Neutral Citation Number: [2021] EWHC 2510 (QB)

Case No: BM00139A

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM A DECISION OF HIS HONOUR JUDGE MURDOCH SITTING IN NORTHAMPTON COUNTY COURT

Birmingham District Registry
33 Bull Street, Birmingham, B4 6DS

Date: 15/09/2021

Before :

MR JUSTICE JACOBS

- -

Between :

Marwan Elgamal	**Claimant/ Respondent**
- and -	
Westminster City Council	**Defendant/ Appellant**

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- -

Jeffrey Deegan (instructed by **Seatons**) for the **Claimant/Respondent**
Andrew Lyons (instructed by **Plexus Law**) for the **Defendant/Appellant**

Hearing date: 29 July 2021

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Approved Judgment

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

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MR JUSTICE JACOBS

Mr Justice Jacobs :

A: Introduction

1. The Defendant appeals, with permission of Pepperall J, against the judgment and order of HHJ Murdoch made on 8 October 2020. The judge determined that the defendant should pay the Claimant £ 125,321.33 in damages for personal injury, and costs on an indemnity basis following the Defendant's rejection of the Claimant's Part 36 offer.

2. The central issue on the appeal concerns the judge's decision that the Claimant had not been fundamentally dishonest in relation to his claim, and that accordingly the provisions of s 57 of the Criminal Justice and Courts Act 2015 were inapplicable. On behalf of the Defendant, Mr. Lyons contends that the judge found the Claimant to have been dishonest, and that he should also have determined that he was "fundamentally" dishonest. On behalf of the Claimant, Mr. Deegan initially accepted that the judge had found the Claimant to have been dishonest, but in the end submitted that there was no such finding, and that this court should not find dishonesty when the judge had declined to do so. He also submitted that any dishonesty, even if established, was not sufficiently fundamental so as to bring the provisions of s 57 into play.

3. If the Defendant's appeal fails on the central issue, then a further issue arises as to the way in which the judge dealt with the costs of the proceedings. The award of £ 125,321.33 comfortably beat the Claimant's Part 36 offer made shortly before the trial and the judge determined that the Defendant should pay costs on an indemnity basis from an appropriate date thereafter. The Defendant contends that the judge should not have reached that decision, because he failed to take into account the manner in which the Claimant had exaggerated his claim.

B: The factual and medical background

4. The Claimant's claim arose from an accident which he suffered on 27 January 2012. He injured himself on equipment, known as an air track, at the Defendant's gym in London. He performed a "flip", landed awkwardly, and violently twisted his left knee. Liability for the accident was compromised at 65% in the Claimant's favour, and the award of damages of £ 125,321 therefore reflected a 35% deduction for contributory negligence.

5. At the time of the accident, the Claimant was aged 22 and had been heavily involved in the sport of "free running". He also enjoyed parkour, which is a similar activity. In 2008, he competed at the World Championships for free running, and was ranked 8th. He had worked on a number of film projects as a trainee stunt man, and it was his intention fully to qualify as a stunt man and then to develop his career in that role. Prior to the accident, he had completed an honours degree, and his stunt man work was carried out during his degree studies. There was no dispute that his injury put paid to any potential career or earnings as a stunt man. The injuries sustained were a complex multi-ligamentous disruption of the ligaments of his left knee. The Claimant underwent a series of operations to reconstruct the posterior lateral corner of his left knee and anterior cruciate reconstruction.

6. By the time of the trial, there was substantial agreement between the two expert orthopaedic surgeons (Mr Mandeep Lamba instructed on behalf of the Claimant, and

Mr. Andrew Unwin on behalf of the Defendant) as to the nature of the physical injury and its physical impact. In their joint report dated 25 November 2019, the experts agreed that the Claimant had sustained an injury to his left anterior cruciate ligament ("ACL") as a result of the accident, and that he had subsequently undergone 5 surgical procedures between February 2012 and March 2017 in order to manage his left knee symptoms. It was agreed that there was laxity of the ACL and posterolateral corner with some loss of movement. The symptoms of instability would not improve without further surgical management, but the Claimant was reluctant to undergo further surgery and the experts agreed that his reluctance to do so did not represent a failure to mitigate his losses. There was also agreement that: the Claimant would be permanently unable to undertake employment which involved heavy lifting, kneeling or squatting; he was capable of employment of a sedentary and light manual capacity; he was capable of using public transport to reach his place of employment, including during hours when public transport is busy; on the basis of his claimed symptoms, he reasonably required assistance which involve kneeling and squatting; and he would be unable to return to recreational or energetic sporting activity that requires sudden twisting or pivoting manoeuvres.

7. By the time of this joint report, the two experts had viewed video surveillance footage, which formed a central part of the evidence relied upon by the Defendant at trial. The footage had been taken some years after the accident, on 12 January 2017, 19 October 2017 and 12 January 2018. The last footage was taken on the date when the Claimant had been seen by Mr. Unwin for the second time. The footage was disclosed to the Claimant on 1 July 2019.

8. On the basis of the evidence in the surveillance footage, the experts were agreed that the Claimant was capable of walking normally, using a staircase and using public transport. They were agreed that there was no evidence that he could squat, kneel or twist on his left knee, and that his symptoms did not reasonably prevent him from his current freelance work which was of a sedentary and light manual capacity. They also agreed that he was not disabled as defined by the Equality Act 2010.

9. The agreement by the experts that the Claimant was capable of walking normally, using a staircase and using public transport during busy hours, was relevant to the Defendant's case as to fundamental dishonesty. Thus, as noted by Mr. Unwin in the joint report, there was a "discrepancy of the video surveillance footage and both Mr. Lamba's and Mr. Unwin's examination findings at the time of their First Reports in respect of his antalgic gait". Antalgic gait was a reference to the fact that the Claimant, when seen by these experts on earlier occasions, had a noticeable limp.

10. Prior to the joint report, Mr. Unwin had seen the Claimant on two occasions, and had written three reports. His first report was dated 12 January 2018 (the same day as the last of the surveillance footage) and was based upon an interview and examination on that day. The Claimant had told him that: his knee symptoms were exacerbated when sitting in confined spaces on trains and aircraft; he had pain, instability and loss of movement at the left knee; he was fearful of crowds and rush hour traffic on public transport for fear of his knee being knocked and giving way; his knee was very weak, and that he had lost movement; he could only walk for approximately 20 minutes on the flat before he experienced significant pain which stopped him from walking further; that he could not walk for longer than a mile; that traversing staircases was problematic and that he could not use them normally, having to rely on a bannister or rail. He also

said that he found it difficult to enter and/or exit a car. His symptoms did not prevent him from working in a sedentary capacity, but he did need to move around. They also interfered with heavy manual DIY and gardening, and in particular activities which involved regular kneeling, squatting, heavy lifting, the use of ladders or working within confined spaces. Mr. Unwin concluded that at no stage during the interview or examination did the Claimant attempt to exaggerate his symptoms or signs in any way or form. He described the Claimant as walking "with an abnormal gait, which is antalgic (painful) at the left knee".

11. In his conclusions, he said that the Claimant's symptoms of instability on day-to-day activities were in excess of what he would expect in the presence of "modest laxity of the posterolateral corner and ACL". His experience was that patients with that condition did not experience symptoms of instability on day-to-day activities such as walking on staircases and using public transport, but do experience symptoms of instability on pivoting activities such as sport or jumping from a height.

12. Mr. Unwin's second report was dated 2 April 2019, and was based on an examination and interview on 2 February 2019. The Claimant said that he continued to have pain, instability and loss of movement at the left knee: he did not trust the knee. He was fearful of using public transport at rush hours. His walking distance remained restricted to walking for 20 minutes on the flat. He could not kneel or squat on the left knee. He continued to have difficulty entering and/or exiting a car. Mr Unwin again said that at no stage during the interview or examination did the Claimant attempt to exaggerate his symptoms or signs in any way or form. He noted, however, that the Claimant no longer walked with an abnormal gait, and that he was able to traverse a staircase relatively normally.

13. In his third report dated 17 August 2019, Mr Unwin commented on the surveillance footage and other documents which he was shown. He did not conduct a further interview with the Claimant. He summarised the findings and conclusions in his earlier reports. He said that the further documentation demonstrated that the Claimant was functioning at a significantly better capacity than that suggested by him at the time of his first and second reports, and also to others in the medico-legal process in this matter. He contrasted the issues with walking and a limp, reported in his first report, with the video footage taken on the same day: this clearly showed no limp and the Claimant's ability to walk freely. The footage also showed that on that day he could enter and exit a car freely, and was able to use a staircase freely despite his assertion that he was not able to do so. He expressed the view that there was a "significant discrepancy between the symptoms and signs claimed by Mr. Elgamal at the time of my First and Second Reports, and that of the supplied documentary evidence". He said that he would advise the court that "Mr Elgmal is claiming symptoms and signs that are not part of his normal day-to-day life and that are claimed for the purposes of medico-legal gain".

14. The above reference in Mr Unwin's third report to "others in the medico-legal process" relates to the fact that there were other doctors or professionals who saw the Claimant limping or to whom the Claimant described problems and symptoms along the lines of those described to Mr Unwin. I was referred during the hearing of the appeal to the reports of: Mr Lamba (the other consultant orthopaedic surgeon); Trevor Gilbert, a jointly instructed employment expert; Ian Fussey, a consultant psychologist instructed by the Claimant; and Dr Paul Mallett, a consultant psychiatrist instructed by the Defendant. It is not necessary, however, to describe these reports in detail. Mr Unwin's

reports are sufficient for the purposes of the argument on fundamental dishonesty which the Defendant advances. The judge's judgment describes that evidence in detail, indicating that he regarded Mr Unwin's evidence as the most significant. One reason for this, no doubt, is the fact that surveillance footage was taken on the day of the Claimant's interview and examination by Mr Unwin on 12 January 2018.

C: The claim and the proceedings leading to the judgment

15. Proceedings were issued in May 2016, seeking damages in excess of £ 200,000. By that time, the parties had agreed the 65/35 split on liability. The Particulars of Claim described the injury, and said that full details were contained in the reports of Mr M Lamba dated 20 October 2013 and an addendum dated 14 May 2015, and (as to psychological injury) the report of Ian Fussey.

16. A schedule of damages was prepared and signed with a statement of truth by the Claimant's solicitors. This was served in May 2016. The signed schedule gave a total quantified damages figure of £ 405,997.43. This figure is considerably lower than the figures contained in what appears to be an unsigned draft schedule which was provided, apparently at around same time, to the Defendant. Mr Deegan submitted, and I agree, that the relevant schedule is the signed schedule.

17. The schedule of loss did not at that stage contain a figure for general damages, indicating that it was "tbc" (to be confirmed). There were some relatively small figures for travel, painkillers and prescriptions. These did not feature in the argument before me, and it is not necessary to discuss them, or the updated figures, in this judgment.

18. In relation to past loss, the principal claim was £ 67,576.99 for loss of earnings. The basis for calculating this figure was set out in the schedule. It was calculated by reference to the earnings of £ 18,000 per annum that the Claimant would have earned as a social media marketer and/or designer/ videographer, plus £ 5,000 per annum from film work as a stunt man. A deduction was made for the earnings which the Claimant had made from his employment by a business called Metropolis. As described below, the Claimant did recover at trial sums in respect of past loss of earnings, but the award was substantially lower than that claimed, essentially because the judge considered that the Claimant had not sufficiently mitigated this loss.

19. The Defendant's case on fundamental dishonesty did not, however, focus on this aspect of the claim actually made. This was for good reason. The case of fundamental dishonesty concerns the alleged exaggeration of the Claimant's symptoms, including the manifestation of a limp, to Mr Unwin and others. However, there is nothing which suggests that this exaggeration, even if it existed, had an impact on the claim in respect of past losses that the Claimant was putting forward.

20. The other claim for past loss was much smaller. This was a claim for £10,666.47 for "care and attendance". This was described in the particulars of loss as follows:

> "For a period of time immediately following the accident and following the subsequent operations the Claimant has required care and assistance from his family in helping him recover from his injuries.

> The Claimant would normally have carried out his normal share of household tasks and duties but his family have had to carry out those duties for him including washing, ironing, cooking, cleaning. At this stage a broad brush average of 1 hour per day x £ 6.70 per hour has been used as a basis for the calculation for the care and assistance"

21. The resulting claim, in respect of the period between 27 January 2012 and 15 May 2016 (1575 days), at 1 hour per day x 6.70 per hour, was £ 10,522.50. This aspect of the claim did feature significantly in the Defendant's argument on fundamental dishonesty.

22. The claim in respect of future loss, leaving aside a small claim for travel expenses, was £ 327,000 comprising £ 20,000 for future loss of earnings and £ 307,000 for future loss of opportunity. The future loss of earnings claim was pleaded on the basis that the Claimant had not been able to hold down regular employment due to the accident and operations, but that he was "hoping to have recovered sufficiently enough to be able to return to full-time regular work". A "provisional future loss of earnings of up to £ 20,000 was estimated, with a more accurate figure to be provided in due course". As with the claim for past loss of earnings, the Defendant's argument on fundamental dishonesty did not focus on this aspect of the claim actually made, again in my view for good reason. There was again nothing to suggest that the alleged exaggeration had any real impact on this claim. This was not a case where the Claimant contended that he was unable to work at all. Indeed, the claim asserted that the Claimant would, it was hoped, recover sufficiently to enable him to return to full time work.

23. The claim for £ 307,000 for future loss of opportunity comprised over 75% of the total quantified claim. It was based on the inability of the Claimant to pursue his career as a stuntman in the film industry, with a suggested multiplicand of £ 20,000 per year. As with the other claims for lost earnings, the Defendant's fundamental dishonesty case did not attack this aspect of the Claimant's claim actually made. Again, this was for good reason. There was no doubt that the undisputed injury had put paid to the Claimant's career as a stunt man, regardless of whether the Claimant was exaggerating a limp, or difficulties walking or anything else.

24. On 13 October 2016, shortly after service of the Defendant's defence, the Claimant signed a witness statement. This was provided to the Defendant at some stage. The statement described his current injuries at that time. He said that the discomfort was fairly constant. He could not sit down for any length of time. He needed a pillow between his knees at night to help him have any form of disturbed sleep. He could not walk more than 20 minutes without his knee giving way and losing his balance. He could only run a few yards, and even then he ran awkwardly and with a noticeable limp. He could manage stairs going up, but needed to be careful. A section of his witness statement dealt with care and attendance: his brother and mother helped him out with various tasks and duties around the house that he normally could and would have done. He could no longer help his mother doing certain tasks around the house. His difficulties in kneeling mean that he could not pray properly. He could also not perform Hajj in the Middle East, because the occasion is always extremely busy and there are large crowds which would worry him.

25. On 18 July 2018, directions were given by Deputy District Judge Carr, leading to a 2 day trial. A further directions hearing took place on 23 August 2019. The Defendant

had served the surveillance evidence in July 2019. Directions were given for supplemental statements and further expert reports, as well as for updated schedules of loss.

26. Pursuant to those directions, the Claimant served a second witness statement. This dealt with various matters, including his response to the surveillance footage. The thrust of the evidence was that the Claimant made major efforts to appear 'normal' in terms of his presentation to the world. His body paid the price for this after he had made these efforts. He accepted that the footage was seemingly at odds with some of the medical evidence, but he refused "as far as possible to present to the world as physically disabled or needy". He was the sort of person who ploughed on.

27. In December 2019, some 5 months after the disclosure of the surveillance evidence, the Claimant served his updated schedule of loss. This increased the claim from (in round terms) £ 405,000 to £ 735,000 (prior to the 35% contributory negligence deduction).

28. In that schedule, the claim for pain and suffering and loss of amenity (or "PSLA"), previously unquantified, was now advanced at £ 92,000. That figure referred to the Judicial College Guidelines 15th Edition. In relation to psychiatric damage, the Claimant said that the injury was "moderate" within Section 4 (A) (c), with a range of £ 5,000 to £ 16,270. The amount claimed was £ 12,000. In relation to the physical injuries, the Claimant relied upon Section 7 (M)(a)(i) dealing with "Orthopaedic Injuries – Knee injuries – Severe". The relevant description of injuries in that category (set out in full below, is: "Disruption of the joint, gross ligamentous damage, lengthy treatment, considerable pain and loss of function", with a range between £ 59,490 and £ 82,080. The case advanced was at the top of that range, namely £ 80,000. The combined total for PSLA was therefore £ 92,000.

29. In its counter-schedule, the Defendant took a radically different view. The claim was in the "Moderate" category; either at the lower end of the 7 (M)(b)(i) bracket or at the upper end of the 7(M)(b)(ii) bracket for the knee injury. (These are set out in full below). The PSLA should therefore be valued by the court in the region of £ 12,000. The Defendant did not specifically refer to the claim for psychiatric injury, which was therefore in dispute. Overall, the Defendant described the PSLA claim as "grossly overstated".

30. Reverting to the Claimant's updated schedule of loss, there was an increase the past loss of earnings claim from £ 71,000 to £ 227,000. This was partly because of the increased amount of time now covered by past loss of earnings. It also included significantly greater figures for the stunt man earnings which, on the Claimant's case, he would have enjoyed after completion of his training.

31. The Care and Attendance claim for past losses also increased, from £ 10,552 to £ 19,662. The basis of calculation (1 hour per day at £ 6.70) remained the same. The increase was attributable to the increased number of days. The 1 hour per day at £ 6.70 was again described as a "broad brush average".

32. The claim for future loss of earnings was again the most substantial element of the updated claim, amounting to £ 338,100. The case was again based exclusively on the Claimant's loss of stunt man earnings.

33. Three additional claims, which had not appeared in the earlier schedule were introduced.

34. First, a claim was made for future CBT (Cognitive Behaviour Therapy) in the sum of £ 3,500. The Defendant took no point on this in submissions on appeal, and in fact the judge awarded this amount in full.

35. Secondly, a claim was made for the additional costs of an automatic car, in the sum of £ 15,682. The basis of the claim was that as a "result of the accident and the residual weakness to the left knee the Claimant will require an automatic vehicle as opposed to a manual transmission". This claim was not, however, supported by the orthopaedic experts, and the claim was therefore not pursued at trial. In closing submission to the judge, the Defendant did not take a point on this in relation to fundamental dishonesty, but an argument was developed on appeal.

36. Thirdly, a claim was made for future care in the sum of £ 30,780.77. The basis of the claim was that:

> "As a result of the accident the Claimant will require future assistance with heavy housework and gardening or any task which reasonably involves kneeling and squatting; agreed per joint statement to court of Mr Mandeep Lamba and Mr. Andrew Unwin – paragraph 10.1+."

This was a reference to the paragraph of the joint report where the experts had agreed that on the basis of the Claimant's claimed symptoms "he reasonably requires assistance which involve kneeling and squatting". The claim made in this regard was for 3 hours a week, at the rate of £ 9.18 per hour. The claim was therefore in one respect lower than the claim for past care, which had been based on 1 hour per day. However, the rate of £ 9.18 per hour was higher, because it was anticipated that the Claimant would be living away from home by the age of 21 and would not therefore have the benefit of family assistance.

37. On 5 May 2020, the Claimant made a Part 36 offer to accept £ 90,000 in full and final settlement inclusive of contributory negligence. This was somewhat more than the Part 36 offer previously made by the Defendant, in 2016, of £ 50,000.

38. The trial took place before HHJ Murdoch, sitting in the Northampton County Court, on 20-21 July 2020. I did not have transcripts of the evidence, but was told that the Claimant was cross-examined for the best part of 2 days. Oral closing submissions were made on 18 August 2020, and the judge gave a written decision on 8 October 2020. He awarded the following sums prior to the 35% deduction for contributory negligence:

(1) PSLA: £ 60,000.

(2) *Smith v Manchester* award for handicap in the labour market: £ 54,000, representing 3 years worth of income.

(3) Loss of congenial employment: £ 8,000.

(4) Past losses: £ 33,942.80 comprising:

a) Past loss of earnings: £ 33,000;

b) Past care: £ 705;

c) Painkillers, travel and other amounts agreed between the parties: £ 237.80

(5) Future losses: £ 9,348.96, comprising:

a) Travel: £ 75.96

b) CBT treatment: £ 3,500

c) Future care: £ 5,773.

39. After the 35% contributory negligence deduction, the above figures reduced to a total of £ 125,321.33. The judge also awarded interest and costs. In relation to the period after 26 May 2020, being 21 days after the Claimant's Part 36 offer, the Defendant was ordered to pay the costs on an indemnity basis together with interest at the rate of 5% per annum on the Claimant's indemnity costs. The judge refused permission to appeal, as did Collins Rice J on the papers. On a renewed application, permission was granted by Pepperall J.

D: The judgment of HHJ Murdoch

40. In his judgment, the judge described the background to the claim and the Claimant's written and oral evidence. He also described the evidence given by the Claimant's brother, Mr Hossam Elgamal, who said that his brother limped every day, even if it was not a constant limp. The judge then summarised the expert evidence from the various experts.

41. The judge then set out his "findings", dealing with a number of factual issues that arose in the trial. The judge's fact findings included a section addressing the question: "what do the DVDs show?" In that section, he concluded that the Claimant showed no obvious signs of discomfort or pain when sitting on the tube in London, being able to sit for the entire bumpy journey. He sat with his injured leg exposed to being struck by another passenger sitting next to him, rather than sitting in the seat whereby his leg would be protected by the side of the train. He had also taken long-haul flights, showing that he was able to sit for long periods without pain and could negotiate busy public areas in airports without difficulty. He could climb a short set of steps without holding the bannister, and could climb a steep stationery escalator without obvious difficulty. The DVD showed no real difficulty getting into a car. It also showed him walking without a limp. That was to be contrasted with his presentation to Mr Unwin on the day of examination, where he presented with a limp obvious to that doctor. The judge went on to say:

> "Even if the claimant believes the limitations that he suffers with his knee now as compared to how he was prior to the accident,

> are the equivalent of a limp, it is clear that he presented to the doctor with something far more than is shown on the DVD. It must therefore follow that the level of limp exhibited to the doctor was an exaggeration".

The judge also noted that in the second examination by Mr Unwin, in February 2019, the Claimant was said to be no longer walking with an abnormal gait.

42. The judge then continued:

> "Pulling all those threads together I find that he is exaggerating the ongoing effects of his injury
>
> 1. He clearly moves up and down both stairway and an escalator without holding onto the bannister. There is in comparison to his evidence that he is unable to do so.
>
> 2. He clearly gets into and out of a car without any difficulty. I accept that he might have to make an adjustment to the way that he gets into the vehicle but that is very different from saying he finds it difficult to get into and out of it.
>
> 3. He clearly can walk at a fast pace without demonstrating an obvious limp. There's a clear difference between his presentation at the examination and the video that has been taken in the minutes after the examination. The only explanation between the difference at examination and in the street outside is that he was exaggerating the level of his limp at the examination.
>
> 4. There is no evidence of him trying to protect his knee or being aware of those around him as demonstrated on the tube journey where he sits for the entire length of the longest journey on the tube with a vacant seat to his left, where any other passenger could have sat and bumped his knee, rather than sitting in that vacant seat and protect his left knee against the side of the carriage.
>
> I do however accept that pre-accident the claimant was an extraordinary athlete. That is demonstrated by his success in judo and parkour. It is also demonstrated in the photographs taken in Trafalgar Square for the campaign for the world of free running championships where he is seen leaping from the top of one of the lions, a distance of some 15 feet, to land on a crash mat below.
>
> He was clearly moved in evidence when looking at those photographs. He said and I believe him that he is emotional when looking at photographs of what he could do compared to how he is now.

> The claimant may be exaggerating what the weakness in the knee prevents him from doing e.g. coming downstairs without holding the hand rail but it doesn't mean that he doesn't have a weakness in the knee and is therefore unable to return to more physical activities.
>
> The medical evidence is likewise clear; he suffered a major injury to his knee that has required surgical intervention on a number of occasions and intense physiotherapy. Mr Unwin reports that in his experience patients who suffer such injuries do not usually display difficulties in normal day to day activities but would at extremes like playing sport or jumping. In my judgment Mr Unwin is absolutely correct and the DVD fully supports that opinion."

43. The judge accepted that, on the balance of probabilities, the Claimant would have become a stuntman. He then dealt with the various heads of claim, and his judgment includes the following.

44. In relation to past lost income, the judge said that with seven operations and the recovery period from those, there would have been times when he was unable to engage in any form of employment. (I note that there had been two further operations after the date when the orthopaedic experts had written their joint report, describing 5 operations). However, the judge considered that the Claimant had made little effort to obtain employment, and this failure to mitigate had the effect of reducing the claim for past loss of earnings to £ 33,000.

45. In relation to past care, the judge said that the Claimant's brother's evidence lacked detail, and that the level of care was not supported by the medical experts. He therefore awarded 133 hours at £ 5.30 per hour, for a total of £ 705.

46. In respect of the claim for future CBT, he described the Claimant as someone who has shown a determination to get better, and the judge awarded the amount claimed in full.

47. In relation to future care, the judge described the claimant as having a "serious knee injury … which I have already concluded allows him to negotiate stairs but not do harder physical work". There would therefore have to be assistance for heavy work, but this would be "sporadic". The experts disagreed as to whether the appropriate figure was 48 or 12 hours per year. The judge seems to have split this difference by awarding 30 hours, stating that it was unlikely that the care would be gratuitous.

48. He also awarded £ 8,000 for loss of congenial employment, describing the Claimant as having great sporting prowess having been a GB athlete. His skill in parkour would have led him to become a stunt man. He had lost that congenial employment, and the judge did not accept that this head of claim should be rolled into the award for general damages.

49. The judge's *Smith v Manchester* award was for 3 year's loss of income in respect of his handicap in the labour market "on the basis of the serious injury that he did suffer, the

number of operations he has had" and other matters including the fact that employers had been put off by his injury. The judge said that he had taken into account the fact that the Claimant was more mobile than he said in evidence.

50. The judge declined to award any future loss of income. This was because the expert evidence did not support this head of claim. That expert evidence was from Mr. Gilbert. Its substance was that employment as a stuntman would not enable the Claimant to have enjoyed a higher income than he was still able to achieve by doing other work.

51. In relation to PSLA, the judge said that the medical evidence made it clear that this was a "nasty knee injury". He said:

> "From the oral evidence it is clear that the claimant was once a very fit and agile young man and is now restricted in what he can do.
>
> However he has exaggerated the level of his ongoing disability.
>
> I find that he has ongoing pain but he does not have a noticeable limp, that he can walk up and down stairs on most occasions without the need to use banister that he can go to public places and is not in such fear of damaging his knee that he does not go to them.
>
> I have no doubt that at the end of a long day his knee is in pain but is not at a level that prevents him from being able to undertake sedentary employment or engage in most day-to-day activities.
>
> I do accept that he has been unable to return to parkour and similar strenuous physical activities.
>
> When considering loss of amenity of course I must consider that one of the great hobbies that he had was parkour."

52. The judge then set out the parties' respective contentions, with counsel for the Defendant contending for a total award of £ 12,000, and counsel for the Claimant contending that the correct bracket for the knee is [a] [i]. Although this was not the subject of the appeal (or indeed of argument on the appeal), it appears that there is an error in the judge's judgment at this stage. The judge set out excerpts from the Judicial College Guidelines for "Severe Leg Injuries", whereas the parties had been referring in their submissions to the guidelines for knee injuries.

53. The Claimant's case had been that the case fell within the top category of severe knee injuries, where the top two categories are:

(i)	Serious knee injury where there has been disruption of the joint, the development of osteoarthritis, gross ligamentous damage, lengthy treatment, considerable pain and loss	£59,490 to £82,080	**£65,440 to £90,290**

	of function, and an arthroplasty or arthrodesis has taken place or is inevitable.		
(ii)	Leg fracture extending into the knee joint causing pain which is constant, permanent, limiting movement or impairing agility, and rendering the injured person prone to osteoarthritis and at risk of arthroplasty.	£44,470 to £59,490	**£48,920 to £65,440**

(The figures in bold incorporated a 10% uplift).

54. By contrast, the Defendant's case was that the injuries were in the "moderate" category for knee injuries, namely:

(i)	Injuries involving dislocation, torn cartilage or meniscus which results in minor instability, wasting, weakness, or other mild future disability. This bracket†also includes injuries which accelerate symptoms from a pre-existing condition over a prolonged period of years.	£12,650 to £22,340	**£13,920 to £24,580**
(ii)	This bracket includes injuries similar to those in (b)(i) above, but less serious and involving shorter periods of acceleration or exacerbation, and also lacerations, twisting, or bruising injuries. Where there is continuous aching or discomfort, or occasional pain, the award will be towards the upper end of the bracket. Where recovery has been complete or almost complete the award is unlikely to exceed £5,160 (**£5,680** accounting for 10% uplift). Modest injuries that resolve within a short space of time will attract lower awards.	Up to £11,730	**Up to £12,900**

55. The judge awarded a sum of £ 50,000 which is at the top end of the "serious" leg injury (Severe leg injuries) category, namely:

(i)	Serious compound or comminuted fractures or injuries to joints or ligaments resulting in instability, prolonged treatment, a lengthy period of non-weight-bearing, the near certainty that arthritis will ensue; extensive scarring. To justify an award within this bracket a combination of such features will generally be necessary.	£33, 450 to £46, 780	**£36, 790 to £51, 460**

56. The judge also awarded, separately, £ 10,000 in respect of the psychological injury.

57. On any view, these PSLA figures (totalling £ 60,000) were a long way from the £ 12,000 for which the Defendant had contended. They were closer by some distance to the £ 92,000 figure included in the Claimant's updated loss schedule. It is clear that the judge did not accept the Defendant's case, in its schedule of loss, that the PSLA claim was "grossly overstated".

58. Having dealt with the heads of loss, the judge addressed the Defendant's case that "the claimant's exaggeration led inexorably to a finding of fundamental dishonesty and the dismissal of the claim". Having set out section 57 of the Act, and passages from various authorities, the judge said that the assessment of dishonesty is on a case-by-case basis. His conclusions were expressed as follows:

> "What do I make of this claim?
>
> The claimant clearly in his evidence believes that he is disabled to a greater extent than I have found. He gave clear evidence that he was making adjustments to get into the car that were not visible to me. From his perspective he was not lying.
>
> However objectively he was exaggerating and so as a fact was lying.
>
> It is not just a case of looking at what claimant claims v what he's recovered. The reality of why he's not recovered the major head of claim, future loss of earnings is the failure to produce the evidence to establish a difference between what a stuntman earns and sedentary employment. His lies played no part in this aspect of the case.
>
> Although I have not accepted the level of his ongoing disability and therefore found there was an exaggeration; there was an exaggeration as to the level of the ongoing disability arising from a very serious base injury.
>
> Those findings were not fundamental to this case. They certainly did not result in a reduction in general damages to the level the defendant submitted or indeed anywhere near that level, nor did they result in a loss of a Smith v Manchester award.
>
> The claimant was thus not fundamentally dishonest and my awards stand."

E: Legal principles

Fundamental dishonesty

59. Section 57 of the Act provides as follows:

> **"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.

60. The section has been considered in a large number of cases. A thorough review of the authorities, and the background to the section, is contained in the decision of Julian Knowles J in *London Organising Committee of the Olympic and Paralympic Games v Sinfield* [2018] EWHC 51 (QB) ("Locog"). I was also referred to some other cases, including decisions where the approach of Julian Knowles J in Locog has been applied: *Razumas v Ministry of Justice* 2018] EWHC 215 (QB) (Cockerill J); *Wright v Satellite Information Services Ltd* [2018] EWHC 812 (QB) (Yip J) *Molodi v Cambridge Vibration Maintenance Service* [2018] EWHC 1288 (QB) (Martin Spencer J); *Pegg v Webb* [2020] EWHC 2095 (QB) (Martin Spencer J). I have also considered the judgment of Stacey J in *Michael v I, E and D Hurford Ltd and anr* [2021] EWHC 2318 (QB).

61. The case law shows that the statutory requirement of "fundamental dishonesty" requires separate consideration of two questions: whether there was dishonesty, and whether it was fundamental. The Act refers to the claimant being fundamentally dishonest, rather than the claim. However, it will be rare for a claim to be fundamentally dishonest without the claimant also being fundamentally dishonest: see *Locog* para [60].

62. The requirement for dishonesty is to be determined in accordance with the principles in *Ivey v Genting Casinos Limited (t/a Crockfords Club)* [2017] UKSC 67. In summary, whilst dishonesty is a subjective state of mind, the standard by which the law determines whether that state of mind is dishonest is an objective one. Thus, if by ordinary standards a defendant's mental state is dishonest, it is irrelevant that the defendant judges by different standards. The relevant statement of principle is in para [74] of *Ivey*:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

63. Where there is fundamental dishonesty in the presentation of a claim in the early stages of the proceedings, the claimant is likely to be regarded as fundamentally dishonest even if the dishonest aspects of the claim are not persisted in: see *Roberts v Kesson* para [54].

64. As shown by the review of the authorities in *Locog*, the requirement that the dishonesty should be "fundamental" has been described in different language by various judges. It is, however, often said that the dishonesty must go to the root or the heart of the claim.

65. Thus, in *Howlett v Davies* [2017] EWCA Civ 1696, the Court of Appeal considered the meaning of fundamental dishonesty in the context of "one way costs-shifting" in CPR 44.16. Newey LJ said at [16]:

> "[16] As noted above, one-way costs shifting can be displaced if a claim is found to be "fundamentally dishonest". The meaning of this expression was considered by His Honour Judge Moloney QC, sitting in the County Court at Cambridge, in *Gosling v Hailo* (29 April 2014). He said this in his judgment:
>
> > 44. It appears to me that this phrase in the rules has to be interpreted purposively and contextually in the light of the context. This is, of course, the determination of whether the claimant is 'deserving', as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended, for reasons of social policy, by the QOCS rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.
> >
> > 45. The corollary term to 'fundamental' would be a word with some such meaning as 'incidental' or 'collateral'. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self-contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty.'
>
> [17] In the present case, neither counsel sought to challenge Judge Moloney QC's approach. Mr Bartlett spoke of it being common sense. I agree."

66. Similarly, in the decision quoted in paragraph [58] of *Locog*, HHJ Harris QC described fundamental dishonesty as

> "a substantial and material dishonesty going to the heart of the claim – either liability or quantum or both – rather than peripheral exaggerations or embroidery, and it will be a question of fact and degree in each case .. Was there substantial material dishonesty which went to the heart of the quantum of this claim?"

And in the decision quoted in paragraph [59], HHJ Hughes QC said that:

> "fundamental dishonesty may be taken to be some deceit which goes to the root of the claim. The purpose of the phrase is twofold; first, to distinguish any dishonesty from the exaggerations, concealments and the like that accompany personal injury claims from time to time. Such exaggerations, concealment and so forth may be dishonest, but they cannot

> sensibly be said to be fundamentally dishonest: they do not go to the root of the claim."

67. In paragraphs [62] and [63] of *Locog*, Julian Knowles J said, following his review of the authorities:

> [62] In my judgment, a claimant should be found to be fundamentally dishonest within the meaning of s 57(1)(b) if the defendant proves on a balance of probabilities that the claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s 57(8)), and that he has thus substantially affected the presentation of his case, either in respects of liability or quantum, in a way which potentially adversely affected the defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation. Dishonesty is to be judged according to the test set out by the Supreme Court in *Ivey v Genting Casinos Limited (t/a Crockfords Club)* , supra.
>
> [63] By using the formulation 'substantially affects' I am intending to convey the same idea as the expressions 'going to the root' or 'going to the heart' of the claim. By potentially affecting the defendant's liability in a significant way 'in the context of the particular facts and circumstances of the litigation' I mean (for example) that a dishonest claim for special damages of £9000 in a claim worth £10 000 in its entirety should be judged to significantly affect the defendant's interests, notwithstanding that the defendant may be a multi-billion pound insurer to whom £9000 is a trivial sum.

68. This formulation of Julian Knowles J has been referred to in a number of subsequent cases. In *Roberts v Kesson* [2020] EWHC 521 (QB) Jay J described (at [43]) these paragraphs as containing a "gloss" on what the Court of Appeal had said in *Howells*, but also as providing criteria which were nevertheless "helpfully laid down": see [60]. Jay J then described taking a "holistic approach" to the question of whether the dishonesty went to the root of the claim, adding (in [61]) that:

> "It was the policy of Parliament in enacting Section 57 that even in circumstances where other claims may be valid, if a party advances a claim which is dishonest and it is significant and substantial, the Court should not be slow to find that the stringent criterion of Section 57 has been fulfilled".

69. The Defendant's argument in this case has tended to treat paragraphs [62] and [63] of the decision in *Locog* as though they were a statutory definition of "fundamental". For example, there was considerable focus by Mr Lyons on the expression "potentially adversely affected". He argued that the word "potentially" indicates that the court is concerned not only with the claim that was actually put forward, but with the claim that might potentially have been put forward in the light of the alleged dishonesty. He submitted in that context that the need to focus on the potential adverse effect was important where there had been surveillance footage which, once disclosed, would have served to put a brake on the potential claims that might have been advanced in the absence of that footage. As Mr. Lyons said, the genie could not be put back into the bottle. The effect of this argument was that there could be fundamental dishonesty

arising where a potentially much larger claim could have been advanced on the basis of dishonesty, even if it was never in fact advanced.

70. I do not accept the full width of this approach. The relevant statutory word is "fundamental". That is the only statutory word, and paragraphs [62] and [63] in *Locog* should not be read as though they are a substitute for it. Furthermore, as Julian Knowles J explained in paragraph [63], he was seeking to capture the same idea as the expressions "going to the root" or "going to the heart" of the claim. In my view, those expressions do sufficiently capture the meaning of "fundamental" in the present context, and the difference between conduct which is (as Martin Spencer J said in paragraph [20] of *Pegg*) "merely" dishonest and fundamentally dishonest.

71. The Defendant's argument, based on the word "potentially", loses sight of the need for the dishonesty to go the root of the claim. It invites enquiry into what claims might have been advanced, even if they were not actually advanced. It is difficult to see how a claim which was not actually advanced can be said to have been fundamentally dishonest. Furthermore, it would lead in many if not most cases to the surprising conclusion that any dishonesty would qualify as fundamental, because of its potential to result in different or larger claims, even if such claims were not in fact made. I do not consider that the *Locog* case is to the contrary effect. Julian Knowles J was considering a dishonest claim for gardening expenses that was actually made. He was not considering dishonesty in the context of a claim that was not actually made, but which might theoretically have been made.

72. Ultimately, it seems to me that the question of whether the relevant dishonesty was sufficiently fundamental should be, and is, really a straightforward "jury" question: as HHJ Harris QC said, it is a question of fact and degree in each case as to whether the dishonesty went to the heart of the claim. That must involve considering the dishonesty relied upon, and the nature of the claim – both on liability and quantum – which was actually being advanced.

73. I accept that, in this context, the court is concerned with the potential impact of the dishonesty on the claim actually made. In the present case, where the dishonesty is alleged to have resulted in an inflated claim for a genuine injury arising from a genuine accident, it is necessary to consider the extent to which the alleged dishonesty resulted in an inflated claim; ie the extent to which the dishonesty, if not exposed, would potentially have resulted in a higher quantum of recovery in respect of the claims made. This in turn involves consideration of the various losses claimed by the Claimant, and the potential impact of the alleged dishonesty on the award for those losses.

74. In some cases, it will be obvious that the dishonesty had a potential impact on the amount that might be awarded for a particular head of loss. For example, a personal injury claim will invariably involve a claim for PSLA, and a dishonest description of symptoms and suffering will inevitably have a potential impact on the PSLA. The significance of that potential impact is a matter for consideration in the context of whether the dishonesty went to the root of the claim. Conversely, it may be clear that the alleged dishonesty has no material impact on a particular head of loss. In the present case, for example, the Claimant's inability to work as a stunt man was the basis of the major claims for lost earnings, and the dishonesty had no material impact on the claim in that regard.

75. In other cases, there may be room for dispute as to whether or not there was any potential impact. In the argument on this appeal, the claim for the automatic car assumed, in the Defendant's argument, a greater significance than in the proceedings below, when it had not been mentioned in the closing argument on behalf of the Defendant. There was a debate on appeal as to whether the alleged dishonesty had any actual or potential impact on that claim at all. In my view, where there is room for dispute as to the impact of alleged dishonesty on a particular head of claim, then the Defendant – who bears the burden of proving fundamental dishonesty – will need to lay the necessary groundwork for its argument; for example, by eliciting from experts that their opinion on a particular head of loss would be different if a claimant's case as to the extent of injury were accepted or rejected.

Approach to the judge's findings

76. In the present case, the judge found that the claimant was not fundamentally dishonest, and I am being asked to overturn that finding. I will need to address the question of whether the basis of the judge's decision was (i) that the Claimant was not dishonest, or alternatively (ii) that although he was dishonest, the dishonesty was not fundamental. Either way, the appeal before me is by way of review, and I must therefore conclude that the judge's decision was wrong: see *Locog* paragraph [69].

77. Paragraphs [70] and [71] of *Locog* set out the applicable principles concerning the approach to be taken to a judge's findings of fact. These include the principle that:

> "In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere"

78. The authorities show, however, that there is a distinction between the finding of a specific fact and the finding of fact which is really an inference from facts specifically found. In the latter case, an appellate tribunal will more readily form an independent opinion than in the case of specific facts which involve the evaluation of the evidence of witnesses, particularly whether the finding could be founded on their credibility or bearing: see the authorities discussed by Martin Spencer J in *Pegg* at paragraph [23] and by Stacey J in *Michael*.

F: The parties' arguments as to fundamental dishonesty

79. In its grounds of appeal on the principal issue, the Defendant relied upon the following matters in relation to the judge's judgment:

> "1. Failing to properly apply the test as to fundamentally dishonesty;

> 2. Failing to have proper regard to the test as to fundamental dishonesty and the consequences of a finding of fundamental dishonesty;
>
> 3. Failing to conclude that C was fundamentally dishonest when due to his findings of fact HHJM should have concluded this;
>
> 4. Finding that C's lies/exaggeration were not fundamental to this case. In doing so, HHJM failed to consider what would have been the consequences to the conclusions of the experts and his decision on quantum had it not been established C was exaggerating his injuries;
>
> 5. Finding that C from his own perspective was not lying given the findings of facts which were made."

80. These points were developed by Mr Lyons in his written and oral submissions. In summary, he submitted that the judge did find that the Claimant had lied as to the true level of his disability. There was dishonest exaggeration, and this went to the heart of the claim. He had presented himself in a dishonest way to the doctors, in particular to Mr Unwin. Whilst there was a serious base injury in this case, it did not follow that there could not be fundamental dishonesty simply because of its seriousness. Mr Lyons submitted that the seriousness of the injury would be a relevant factor in deciding whether this was a case where there was "substantial injustice" so as to allow a dishonest claim to stand pursuant to section 57 (2) of the Act. However, s 57 (2) was not relied upon by the judge, and there was no respondent's notice seeking to uphold the decision on other grounds. Accordingly, since this is not a case of substantial injustice, the seriousness of the injury was either irrelevant or at least not particularly relevant to the question of fundamental dishonesty. The question of whether the dishonesty was fundamental depended upon the nature and manner of the lies, rather than the nature of the injury.

81. Here, the dishonest presentation related to the existence of a limp, and also to the other difficulties which the Claimant alleged but which were found by the judge to have been exaggerated. The exaggerations found by the judge could not have been anything other than a conscious and deliberate exaggeration. In so far as the judge did not make a finding to that effect, then this court should not hesitate so to find, because there was no other logical conclusion.

82. Mr. Lyons submitted that the extent and manner of the dishonesty was stark. If there had been no surveillance footage, the judge would no doubt have accepted the Claimant's account of his injuries. This would have resulted in the judge looking at the PSLA claim in a different way. It would have resulted in a significantly greater award for that element of the claim, and Mr Lyons would not have argued for an award as low as £ 12,000. He also submitted that the care and attendance claim would have been much larger, but for the surveillance footage, whereas in fact the award was only £ 773. He also relied upon the claim made, and then abandoned, for the automatic car.

83. Overall, he submitted that the claim depended as to a substantial or important part of itself upon dishonesty. The judge was wrong to say that the Claimant's level of exaggeration was not fundamental to the case. The judge's analysis of fundamental

dishonesty was inadequate. The judge failed to consider and reflect upon the case that the Claimant would have likely advanced in the absence of the surveillance footage.

84. On behalf of the Claimant, Mr. Deegan ultimately submitted that the judge had not found the Claimant to be dishonest. The judge had said that the Claimant, from his perspective, had not been lying. That was not a finding of dishonesty. The court was not now in a position to make, and should not make a serious finding of dishonesty which the judge, who heard the Claimant over the best part of 2 days, had not made.

85. Mr Deegan's principal submission, however, was that any dishonesty was not fundamental. He said this required consideration of how, if at all, the dishonesty impacted on the claim that was actually made. He said that there had been no real attempt, in the submissions made to the judge, to address the question of how the alleged dishonesty impacted on the claim. This attempt had only been made on the appeal, but it did not establish a case of fundamental dishonesty. Fundamental dishonesty needed to go to the heart of the claim actually presented. An exaggeration of injury which did not significantly impact on the sums claimed would not be fundamental dishonesty. Fundamental dishonesty must involve considering the claim that was actually made, and whether (using the adjectives or adverbs in paragraph 62 of *Locog*) the dishonesty substantially affected the presentation of the Claimants case in a way which potentially adversely affected the defendant in a significant way.

86. Mr. Deegan's submissions paid close attention to the claims that were actually advanced. He said that the limping and other exaggerations were not fundamental to the claim, given the context of the very serious injury which the Claimant had indeed suffered. In relation to some aspects of the claim, the most significant in financial terms, the exaggerations were irrelevant. Thus, the loss of earnings claim was based upon the Claimant's inability to work as a stuntman. The evidence clearly showed that the Claimant could not do so, as a result of the injury which was established. In relation to other aspects of the claim, the exaggerations found by the judge, including the limp, would not have made any real difference even if potentially relevant. Thus, in relation to the PSLA claim, the judge had awarded £ 60,000: the limp would not make much of a difference if any. The judge, notwithstanding his findings as to exaggeration, was nevertheless "largely with us" in relation to the PSLA claim that was advanced; certainly by way of comparison with the £ 12,000 for which the Defendant was arguing.

87. Similarly, the exaggerations made no difference to the *Smith v Manchester* award. It was uncommon to award more than 3 years loss of earnings in that context. That was the figure which had been sought at trial. It was not specifically pleaded in the schedules of loss. The judge had awarded the full amount claimed, notwithstanding his findings as to exaggeration.

88. In relation to other aspects of the case on which the Defendant now focused, Mr. Deegan submitted that there was no fundamental dishonesty. For example, the claim in respect of the automatic car was not related to the exaggeration. It was put on the basis of the weakness in the Claimant's knee. The judge had accepted that there was a weakness, but the experts had agreed that the Claimant could nevertheless drive a manual car. There was also no fundamental dishonesty in relation to the care aspects of the claim.

89. Looking at the matter overall, Mr Deegan submitted there had been no attempt in the loss schedules to exaggerate the Claimant's losses as a result of any dishonesty. It was difficult to see how the Claimant in any way sought to persuade the judge, by reference to particular items of damage, that the claim was exaggerated as a result of the exaggeration of the injury.

G: Discussion

90. The first issue which arises is whether the Claimant was dishonest. If not, then no question arises as to whether the Claimant was fundamentally dishonest.

91. The judge's finding in relation to this question was in my view contained in the following passage at the conclusion of his judgment:

> "What do I make of this claim?
>
> The claimant clearly in his evidence believes that he is disabled to a greater extent than I have found. He gave clear evidence that he was making adjustments to get into the car that were not visible to me. From his perspective he was not lying.
>
> However objectively he was exaggerating and so as a fact was lying."

92. Earlier in his judgment, the judge had described in some detail, and with clarity, the ways in which he had found that the Claimant was exaggerating: "Pulling all those threads together, I find that he is exaggerating the ongoing effects of his injury". These exaggerations included, for example, walking at a fast pace without demonstrating an obvious limp.

93. As the passage in paragraph [74] of *Ivey* shows, a finding of dishonesty depends initially upon a finding as to the state of an individual's knowledge or belief as to the facts. This is a subjective question. If an individual genuinely believes that the facts are as he represents them to be, then there can be no question of dishonesty. That is so even if, on an objective view of the facts, they are not in accordance with the individual's subjective belief.

94. In the present case, the judge held that the Claimant clearly in his evidence believed that he was disabled to a greater extent than the judge had found. The judge went on to say that, from the claimant's perspective, he was not lying. In my view, these findings negate a necessary requirement for a finding of dishonesty, since they can only be read as a finding that the Claimant had a genuine belief in the facts which he represented. That finding must relate both to the Claimant's evidence in the witness box at trial, and statements to similar effect to doctors at an earlier stage. The judge did not find that the Claimant had (subjectively) lied to him in his evidence, or that he had (subjectively) lied in the statements that he made to doctors.

95. In my view, this is an area where, in accordance with the authorities, I should be reluctant to interfere with the conclusion of the judge. He heard the Claimant give evidence for a lengthy period. I did not. His findings are as to a specific fact (was the Claimant subjectively lying), rather than as to an inference from facts specifically

found. The authorities also establish that where a party has been acquitted of fraud, the decision in his favour should not be displaced except on the clearest grounds: see the cases cited in *Locog* para [71]. All of these matters lead to the conclusion that I should not overturn the judge's finding, and should not find dishonesty in circumstances where the judge did not do so.

96. However, Mr Lyons submitted that this was one of the rare cases where an appellate court should overturn that finding, if I were to take the view (as I do) that the judge did not find the Claimant to have been dishonest. He said that this aspect of the judge's reasoning did not sit happily with his earlier findings of exaggeration. The judge had found objective exaggeration, and therefore the court should be willing to conclude that there was subjective exaggeration as well. The Claimant must have known, for example, that he was putting on a deliberate limp when he met the medical experts. He said that this must have been a conscious exaggeration, and that it was "absurd" to say otherwise.

97. I was not persuaded by this submission. Judges frequently hear from witnesses who have persuaded themselves as to the existence of certain facts, but where the judge takes a very different view. Such witnesses are not, or at least not necessarily, untruthful or dishonest.

98. In the present case, the Claimant had given a detailed explanation, in his second witness statement, as to why the surveillance evidence might seem to be at odds with some of the medical evidence. The essence of that explanation, as Mr Deegan argued to the judge, was that the claimant was trying to adapt to his disability and live life as normally as possible. Mr Deegan had submitted to the judge that it was also appropriate to bear in mind the Claimant's own subjective perception of his disability, bearing in mind that "we are dealing with an individual here who was extremely athletic before the accident occurred, capable of undertaking extreme acrobatic manoeuvres, and therefore to him, not being able to leap up the stairs in the tube station, but having to walk up them in a more …sedentary fashion, is struggling, that is having difficulty".

99. Accordingly, in my view there was evidence and argument before the judge which meant that a conclusion that the Claimant was subjectively dishonest was not inevitable, and that the contrary conclusion was not absurd. Overall, I do not consider it appropriate, having not had the benefit of hearing the claimant, to reject the view which the judge formed as to the Claimant's subjective belief.

100. Mr Lyons pointed out that there had been no respondent's notice seeking to uphold the judge's decision on the basis that there was no dishonesty. I do not think that any respondent's notice was necessary. Such a notice would have been required if (as Mr. Deegan initially accepted in his written skeleton) the judge had found the Claimant to be dishonest, but had rejected the s 57 argument only on the basis that the dishonesty was not fundamental. However, it does not seem to me that this is what the judge did find.

101. However, even if my conclusion as to dishonesty were wrong, I do not consider that the present is a case where there was fundamental dishonesty; ie dishonesty which went to the heart or root of the claims which the Claimant made.

102. I accept that an appellate court might more readily overturn the decision of a judge on the question of whether dishonest was fundamental, since that question is in the nature of a conclusion drawn on the basis of other primary facts. I also agree with Mr Lyons that the judge's decision on this issue was very briefly reasoned, and that the court might therefore be more willing to overturn it.

103. I do not, however, accept Mr. Lyons' proposition that the serious nature of the injury is relevant only, or at least principally, to the question of substantial injustice. In my view, the seriousness of the injury is very relevant to the question of whether dishonesty is fundamental, in the sense of going to the heart or root of the claim. If there indeed is a serious injury, and a claimant has been honest about that, then a court may readily conclude that a degree of exaggeration may not go to the heart of the claim, but would more appropriately be regarded (to use some of the words used in the authorities) as incidental or collateral or embroidery. By contrast, in a case where a judge dismisses a claim because the injuries have not been proved at all, then a finding of fundamental dishonesty may easily follow in a case where the claimant has asserted the existence of those injuries: see eg *Pegg* (a case dealing with CPR 44.16 rather than s 57 of the Act) para [20]. The position will likely be similar if there is some injury, but it is not of any great significance, and the Claimant has exaggerated so as to make it appear very serious.

104. However, in a case where (as here) there has indeed been a "very serious base injury", the question as to whether exaggeration reaches the level of fundamental dishonesty is likely to raise a more nuanced question depending upon the degree of exaggeration. I do not therefore accept that the question of whether the dishonesty is fundamental depends upon the nature and manner of the lies, rather than the nature of the injury. The nature of the injury is an important part of the "particular facts and circumstances of the litigation" referred to by Julian Knowles J.

105. Accordingly, HHJ Murdoch was therefore in my view right when he attached importance to the fact that there had been a "very serious base injury" in the present case.

106. He also said that there had been an "exaggeration". Where there has indeed been a very serious injury, the existence of "exaggeration" may well mean that the case is not in the territory of fundamental dishonesty. Exaggeration can of course be dishonest, although the word is very often used to denote statements made which a person would hesitate to describe as dishonest. What is clear in my view is that (as HHJ Hughes recognised) it is not the purpose of s 57 to result in the dismissal of claims where there has been any exaggeration by a claimant. In the committee stage of the Criminal Justice and Courts Bill set out in paragraph [61] of *Locog*, Lord Faulks QC referred to people who behave in a fundamentally dishonest way by "grossly" exaggerating their own claim. Ultimately, however, the question is one of fact and degree, including consideration of the potential financial consequences of the exaggeration in the context of the claim that is actually advanced by the claimant in the litigation.

107. In that context, I consider that it is important, as Mr. Deegan submitted, to pay regard to the quantum of the claim and its component parts, particularly in a case where (as here) liability was admitted and there would inevitably be some recoverable damage – as evidenced by the Defendant's Part 36 offer itself. That must involve considering the extent to which the dishonesty relied upon had an actual or potential impact on the

quantum of the claims advanced by the claimant, and the significance of that impact. The authorities and indeed s 57 itself show, however, that it is not an automatic answer to a case of fundamental dishonesty that it related to one component part of the claim, and that there were other components which were completely genuine.

108. In the present case, it does not seem to me that the exaggerations alleged had an actual or potential impact on the claims advanced so as to move into the territory of fundamental dishonesty. Put simply, they did not go to the root of the claims whether viewed as a whole or individually.

109. The most significant element of the claim, financially, were the claims for lost earnings, both past and future, relating to the Claimant's inability to work as a stuntman. These claims failed. The loss of these claims was the result of the lack of evidence "to establish a difference between what a stuntman earns and sedentary employment". As the judge correctly said, this was unconnected to the exaggerations: "his lies played no part in this aspect of the case". It was not suggested that this analysis was incorrect.

110. Mr Lyons submitted, however, that it was not sufficient to look at the claim for lost earnings that was actually brought. It was also necessary to consider what claims might have been brought, potentially, but for the existence of the surveillance video. It was suggested, in substance, that additional claims for lost earnings might have been made if the surveillance video had not been produced. For reasons already given in Section E, I consider that fundamental dishonesty should be considered in the context of claims actually brought, rather than claims that might theoretically have been made but were in fact never made.

111. In any event, this argument does not withstand scrutiny on the facts. The Claimant did not seek to tailor his case for damages in the light of the surveillance video. When the original schedule of loss was served, the lost earnings claim was put on the basis that the claimant would have earned sums, initially as a trainee and then greater sums when fully qualified, as a stuntman. That was the case that remained, with higher figures, in the updated schedule of loss. Indeed, the surveillance video had no downward impact on the claim made at all: the claim in fact increased in the updated schedule of loss, which was served some 5 months after the surveillance video was disclosed. The Claimant's case, throughout, was that his injuries were as he had described them: he did not accept that the surveillance video accurately portrayed the true position. This was not, therefore, a case where his evidence changed in material part as a result of that video. Moreover, this was not a case where the Claimant was seeking to argue that the limp, or the other exaggerations referred to by the judge, prevented him from working.

112. A related aspect of the loss of earnings claim was the *Smith v Manchester* award. The judge awarded £ 54,000, which represented three years earnings. This was in fact the largest individual component of the Claimant's successful damages claim. There was no aspect of this claim which was dishonest let alone fundamentally dishonest. The claim was not in fact particularised in the Claimant's original or updated schedules of loss, but was introduced at trial. The claim succeeded in the full amount for which Mr Deegan had argued in his closing argument. In holding that the claim succeeded in full, the judge said that he had taken into account the fact that the Claimant was more mobile than he said in evidence. But it is apparent that this was not a significant point in the context of other evidence which, on the judge's findings, showed that the claimant was handicapped in the labour market on the basis of the "serious injury" which he had

suffered, the number of operations he had had, and the other factors referred to by the judge.

113. Mr Lyons suggested that the *Smith v Manchester* award might have been larger if the judge had accepted the Claimant's evidence as to the full extent of the impact of the injuries. Mr Deegan said that *Smith v Manchester* awards are rarely in excess of the three years that the judge awarded – a proposition with which Mr Lyons disagreed. Without resolving the latter debate, it seems to me that the argument that there might have been a significantly higher *Smith v Manchester* award, if the judge had accepted the Claimant's evidence, is insubstantial and certainly a long way from fundamental dishonesty territory. The reality is that the judge did not accept that evidence, but nevertheless awarded the full amount for which the Claimant had argued. The Claimant's case for a full 3-year award was not reduced from what it might otherwise have been, in the light of the surveillance video. On the contrary, the Claimant's case was that his evidence as to the extent of his injuries should be accepted, notwithstanding the video.

114. A separate and important aspect of the claim was for PSLA. One of the reasons given by the judge for saying that the findings of exaggeration were "not fundamental in this case" was that they "certainly did not result in a reduction in general damages to the level the defendant submitted or indeed anywhere near that level". Contrary to the submissions on behalf of the Defendant, it does seem to me that this is an important matter in the context of the fundamental dishonesty argument. The claim for PSLA was not quantified in the original schedule of loss, but was in due course quantified in the sum of £ 92,000 in the updated schedule of loss. That claim comprised a principal element for the knee injury (£ 80,000), and an element for psychological damage (£ 12,000). In relation to the latter, the judge's award was £ 10,000, and was thus very close to the figure claimed. The judge's award of £ 50,000 rather than £ 80,000 for the knee injury element did represent a reduction. It was not, however, a reduction which can be said to indicate that there was gross exaggeration of the PSLA element of the claim or dishonesty which went to the heart of the claim. On the contrary, the amount awarded showed that the judge considered that the injury fell into the category of a severe leg injury, and within that category was to be regarded as "serious". It is unfortunate that the judge seems to have mistakenly referred to the Judicial College guidelines for leg injuries rather than knee injuries. However, if the amount awarded is to be taken as the reference point, the applicable categorisation for knee injuries would again be "severe", covering "leg fracture extending into the knee joint causing pain which is constant, permanent, limiting movement or impairing agility, and rendering the injured person prone to osteoarthritis and at risk of arthroplasty".

115. I accept that it is possible that the award might possibly have been higher if the judge had accepted the Claimant's case in full. But I was not persuaded that it would have been significantly higher. The judge's decision was based upon various factors: that this was a "nasty" knee injury (and it had involved a large number of operations); the claimant was previously very fit and agile, but was now restricted; he had ongoing pain, with no doubt that he had pain at the end of a long day; that he was unable to return to his previous physical activities, including his great hobby of parkour; and that he would, on the balance of probabilities get osteoarthritis and require a knee replacement. All of those factors drove an award which was (taken together with the psychological injury) some 5 times as high as that for which the Defendant argued. The fact that it was,

possibly, somewhat reduced from what it might have been in the Claimant's case had been accepted in full, does not seem to me to bring this case within "fundamental dishonesty" territory.

116. Conversely, I can see that if the judge had accepted the Defendant's case that the injury was only worth £ 12,000, then the case for fundamental dishonesty might have been stronger; because on that hypothesis the Claimant would have been pretending to have a severe injury when in fact there was nothing too much wrong. But those are not the facts of the present case.

117. It also seems to me that this was really the point which was made by the judge in paragraphs 9 and 10 of his 8 October 2020 judgment on costs. The judge there said:

> "9. So what was the reality of this case? The reality of this case is that the claimant was faced with a submission that his claim should be dismissed because he had been fundamentally dishonest. If that submission had succeeded the claim would have been dismissed, I would have been assessing damages on the basis of a very minor, relative to the claim, injury and many of the heads of loss which I found in my judgment would have equally been dismissed.
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> 10. I did not have to do this exercise but, broadly, there would have been a finding for the claimant perhaps in the sum of £20,000 or so. That would have been offset against, no doubt, an order for costs against the claimant. So the claimant's claim would have been dismissed, he would have had a costs order against him subject to a deduction for my assessment of what the true worth of his claim was. The claimant would then possibly have faced a criminal sanction arising from findings of dishonesty and fundamental dishonesty. That was the case that the claimant faced, instead of which I have awarded him substantial damages of over £100,000"

118. Mr Lyons submitted that this paragraph showed that the judge did not really understand the nature of a case under section 57; because he seems to have thought that he would have been assessing damages on the basis of a very minor injury in the context of section 57, when in fact he would have been required to make findings on all aspects of the injury and these would not be reduced by reason of the section 57 argument. In my view, however, the judge did not misunderstand section 57. His point in these paragraphs was essentially that if the claim had been fundamentally dishonest, that would likely have been a consequence of the fact that there was nothing much wrong with the Claimant (as the Defendant contended), with the consequence that he only recovered damages in a relatively small amount. In contrast, on the basis of the judge's findings, the claim was substantially successful, notwithstanding the element of exaggeration that the judge considered to exist.

119. As indicated above, Mr. Lyons made a point on appeal, which he had not made to the judge, concerning the claim for the automatic car. This was, in context, a comparatively small claim of £ 15,000 which in the event was not pursued. The claim was introduced into the Claimant's claim after the surveillance video had been disclosed, showing again

that this is not a case where a Claimant has tailored his case in the light of surveillance evidence.

120. I do not consider that it has been shown that this claim was causally related to the exaggerations relied upon by the Defendant. It was put forward on the basis that the weakness in the Claimant's knee meant that he needed to drive an automatic car. That does not seem to me to have anything much to do with limping or the other exaggerations relied upon. Indeed, the judge accepted that the Claimant did indeed have weakness in his knee, and this seems to me to be indisputable on the evidence. The reason that the claim was not pursued was that the experts considered that, despite the Claimant's knee problems, he could nevertheless drive a manual car. There was no evidence that either expert would, or might, have taken a different view if the Claimant's evidence as to limping and his other difficulties were accepted. This was not a point which appears to have been explored in the evidence, and it seems to me that the Defendant did not lay the groundwork for the argument about the automatic car. In any event, the argument about the automatic car seems to me to be a very long way from a case of fundamental dishonesty, whether taken on its own or in conjunction with the other matters on which the Defendant relies.

121. I reach the similar conclusions in relation to the care costs, past and future, claimed by the Claimant. The claim for past care costs was put on a "broad brush" estimate of 1 hour a day. The case failed because, in the judge's view, the evidence as to care provided by the Claimant's brother lacked detail. In addition, the experts did not support the level of care for which the Claimant argued. The judge did accept, however, that some 133 hours of care should be awarded, reflecting the fact that care had indeed been provided in the past.

122. Accordingly, the position is that the Claimant had indeed required care in the past, but his "broad brush" estimate – of a relatively low level of care at one hour a day – was not accepted in the light of all the evidence. It does not seem to me that this can sensibly be said to be a case where dishonesty went to the root of the Claimant's case. Furthermore, I do not consider that it has been shown that the claim for care costs was materially linked to the areas where the judge considered that there had been exaggerations. The latter principally concerned the way in which the Claimant would move about on a day-to-day basis, rather than anything to do with care provided by his family. There was also no evidence that the experts would, or might, have taken a different view if they had accepted the Claimant's account of his injuries in full.

123. The same applies to the future care costs. This claim was introduced in the updated schedule of loss. It was in fact based upon the conclusions in the joint report of the orthopaedic experts, as to the need for a level of future care in relation to heavy housework and gardening or other activities which involved kneeling and squatting. That conclusion was reached after the experts had seen the surveillance video, and the Claimant then sought to rely upon the joint agreement in relation to this aspect of his claim.

124. I again cannot see that this could be regarded as a case of fundamental dishonesty. The claim has not been shown to be related to the exaggerations relied upon by the Defendant. In any event, the experts had agreed upon the need for the relevant care and assistance, and the Claimant had advanced a case based upon that evidence. The substantial reduction, in the judge's award, from the 3 hours per week claimed, was not

a consequence of the failure of the Claimant's case in relation to the areas where there had been exaggeration. Rather, it was because the experts, when asked further specific questions as to the level of care, did not consider as much as 3 hours per week would be required, although it was agreed that some care would be required.

125. The position overall is that although the judge's reasoning was brief, his judgment was ultimately sound in that, as he said, this was not a case of fundamental dishonesty.

F: Costs

126. The Defendant contends that the judge failed properly to address the question of whether it was unjust for the Defendant to be required to pay the Claimant's costs on an indemnity basis, having not responded to the Claimant's Part 36 offer. The Defendant relies upon CPR 36.17 which provides that the consequences there set out apply unless the court "considers it unjust to do so". The argument was based upon the judge's failure to deal with the Defendant's argument that indemnity costs should not be awarded in the light of the Claimant's exaggeration of his case and the lies that, on the judge's findings, had been told.

127. The judge's approved judgment in relation to costs runs to some 22 paragraphs. He dealt first with the question of costs prior to the Part 36 offer. In that context, and by reference to the terms of CPR 44.2, he considered the argument that the Claimant had exaggerated his case. Paragraphs 9 and 10 of his later judgment, which are quoted above, appear in that context. The judge rejected the argument, essentially because the claim had succeeded in a substantial sum, the arguments as to fundamental dishonesty had failed, and there was nothing in the Claimant's conduct which warranted the disapplication of the usual order that the successful party should be awarded his costs. There is no appeal in respect of that part of his decision.

128. In the context of Part 36, the judge referred (in paragraph [14]) to the submission of the Defendant that he should again reconsider the issue of conduct, "namely the exaggeration and the lies that I have found". Although Mr Lyons argued that the judge did not in fact do so, it seems to me that he did address the argument in paragraphs [17] and [18] of his judgment as follows:

> "17. I go back to the real issue in this case and that is, and I remind myself that I have got to take into account all the circumstances of the case and I have spelt out what the circumstances of the case are when I considered the issue in relation to costs generally and, in my judgment, those circumstances do not change between Part 44 and Part 36, they are the same. That is that this claimant faced a massive sanction if the real issue that the defendant wished to raise, that is of fundamental dishonesty, was found against him and, in my judgment, those are circumstances which must take into account in relation to the offer, the Part 36 offer.
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> 18. So, in my judgment, it is not a case of me having to decide whether the Part 36 offer bites or not, it is a matter for me to consider whether it is unjust to make the orders referred to because of factors like whether the *Smith v Manchester*

> information was available to the defendant at the time but that is subsumed in the consideration of all the circumstances and, as I say, the reality of this case is that that was the defendant's case, that they submitted that the claimant had been fundamentally dishonest, they submitted that on the back of that the claim should be dismissed and I have no doubt that if it had been so dismissed there would be submissions that the defendant was entitled to their costs because of that fundamental dishonesty, even possibly on the indemnity basis but I do not know about that, I am not making that as part of my reasoning but that, as I say, leads me to the consideration of all the circumstances and in those circumstances, in my judgment, the costs consequences of the Part 36 offer apply and the claimant is going to be entitled to the interest and the costs consequences that flow as set out in Part 36. I will turn to interest and then I will hear submissions on what the discretionary elements of interests should be – in other words, what the interest rate in relation to the discretionary elements should be."

129. I see nothing wrong with the judge's approach or decision. This was a discretionary decision for the judge to make, taking into account all the circumstances of the case. The judge decided to apply the usual costs consequences of a failure to beat an unaccepted Part 36 Claimant's offer. He did not consider it unjust to do so, and I can fully understand his decision, which was well within the ambit of his discretion. After all, the Claimant had made a reasonable Part 36 offer, had established his case at trial, and had defeated the "fundamental dishonesty" argument. I see no basis for overturning the judge's decision.

130. Accordingly, the appeal is dismissed.