for assistant manager which would have been difficult to fill because of the hours required.

(9) There was in any event no reason not to appoint the claimant to the post manager in December 2014 if that was intention. By then he had resumed working full time and the job would have been office-based and or administrative and not manual in nature. The job and duties were well within his physical ability.

(10) Had it been likely that they would increase the claimant's salary then the expectation would have been that his pay would have increased when he was appointed manager in December 2016 but that did not occur.

MY ASSESSMENT OF THE SOCIAL MEDIA EVIDENCE

165. I have read the report on the video evidence written by Professor Briggs dated 12 November 2018. I have also read the report of Mr Cobb dated 15 November 2018. Those reports are full and set out the contrast between what the claimant says he can do and what he is shown as doing on the video.I am satisfied that those reports and the

joint report accurately set out what is seen on the video. I have set out my own brief report in chronology above summarising the position the impression given by the claimant when he is observed on video is of a person who has made a good recovery from his ankle injury he does not appear restricted in ways that he describes in evidence and I am satisfied having watched the video several times and taking into account the inaccuracies and unsatisfactory nature of his evidence that even if the video is mainly of one day the picture that it gives is of someone much less injured and restricted than the evidence and reports the claimant would suggest. I am fully satisfied and agree with the conclusion of the two orthopaedic experts that the future claims for dog walking, care, holiday costs, bathroom alterations, garden and corrections, DIY and gardening are all unjustified and not required.

MY FINDINGS ABOUT THE CLAIMANT AND THE EVIDENCE

166. I have set out in the course of my review of claimant's evidence a number findings that I have made in respect thereof. I do not intend to repeat those findings at this point. The claimant is in my judgment and unreliable and dishonest witness who has sought to exaggerate his claim. I find and am satisfied that he has not given an honest or truthful account of the extent to which he was able to attend work following the accident. I do not accept that he remained using crutches as he alleges beyond the end of August or beginning of September 2014. I find that the review note on 9 October 2014 confirms by inference that crutches was not being used and that the direction of travel was to wean off the boot. I find that by October 2014 he was back to working long hours and that in no way was his working day restricted as he alleges. I accept that he continued to suffer discomfort and that he has not since his accident been able to carry out heavy tasks or fulfil all the duties that he did previously.

167. By the winter of 2014 and satisfied that any pain from his ankle was at a low level. I conclude that the entries in the chronology on 6th and 9th January 2015 are accurate and that apart from some discomfort in the cold his wound and pain had settled. I note that when attending surgery and seeking a disabled badge he was noted as able to walk up the surgery stairs. I find the pain returned in March 2015 and that the decision to remove the metal work, which had been going to happen earlier but was delayed because of the need to train Jonathan Keith was then actioned once again. Dealing with the question of training Jonathan Keith I do not accept the claimant's evidence that he was only working very restricted hours at this time - the amount he claims to working would not justify postponing a necessary operation. Further, the amount he was on his account working would not lead his employer to ask him to delay the operation. In terms of his 16 hour days on his account he is scarcely working any time at all and would not be missed.

168. I accept with qualifications the evidence of Peter Assenheim that in the period until his retirement he only paid when people were presently working and inevitably put personnel on statutory sick pay when they were absent for reasons of sickness. Although I find that by October 2014 the claimant was back working at or near to his previous hours I am satisfied that he was permitted some latitude by his employers, that he did not have to clock on and off as did other employees and that if he attended hospital appointments or on occasion did not come to work that this was not reflected in his pay.

169. I find that he returned to work by 18 June following the May 2015 operation notwithstanding the difficulties there were with his wound healing. I am satisfied that during the healing process which lasted until September 2015 he continued to work as previously. I make a finding as to whether this was at this stage as much as 16 hours a day and on balance of probabilities it is likely that he was working less than this although considerably more that he admits.

170. I find the accounts that he has given to the experts and is important the impression that he has made on those experts from both his account and his demeanour and bearing wer false. I accept that he will have had good and bad days and that at times he will have had pain but not unmanageable pain.

171. I find that the spring of 2016 his recovery will have been as good as is demonstrated by the social media photographs and video clips, and the surveillance evidence. I find that this evidence contrasts, as the orthopaedic experts noted, sharply with the impression and account given by the claimant. I find the reason for that sharp contrast was the promulgation of a false and exaggerated claim.

THE MEDICAL EVIDENCE AND MY FINDINGS IN RESPECT THEREOF

172. I attach as an appendix to this judgment my summary of the reports to the medical experts by the claimant and of their conclusions and Opinions.

173. The claimant saw experts and gave them accounts of his situation on the following dates:

10 July 2015	A265	Professor TWR Briggs
4 February 2016	A278	Professor TWR Briggs
29 November 2016	A302	Dr Michael Spencer
10 February 2018	A355	Mr AG Cobb
11 March 2018	A37	Dr Philip Steadman
12 April 2018	A286	Professor TWR Briggs

174. In addition to the reports listed above, written following consultations with the claimant, there are reports and letters written by the experts which are before the court as follows, all except the report of Professor Briggs dated 1 May 2018 . Being written following observation of the surveillance and social media evidence:

1 May 2018	A297	Professor TWR Briggs
8 September 2018	A416	Dr Philip Steadman
12 November 2018	A298	Professor TWR Briggs
15 November 2018	A363	Mr AG Cobb
20 December 2018	A432	Joint Briggs and Cobb Report
16 January 2019	A436	Joint Spencer and Steadman report

ORTHOPAEDIC INJURY

<u>Tri Malleolar Fracture of the Right Ankle</u>

175. 15-18 June The claimant underwent an open reduction and internal fixation of the fracture under general anaesthetic using screws and a metal plate. He was in hospital for three days, and discharged non-weight-bearing for six weeks post operatively in a

below knee plaster. He received 48 hours of intravenous antibiotics followed by five days of oral antibiotics.

176. The claimant's ankle was slow to heal and has required two admissions to hospital subsequent to the initial reduction and fixation. In August 2014 the claimant was admitted for IV antibiotics for an infected wound, and again admitted in May 2015 for six days for removal of the right ankle metal work.

177. In summary, the evidence of the claimant is that of a man who has been profoundly affected by the accident, whose ability to work has been severely curtailed, who has had to carry out required alterations to his home and garden to accommodate his disability, and who has been put in the position of selling his pride and joy Mercedes motor car by reason of the problems he experiences in getting in and out of the vehicle. He is working a mere fraction of the hours he worked pre accident and is not a reliable member of staff, and has missed out on promotion. He needs help gardening, driving, walking the dog, and his life is fundamentally altered. He has to take morphine daily to deal with his pain. He cannot walk any reasonable distance without stopping. If he walks more than 100 yards he is in pain and needs a stick. Stairs are a problem. The picture painted is dire and serious, and ongoing.

178. The orthopaedic experts have produced a joint agreed medical report in this case. The claimant has not sought to cross examine the defendant's expert around that report. I set that report out in full. The report sets out their conclusions and prognosis, which form the basis of my assessment in this case:

History

(1) The claimant is diabetic, hypertensive overweight and has a past history of back pain and depression but worked long hours at a farm shop. He suffered a Trimalleolar fracture of his right ankle and was treated by open reduction and internal fixation . The wound on the lateral side of the ankle was slow to heal and he required prolonged antibiotic therapy, and wore an Aircast boot for support but the fracture healed well.

(2) Because of grumbling inflammation around the wound the metalwork was removed on 5 May 2015 and the wound required formal washout after it developed a haematoma. The wound was finally healed by August 2015 and he stopped using the Aircast boot.

(3) He continued to experience some pain in the lateral side of the ankle and was referred for a second opinion about his ankle. Following MRI and CT scans he was discussed in the MDT meeting in January 2016 and recommendation was made to carry out arthroscopy of the ankle in order to remove a small fragment of bone which was thought to be contributing.

(4) The CT scan showed good healing of the fracture and a normal joint space with no evidence of degenerative change.

(5) The ankle symptoms improved and he never required the arthroscopy procedure but he was given an injection of cortisone into the joint in the summer 2016.

(6) On 8 September 2017 he suffered a stroke and a week later underwent carotid and endarterectomy.

Condition

(7) It is agreed that the video surveillance film taken between 9 May 2017 and 23 May 2017 shows the claimant at work. He was able to walk normally without a limp understand for long periods without any sign of discomfort or restriction. This apparently normal mobility was in sharp contrast with his own version of events that he "could hardly stand" in March 2017 and that he was "really struggling at work" in June 2017

(8) We were both surprised to see that his behaviour in the film was quite different from the impression given when he saw Professor Briggs on 4.2. 2016 and Mr Cobb on 10.2.2018. Rather than being capable of any light duties in the office he was evidently functioning normally in the manager's role, demonstrating agility, climbing on and off a forklift, lifting boxes and standing and walking with no discomfort apparent.

(9) Professor Briggs noted that at no time during the video was he seen carrying particularly heavy weights and feels he may still be somewhat restricted in that. Mr Cobb felt that restriction of lifting ability would be related to his back pain rather than ankle stiffness.

(10) On at least one sequence he could be seen to have a barely discernible limp when walking showing the slight residual stiffness in his ankle, but not indicating that he was in any pain.

Prognosis

(11) Mr Alexander has made a good recovery following a trimalleolar fracture of his right ankle and that he will be able to continue at the present level of activity as seen in the video film without any deterioration of ankle symptoms in the future. He will be able to continue working as in May 2017 with normal duties and normal hours until normal retirement age.

(12) He will not require ankle arthrodesis or any further surgical procedures on his ankle .

(13) He does not require care, assistance, help with driving, DIY, gardening or dog walking, a walk-in shower or a mobility scooter now or in the future as a result of the ankle injury.

179. The claimant submits rightly the matters of credibility are for me it assess and not for the orthopaedic experts. That is correct but it is difficult for me to reach a different conclusion on whether or not the claimant is walking normally without a limp, able to stand for long periods of time without any sign of discomfort or restriction or whether or not in medical terms he was evidently functioning normally, demonstrating agility climbing on and off a forklift lifting boxes, and standing and walking with no discomfort apparent. These are all things that I would expect an expert, and in this case two experts, to be able to interpret and report on. Clearly what the experts cannot do and in this case do not in my view seek to do is to determine whether or not the claimant is credible when he states that he is suffering what can only be described as moderately severe pain. What they can say is that they see no medical sign of that when observing the video, and they can also say that in their expert opinion the apparently normal mobility was in sharp contrast with the claimant's own version of events as set out in paragraph 7 above. They cannot determine the extent to which his pain may be masked by prescribed painkillers.

180. Mr Laughland submits that they were simply dealing with the impression given by the claimant when he saw them in the consulting rooms. In so far as what is being

reported is functioning normally in the manager's role rather than just carrying out light duties in the office that is clearly a matter for me.

181. In the course of his evidence and that of his partner the claimant sought to refer to ongoing investigations which were taking place with regard to the pain that he states he is suffering. The evidence of his partner Susan Brown was to the effect that since November he has suffered two fractures in his right foot, has been in a plaster cast for eight weeks and that she has had to step up the level of care that she provides for him. The claimant sought to say that he would not have obtained the levels of morphine that he did or a plaster cast if the injury and pain were not genuine.

182. I have found this aspect of the case of the troubling. The claimant accepts in paragraph 44 of Mr Laughland's closing submission the conclusions reached by the orthopaedic experts as set out in their joint report. The defendant anticipated that the claimant, following the above evidence, would argue that he has suffered a deterioration in symptoms since November 2018. The defendant makes clear in closing submissions that no submission of this nature can be entertained and that no findings of this type are open to the court. There is no permission to rely on or refer to or put in evidence comments or observations from the claimant's treating doctors. In any event the treating doctors have not seen the video evidence or the claimant's statements. It would, submits the defendant, be entirely misleading to seek to rely on any of these matters where the claimant has had the opportunity to put them to his expert, Professor Briggs and he has not put them to his expert Mr Cobb. Obviously the defendant cannot tell if Professor Briggs has been involved but apparently the claimant's solicitors corresponded with the defendants attaching a CT scan on 11 February 2019 and referring to an MRI scan and saying that it was important that these were referred to the medical experts. They are referred to in the detailed chronology that Mr Laughland handed to the court on Thursday 21 March 2019 in the morning, but there is no bundle page reference and I assume therefore they are not in the bundle.

183. No application has been made for me to consider any further evidence and the defendant asks me to infer that if there was anything that would have assisted the claimant's case the claimant's advisers including Professor Briggs would have ensured that the material was shared in the proper way between experts and an application made to court so that the evidence be put before me. The absence of any application, submits the defendant, means that there is nothing in any of the scans which is additional to the evidence in the joint orthopaedic report, and nothing that would assist the claimant.

184. The defendant further submits that if the claimant did not accept the conclusions of the joint experts it was open to him to apply to cross examine Mr Cobb. Having taken none of these courses and made no application the Claimant cannot, submits the defendant, seek to assert that the joint report has in any way been superseded or overtaken by events or that it is incomplete in some way.

185. The claimant's closing submission and his response to the defendant's closing submission (where this was set out) does not seek to rely on any of the matters referred to in the claimant's evidence or his partner's evidence and states that the basis of damages must be the joint agreed report and the psychiatric decision.

186. I accept that that must be the position. If there were any substantial development in this case I infer that Professor Briggs would have been informed and that if it was something which was going to affect the case either an adjournment would have been applied for or arrangements made to ensure that the case could be fairly dealt with and the substantial development in some way put in evidence. That has not occurred and I therefore infer that nothing has happened medically which casts doubt on the joint medical report.

PSYCHIATRIC EVIDENCE

187. There is a difference between the two psychiatrists as to the condition suffered by the Claimant. Both agree that their diagnosis is dependant on my findings of fact as to the truthfulness of the claimant. Dependant on that finding is whether his evidence can be accepted as the basis for finding that the claimant is suffering or has suffered any psychiatric condition.

188. The psychiatrists have helpfully agreed a joint statement setting out their agreements and disagreements.

189. Dr Michael Spencer, instructed by the claimant is of the view that the claimant has developed a moderately severe Major Depressive Disorder. He accepts that a chronic adjustment disorder would lie within the range of reasonable opinion but based on the range, severity and chronicity of the psychiatric symptoms reported by the claimant and supported by the records the diagnosis of a major depressive disorder is on balance preferable.
He will require treatment for ongoing depressive and anxiety symptoms comprising antidepressant medication, CBT and psychiatric follow up for the depression, and a course of psychological treatment (incorporating elements of EMDR and CBT for the anxiety.

190. Dr Philip Steadman feels that as a result of the accident the claimant suffered from an adjustment disorder which started June 2014 and extended up until August 2015. He asked the claimant whether he felt depressed and he said he was not (in September 2018). |He asked him if he thought he had ever been depressed and he said may be in the periods containing his hospital admissions because of his ankle. Dr Steadman does not deal that any psychiatric/psychological treatment is indicated.

191. Both experts agree that while he was vulnerable from a psychological perspective his presentation following the index accident whichever diagnosis is accepted has been attributable to the frustration and upset at the pain and physical impact of the accident.

192. In evidence Dr Spencer accepted that he had not seen the claimant to carry out an assessment since November 2016 and that Dr Steadman was in a better position with regard to his current psychiatric health and on the basis of his report would accept that there is no ongoing major depressive disorder after the date of Dr Steadman's

consultation in March 2018. He also agreed that Bush and Co report (2 October 2015) where the question of undergoing psychological therapy was investigated, and making clear that the claimant was then no longer taking antidepressant medication or interested in any psychological therapy opened up the range of possibilities and opinion even if the payment was found to be truthful. If

193. Dr Steadman in evidence put the date for beginning of adjustment disorder as June 2014 with the disorder extending to August 2015.

194. The claimant did not give either expert any substantial answers in respect of his previous psychiatric history. The experts differed in their practice (and this is a recognised difference of opinion between bodies of psychiatrists) as to whether they pre-read medical history or read it after interview. Dr Spencer did not pre-read and does not usually do so. He had asked the claimant about his past psychiatric history and been informed by him that he could not recall any history of psychiatric conditions prior to the index accident. He was asked whether this meant that his report was not as full as it should be. He accepted that having been told that there was no prior psychiatric history that would be missing questions and that the report might not be as full as it might have been but stated that he was confident in the past history what he saw of the claimant and was aware that there was a past history of depression and as he described it in a sense the failure to give a history itself becomes the history and he said it was clear that he had taken the past history into account.

195. Dr Steadman's position was that he reads the history first. He accepted there was a difference between experts (not just the experts in this case) in the approach that they adopted. He falls into the "usually pre reads" category. He does this as he said that people forget things. He said however that he tried not get into a confrontation with the patient. He would ask the patient to make sure if he realised they left something out, and in this case was given the response that there was nothing else to report. He said people usually volunteer more information when he asks if there is anything else to say. He would however have been hesitant about pressing the patient if he did not volunteer the information because it was certainly not his role to cross examine the patient, he would not want to confront, and he had chosen not to probe.

196. It appeared to me that both approaches effectively led to the same conclusion. The doctor (Dr Steadman) who knew there was more to tell because he had pre-read the notes, did not probe and cross examine. The Doctor (Dr Spencer) who suspected and in his head knew there was a past but did not know precisely what it was also chose not to probe either. From the point of view of the patient and the report it would appear to me that each approach has had a comparable result – probing questions concerning the past were not asked.

197. Dr Steadman told me that when the claimant was asked the season of the year he got the reply wrong (it was spring but he responded autumn). He told me that the claimant was not demented (he had passed the dementia test scoring 28/30). Initially he felt that in isolation it was not enough to raise issues of credibility, but when he saw the surveillance videos he was not sure. However he was then asked whether if it was a

deliberate error in order to mislead whether he would not have answered 2 other questions differently in order to exaggerate his symptoms and he agreed that he would have done. I am satisfied that the error is not an error which should form the basis of a finding of a deliberate attempt to mislead Dr Steadman.

198. Ultimately whether or not there is any psychiatric disorder in this case is dependant on the assessment I make of the claimant.

199. I consider that the label to be put on the psychiatric condition in this case is not important. Whether what the claimant suffered is an adjustment disorder or whether he suffered a moderately severe major depressive disorder (and Dr Spencer is of the view that a chronic adjustment disorder would lie within the range of reasonable opinion in this case) what matters is how it seriously it affected him and for how long, and whether or not there is anything that could or should be done to alleviate his symptoms. I am satisfied that the longer the episode and the more serious the episode the more the technical diagnosis would be as Dr Spencer's report.

200. Following the oral evidence from the experts there was substantial acceptance that whatever label is given to the condition the claimant was not suffering from depression by the time of his examination by Dr Steadman in March 2018.

201. Mr Laughland main points in his closing submission in support of the evidence of Dr Spencer were first that I should do so because Dr Steadman has ignored without a proper full explanation, the fact that the claimant presented as "Flattened" and "objectively depressed" when seen by Dr Spencer at interview in November 2016.

202. Dr Steadman's response was being depressed was not the same as having a major depressive illness, and that he had been unable to find anything in his records suggesting depression post 2015. It was again put that this was to ignore Dr Spencer's assessment in November 2016. He responded that he did not think that any episode would have lasted to the end of 2016, he disagreed that the claimant had suffered a major depressive illness and said that while he did not dispute that the claimant had been "flattened" when seen by Dr Spencer but did not necessarily mean that he was suffering from a major depressive illness, it was important to realise that people appear sometimes with flattened aspect, and that beyond March 2015 there was very little medical evidence of a depressive illness in this case.

203. The second point he made concerned cross examination about the note that Dr Steadman had relied on to "anchor" his end date of 19 August 2015 for the end of any adjustment disorder. It had been established that the briefing note provided to Dr Steadman contained a solicitor's error and the date should have been 19.8.2014. Dr Steadman then sought to say August 2015 was still a proper date out of caution although March 2015 was also a justified end date.

204. The third point he made was that Dr Steadman's report and approach can be criticised for alighting on matters that hinder the claimant's case and failing to give credit for things that do not. He refers to the deliberation about the reply of "Autumn" and

questioning whether this was deliberately trying to mislead while at the same time failing to give the claimant credit for his responses that he was not currently depressed and also that he had probably only been depressed in the period of hospital admissions concerning his ankle, which he rightly submits were not self serving or exaggerating.

205. Mr Laughland submits that we have here what on any view was as described by Dr Spencer a moderately severe Depressive Disorder.

206. Mr McLaughlin submits that Dr Spencer is correct in saying that whatever the claimant suffered from it was over within about 7 or so months of the accident, by about March 2015, and he relies on the evidence of Dr Spencer. He relies on the response to the Bush and Co questions, and also to the absence of anything in his notes suggesting otherwise.

My Assessment of the Claimant

207. I have set out above in my review of the case my findings about the Claimant, who is not a reliable witness. He has exaggerated his symptoms and the claim that he makes for compensation. He has sought to mislead the court in this case by presentation of an ongoing care claim, an ongoing dog walking claim, and an ongoing holiday claim.

208. I am however satisfied that he did suffer from depression after the accident, which caused him substantial problems at least until late summer 2015, and consider that the end date of March proposed by Dr Steadman is too early. This accepts the claimant's report to Dr Steadman of maybe suffering depression with regard to his ankle during the period containing his hospital admissions. I also prefer the evidence of Dr Steadman for the reason that without treatment the claimant is no longer suffering from depression. I accept the evidence of Dr Steadman as to the length of time that the symptoms continued, and am satisfied that had the episode continued longer in as serious a form as Dr Spencer states, that there would be something on the medical notes of this man to show it. I find that the episode was over within about year of the accident and that the end date as Dr Steadman suggested should be August 2015.

GENERAL DAMAGES

209. Level of Award

The defendant submits that the bracket for general damages in this case award in this case lies at or near the top of the JSB Modest Injury (d) bracket, so up to £12.050. He submits that there should be no separate award referable to the psychiatric symptoms because the likelihood is that the claimant's psychiatric reaction has not been any different from that which would be expected from any other claimant with this type of injury respect of this type of injury. The award does not he submits fall into the category moderate (c) for an award between £12,050 and £23,310 because the features included in that level of award such as difficulty walking on uneven surfaces difficulty standing or walking long period time awkwardness on stairs and irritation metal plates and residual scarring do not apply in this case .

The claimant submits that I should look at a combination of damages placing the ankle injury by within the moderate category (c) above, and the psychiatric into the moderate bracket (c) £5,130 - £16,720, with a total award in this case of £27,500.

210. I am satisfied that the injury suffered in this case falls into a higher bracket than that contended for by the defendant. This was not a less serious, minor or under displaced fracture. It involved three admissions hospital and has involved a very lengthy and invasive follow-up including intravenous antibiotics and numerous attendances at clinic for dressing and inspecting the wound. The claimant has had to undergo surgery in order to remove the metalwork. My assessment of the figure that should be recovered in respect of general damages for the orthopaedic injury is for an award of £16,500.

211. I am satisfied in this case that the claimant has suffered depression as a result of the accident which exceeds that which would habitually be suffered by somebody injured in this way. that the claimant When I consider the factors to be taken into account in valuing a claim of this nature they are as follows:

(i) The injured person's ability to cope with life, education and work.
The claimant is on my findings able to cope with all the above.

(ii) The effect on the injured person's relationships with family, friends and those with whom he comes into contact
the claimant's partner gave evidence that whereas before he was a happy soul he was now a grumpy and unhappy person and completely changed. I have not accepted that that evidence is truthful but I am satisfied that for the period when he suffered from an adjustment disorder between June 2014 and August 2015 he will indeed have been unhappy, grumpy and a different person to what he usually was.

(iii) The extent to which treatment would be successful
The adjustment disorder having ended there is no need for treatment.

(iv) Future vulnerability
There is no evidence that he is vulnerable in the future.

(v) Whether medical help has been sought
the claimant acted appropriately and consulted his GP. He was prescribed medication.

212. Although I have stated that the claimant suffered psychiatric problems beyond what would be expected for anyone injured in this way there is an element of overlap with the general damages for the orthopaedic injury. This case falls in the middle of the less severe (d) category in the judicial College guidelines.

213. The overall figure I award in this case for general damages is £20,000.

PAST AND FUTURE LOSS OF EARNINGS

214. My findings are that had the claimant not suffered his injury there was a chance that he would have been promoted to manager although I consider that this was in fact unlikely. I do however accept the evidence of Peter Assenheim that Jonathan Keith would have come in alongside but not over the claimant. He would however have been paid for as a member of the family (so at a different level to the claimant). I have set out my doubts

whether the claimant would in fact received an increase in his salary. Had Jonathan Keith not joined the business and had he not been injured and had no one else been brought in or promoted in his place I consider the claimant might well have been paid more whether he was actually described as a manager or not. I do not consider that the employment of Jonathan Keith necessarily would have meant that he was not paid more in any event had he not been injured. Doing the best I can I assess the chance that he might have been paid more at 30%, and the annual increase in his pay at £7500. I will leave counsel to do the calculations on this basis. I do not accept that there would have been above inflation pay rises on this figure each year, and do not accept the 10% followed by 5% spoken of by Peter Assenheim. Such generosity coming from a person who does not even provide his workers with written terms and conditions of their employment in accordance with section 1 of the employment rights act 1996, and who has continuously paid as he admitted at the minimum wage rate and given only minimum statutory holidays would be uncharacteristic and improbable.

The claimant put in a claim on the basis that he would work full-time to 65 and then part-time to age 70. Given his diabetic condition, his stroke, his hypertension and his bad back and given his dislike of paperwork and preference for his old working regime (which would regardless of his accident become more and more problematic as he got older) I find that it is unlikely that he would have worked beyond age 65. Had he done so it would in my judgement had been at a very reduced rate given his health. I consider that on balance of probabilities he would have continued working full time to age 65 and that thereafter he might have worked two or so days a week in retirement. Even that figure would probably have reduced as time went by. I assess the chance that he would have continued beyond 65 on a part-time basis as being 40%.

The claimant is entitled to and should recover the figure of £1403.62 for past loss of earnings.

PAST CARE

215. I am satisfied that an element of care would have been required in this case the claimant. I consider that six hours a day for a man with a broken ankle, even one who is non-weight-bearing, is too high. I accept that he would have benefited with assistance initially in dressing, undressing, and would have needed assistance in bathing/showering and for someone to do his washing. I do not accept that except within the first few days he would have needed assistance going to the toilet. When he was asked about this he was indignant asking "how do I get in bath, how do I wipe my arse?" I was concerned about whether he really could have been significantly more immobile than seemed likely. My concern over his evidence means I have re read the nursing notes. At **E1758** is a nursing note dated 18 June (From A Hill, on Bulphan Ward) which sets out that he is self caring with hygiene, cares for his own pressure areas, mobilises with a zimmer frame, is continent and his bowels had opened and was eating and drinking independently.

216. There is a further note (headed Physio and written by Julie Leyland) stating that she had "confirmed with the patient that he had no concerns from a mobility + stair aspect, and that patient confirmed that he was mobility fine, and was happy with how to complete stairs". There is a nursing note at **E1797** setting out the same information on a form and signed by A Hill, who is a St/N (I have read this to be staff nurse).

217. I do not accept his evidence as this outburst would have indicated that he was pretty much unable to do anything. His remark may have been an outburst, but the content

was intended, and intended to emphasise his lack of mobility and ability to look after himself. Once again he was exaggerating and not telling the truth. He had mobilised on a zimmer frame (and crutches) and although I accept that he would not have cooked for himself and that he would have needed to be driven he wanted to go anywhere, and would have needed help in bathing, I am satisfied that four hours a day for the period up to 10 August 2014 is a reasonable and sensible and indeed generous amount of care and the schedule will reflect that.

218. Once he is weight-bearing and has an airboot the need for care reduces considerably. In this case he did have frequent hospital appointments and his partner accompanied and drove him to those appointments. He also needed to be driven to and from work when he did not use taxis. My judgement is that between 10 August and 30 October 2014 the award should be 2 hours a day, and from 30 October 2014 there is no reason for a claim as he is working all the time, although I don't believe he drives himself and until 10 May 2015 I consider it reasonable to allow 5 hours a week.

219. In May 2015 his care needs would again have increased. For a period until 18 June 2015 when he returned to work, I will allow 3 hours care a day. The nursing notes for 9 May 2015 indicate that he is self caring and mobile with crutches (**E1958**). From 18 June 2015 when he is back at work I will allow 5 hours a week for occasional driving and incidental needs until 1 September 2015. From 1 September 2015 until 1 October 2015 I assess the need for care at 1 hour a week. Thereafter the wound has settled and he is back at work and I see no need for care.

CASE MANAGEMENT

220. The claim of £1,389.22 is agreed.

REHABILITATION COSTS

221. the sum of £1,080.00 is agreed.

TRAVEL EXPENSES

222. travel expenses are claimed in the sum of £2176.83 (the claimant accepting that the sum for 4/2/16 is properly claimed as costs). The defendant accepts the sum of £228.23. the claim was for £2208.23 so I assume is a typo for £2208.23, the amount originally claimed. The claim of £2,176 therefore appears to be agreed.

PAID SERVICES

223. Garden

On the basis of the video and my findings in this case the claimant cannot justify a claim beyond December 2015 by which stage he would have fully recovered from the removal of the metalwork.

I assume a gardener (retired apparently) would charge between £10 and £15 per hour. The charge is therefore a weekly charge of between 4 and 6 hours. The claimant says it is his bit of glory. Given 3 hours of dog walking, 4-6 hours gardening and car cleaning with some conservatory cleaning and monthly window cleaning there is no time left in the one day a week he is not working a 16 hour day.

I will allow 3 hours a week at £15 per hour = £45 per week.

Given that much weekly work there could be no need for complete tidy up costing £895.

Dog Walking

Based on the evidence that I heard from the claimant there is no way that I accept that he walked his dog 1½ hours twice a day. He accepted as much in cross examination. I do however accept that until December 2015 he will not have been able to walk the dog as he had done in the past. Doing the best I can if he is working 16 hour days six days per week (which was his evidence) I do not accept that he was able to walk his dog more than once a week.

I therefore allow a dog walker contrary for the period claimed of 50 weeks for one walk a week which is say £20 per week.

Window Cleaning

The claim will be allowed until December 2015.

I accept the submission made by the Defendant that the cleaning of the conservatory for the family wedding would have been incurred regardless of his accident and this will not be allowed.

I do not accept that he would have done the Lulian Dragomir work or the Warton Wood Works himself and these I do not propose to allow these items

Car Cleaning

I accept that he could not clean his car until December 2015. It would appear to me that for much of that period he was not driving it. I do not know when he started driving again except it was after the June 2015 procedure. A GP note for 20 August 2014 said he would be able to drive in November, and the February 2016 report of Professor Briggs states he is driving but short distances. The claimant was asked the question directly in court but replied he did not know when he started to drive again. In any event his car would not have been being used and therefore it would not have required such cleaning. I will allow one half of the amount claimed to December 2015 subject to further written submissions if this is a wholly incorrect assumption.

The amounts allowed from page 10 of the schedule will therefore be:

Garden Maintenance 50 weeks at £45 per week		£2,250
Window Cleaning to Dec 2015 5x16 and £8		£88
Car Cleaning ½ of claim		£375
Dog Walking	50 x 20	£1,000
Total allowed		£3,713

REPLACEMENT CAR

224. The car that was replaced may have been his pride and joy but it was a very old vehicle and only worth £2,000. I am told it was a Mercedes Coupe GLK. I see no reason why he could not get in and out of it by December 2015, and the car was allegedly sold in March 2016. There is no support for this claim from the Orthopaedic experts. There is no evidence before me of the cost other than in the Claimant's schedule, and there is no evidence of what the cost of a car of similar age to the Mercedes GLK would have cost. This is a substantial head of claim and there should be documents and the claim supported if the previous car was unsuitable. Given the "crouching" photograph (June 2016 **A208**) I see no reason why it would not have been suitable. The Mercedes was a 2003 vehicle. The present car is more modern (I am not told its date of manufacture). At best if the purchase was justified the claimant would be entitled to the cost of a similar aged car to the one he was replacing which was suitable. I have no evidence of that and in any event the Defendant makes valid points about betterment in that this was a greatly more expensive car than the one replaced. I am not satisfied that this purchase was necessary and I am have no evidence in relation to the betterment factor in this claim. I have no documentary evidence (invoice, bank statements or anything at

all) to show the sale price of the Mercedes or the purchase price of the Range Rover. The claimant has misrepresented his condition in this case, and I am not satisfied that the car required replacement. I do not allow the claim for the Range Rover.

225. FUTURE THERAPIES
The claimant's expert Dr Michael Spencer was of the opinion that CBT was required for the claimant in respect of both a major depressive disorder and associated anxiety symptoms. In spite of my findings of exaggeration physical injury I have still concluded that an award in respect of psychiatric damage is justified. My findings are however along the lines of Dr Steadman's report and therefore in my judgement no costs of future therapy are required in this case. As a matter of fact and observing the claimant's position when this was discussed with Bush & Co there was a marked lack of enthusiasm for psychological therapy and I do not have the impression that this is something the claimant would welcome in any event.

FUNDAMENTAL DISHONESTY

226. I return to the question of fundamental dishonesty. Mr Laughland's closing submission persuasively argues that the question of the claimant's condition and his reports thereof are peripheral to what is essentially a claim for loss of promotion. The issue in this case given findings that I have made on the basis of loss of a chance is whether or not the damages schedule advance on 4 February 2018 was dishonest and if so whether it was fundamentally dishonest.

227. The claimant's case is that the future loss items were only taken out of the revised schedule produced subsequent to the joint Orthopaedic report because it would not have been realistic to continue to claim than in the light of that evidence. I do not accept that removing the items alters the fact that they were initially included. The case cannot necessarily be remedied simply by removing the items which are no longer consistent with the joint Orthopaedic report.

228. I am concerned that these items, which were included on the basis of the claimant's instructions and his report of the effects of the injury on him, had been included in the first place, having observed the video evidence. The social media and the surveillance video have demonstrated that those claims were unjustified. The question I have to ask is whether it was fraudulent, that is that it went beyond a claim being put at the highest level possible. A claim put at the highest level is not fraudulent unless it relies on a fraudulent factual presentation. In this case I regret to say that some of the claims made fall outside what could be described as a claim being put at the highest level and go into the category level where in my judgment they represent fundamental dishonesty, relying as they do on what I have found to be a deliberately false account. The claims in this case went beyond what should have been advanced.

229. In plain language the claims in respect of future care, dog walking, additional holiday costs and of house alterations and garden work, were all "try ons". The question is which fall into the category of being fundamentally dishonest, do they go to the root of the claim if they do am I satisfied that nonetheless a dismissal of the claim would mean the claimant suffered substantial injustice.

230. Because this is such a serious allegation it is right that I deal specifically with the abandon parts of claim fall into this category.

Future care

the video evidence and the professional opinions of the doctors make it clear that no future care is required in this case. The saving is £162,349 on the basis of a lifetime care of nine hours a week. To include such claim in my judgement required presentation of the claimant in a far more restricted and immobilised way than was apparent in the video evidence, or in my findings about him on the basis of his evidence. I am confident and find that the claimant will have been fully aware that the presentation of his situation to justify a claim at this level was untrue. There is no doubt also that it is dishonest when looked at by the standards of ordinary people.

Dog Walking

My complaint about the inclusion of this claim falls under two heads. First the claimant never walked the dog as frequently as he alleged, and simply would not have had time to do so. He did walk the dog when not working on his one day off. He is still able in my judgment and in the judgment of the experts to do so. The ongoing claim at £69,513 for life is in my view exaggerated and he will know that it was. It falls within the category of fundamental dishonesty.

DIY Painting and Gardening

These items are, when the claimant is observed, outside the range of an honestly advanced claim and in my judgment are only maintainable on the dishonest evidence advanced. They fall into the category of a claim made with fundamental dishonesty.

Future Loss of Earnings

I have awarded some loss in this respect at a greatly lower figure than was claimed. That does not make the claim fundamentally dishonest.

231. I have considered whether it to dismiss this claim would cause substantial injustice to the claimant. I consider that there is no reason over and above the obvious loss of the damages to which he is otherwise entitled for me not to impose the sanction imposed by s57 of the criminal Justice and Courts Act.

232. The claim is dismissed. I will hear applications about costs if they are not agreed.