Case No: F78YX213

IN THE CARDIFF COUNTY COURT

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 21 March 2023

Before:

His Honour Judge Harrison

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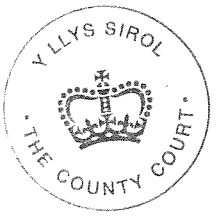

Between:

Claire Thomas	**Claimant**
- and -	
Alan Owen T/A Alan's Tyre Shop	**Defendant**

- -

Fergus Currie (instructed by **Harding Evans Solicitors**) for the **Claimant**
Charlotte Reynolds (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 5 – 11 January 2023

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APPROVED JUDGMENT

His Honour Judge Harrison:

Introduction

1. On the 22nd July 2016 the Claimant was driving her Vauxhall Astra motor vehicle RE60 VKG along the A465 Heads of the Valleys Road from Merthyr Tydfil in the direction of Aberdare.

2. At a point in the road near to the Hirwaun turning she encountered stationary traffic and brought her vehicle to a standstill. Whilst she was stationary a Volkswagen van which was being driven by Mr Alan Owen in the course of his employment with the Defendant and which was travelling in the same direction failed to stop and drove into collision with the rear of the Claimant's vehicle.

3. Liability for the accident is not in dispute. Negligence is admitted. The damage to the Claimant's vehicle was relatively significant and it was considered an insurance write off.

4. The Claimant issued proceedings on the 15th July 2019. The particulars of injury contend that the Claimant who was born on the 7th October 1983 and who is therefore now 39 years old sustained injury as follows:

> "*Soft tissue damage to her neck, head shoulders and back and a concussion injury. In addition she has developed a secondary fibromyalgia syndrome with hemiplegic migraine.*
>
> *She is also said to have suffered psychological consequences of the accident including flashbacks travel anxiety and low mood.*"

In support of her claim the Claimant annexed medical reports from a consultant orthopaedic surgeon Mr Kumar and a consultant neurologist Dr Joseph.

The most recent iteration of the schedule of special damage setting out the claim is dated 24 March 2022 and appears at Core Bundle (CB) page 35. In that document the Claimant seeks significant damages including:

Past loss of earnings from the date of the accident to the date of the schedule of some £124,444.86

Past care and assistance of £16,425.96

Future loss of earnings on a Blamire or Smith v Manchester Corporation using about 2.5 years purchase on pre injury salary amounting to £60,900

Future Care and Assistance for a similar period for about 8 hours per week producing some £8711.04.

5. The basis of the Claimant's claim as reflected in the schedule has been ongoing significant symptomatology such as to disable her in terms of mobility, pain and all aspects of daily living albeit on a variable basis of good days and bad.

6. What makes the Claimant's claim unusual is that despite extensive investigation from various disciplines namely orthopaedic, neurology, pain medicine, neuropsychology and psychiatry, no expert has been able to identify an organic cause for the symptoms complained of. In other words, save for an initial period of months after the accident, no expert has suggested a physical cause for disability.

7. In the absence of a physical cause for the ongoing disability the Claimant advances her case primarily on the basis of the psychiatric evidence. In that regard the Claimant contends the trauma of the accident has been such as to

aggravate a pre-existing Somatic Symptom Disorder (SSD) characterised by some history of complaint of symptoms with no physical explanation. Dr Stephen Davies, the Claimant's expert in psychiatry, put forward his opinion in the joint memoranda he prepared with the Defendant's expert as follows at CB 1083.

> *"Dr Davies updated view based on available information is that if the claimant's account of her symptoms is reliable that Somatoform Disorder is the most likely explanation. But he says that the clinical presentation could also be consistent with Factitious Disorder"*

8. To summarise, whereas a SSD involves involuntary reporting of symptoms that have no organic explanation, a Factitious Disorder involves a conscious overreporting of symptoms. A Factitious Disorder differs only from frank malingering only in so far as the motive for being misleading is unclear.

9. In many ways the paragraph from Dr Davies set out above encapsulates this case. The Defendants say that on any proper analysis of the evidence the Claimant cannot be considered a reliable witness. They contend that the Claimant has not been frank in her reporting of symptoms either to the Department of Work and Pensions (DWP) for the purpose of claiming benefits or to the experts on both sides of the claim. Rather they argue that the evidence available points to a conscious misrepresentation of symptoms (malingering or factitious disorder) and therefore should lead the Court to conclude that the Claimant has been fundamentally dishonest. The basis of this submission is a comparison between how the Claimant has presented herself (to the DWP and experts) and what can be gleaned from social media posts and video surveillance. The Defendants argue that the difference is so stark that a finding that the Claimant has been dishonest is inevitable.

The relevant law

10. There is no dispute as to the applicable law. The burden of proof remains upon the Claimant to establish the consequences of the admitted breach of duty on behalf of the insured driver on the balance of probabilities.

In so far as the Defendants seek to raise fundamental dishonesty then the burden of establishing the same passes to them, again to the standard of the balance of probabilities.

11. Section 57 of the Act provides as follows:

57 Personal injury claims: cases of fundamental dishonesty

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

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

(b) on an application by the defendant for 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.

12. The definition of fundamental dishonesty was considered in LOCOG v Sinfield (2018) EWHC 51:

Per Knowles J at 62 and 63

"In my judgement, a claimant should be found to be fundamentally dishonest within the meaning of 57(1)(b) if the defendant proves on the balance of probabilities that the Claimant has acted dishonestly in relation to the primary claim and/or a related claim (as defined in s57(8)), and that he has thus substantially affected 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……"

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.

13. 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)* (2017) 3 WLR 1212. The common law test can be summarised thus. Whilst dishonesty is a subjective state of mind, the standard by which the law determines whether the state of mind is dishonest is objective. In other words if by ordinary standards the Claimant's mental state is dishonest then that is sufficient.

14. Lord Hughes JSC put it as follows:

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

15. In the context of this case the application of those principles means that in essence the Court is concerned with what the Claimant can establish that she suffers from as a result of the accident (e.g. an aggravation of a somatic symptom disorder (SSD). It is also concerned as to whether the Defendant can

establish to the civil standard that the Claimant has a factitious disorder or is malingering. If the Claimant can establish an aggravation of SSD then she can receive damages based upon her perceived disability even if it is organically inexplicable. If the Defendant establishes a factitious disorder then s 57 applies and the claim must be dismissed. It is agreed by the medical experts in this case that a factitious disorder (or malingering) does not exculpate dishonesty. As a disorder it involves consciously misleading or exaggerating.

Analysis

16. In order to consider the issues raised by the defence it is perhaps helpful to set out the evidence by way of a relevant chronology. To do this it is necessary where possible to cross reference the contents of benefits documentation, social media, medical evidence, witness evidence and surveillance (video) evidence. In considering the social media posts it is relevant to note that these were not in general readily accessible to the public and access was given following an application to the Court.

17. The Claimant's accident occurred on the 22nd July 2016. She had recently left employment in London and was moving back to South Wales where her family were based. She had trained as a lawyer and had worked as both a judge's and barristers' clerk. The medical evidence describes symptoms in the months after the accident. Those symptoms persisted.

18. As a consequence of her ongoing complaints of disability the Claimant sought benefits. In July 2017 a client interview is recorded with the Department of Work and Pensions. It appears at Trial Bundle Vol 4 pg 79. The Claimant described suffering from fibromyalgia, dizziness, hemiplegic migraine and

anxiety. The interview recorded a description of functional ability which included the following:

"uses a crutch when she is outdoors"

In evidence the Claimant says that this should have read "used".

"will go to the supermarket and this is normally with someone. Will walk around the supermarket and will use the trolley to support her"

"she will go across the shop by herself (this is across the road from her home). *There is nowhere else she would go by herself. She says that the main problem is that she cannot get there as she is still nervous of public transport and she says that she cannot walk great distances, this is not due to her mental health."*

19. According to social media in September 2017 she attended a wedding in London. Vol 2 pg 422. At page 424 there is a picture posted of the Claimant dancing. It has the caption *"this may explain the unbelievable amount of pain I'm in today"* followed by the 🤕😁 emojis.

20. By the early part of 2018 the Defendants had placed the Claimant under surveillance. She had also been signposted by her doctors to community exercise classes. In January 2018 she is captured walking to and from the class apparently normally. The distance covered was some 1km each way.

21. On the 22nd February 2018 surveillance evidence showed the Claimant to be looking after her young nephew. The footage shows a short section where the Claimant broke into a short jog, albeit in evidence she explained that her nephew was bursting to visit the lavatory and perhaps little weight should attach to the same. Later on that day she takes her nephew to the local park. She negotiates a set of stairs without using the handrail. She then plays with him in the park lifting him in and out of a swing and seeming to push him on the same whilst

bending down and seemingly without restriction. In oral evidence Ms Thomas said that she was in pain but wanted to spend time with her nephew. She said it was her choice to do that and suffer afterwards but it did not mean that she had lied about her pain.

22. On the following day, namely the 23rd February 2018, surveillance showed the Claimant to be looking after her nephew again. No visit to the park was demonstrated but the Claimant did go out to her local Tesco's. In evidence the Claimant contended that it was not normal for her to look after the child 2 days in a row and that she did not do anything energetic with him. When further challenged she said her symptoms were not black and white and clear cut. She said it was difficult to explain chronic illness and that "no one gets it".

23. On the 26th February 2018 surveillance again showed her walking the 1km to and from her exercise class. She stopped off at Tesco on the way home to do a little shopping. In evidence the Claimant said that she spent the rest of the day sleeping.

24. In March 2018 the Claimant seems to have gone on a trip to Copenhagen and in April 2018 social media reveals that she went to a family reunion in Preston. Vol 2 pg 457.

25. In June 2018 the Claimant had a further interview with the Department of Work and Pensions Vol 4 page 696. The assessment recorded a limited capacity to work and contains the following:

"*She has fibromyalgia which causes generalised body pains and fatigue, and is affected by emiplegic (sic) migraines a few times a week which causes paralysis down one side of her body. Both of these conditions affect her mobility, and she has seen specialists regarding these. She is waiting to see the pain team again*

and is undergoing GP exercise schemes, but does find these difficult due to fatigue and pain and stops frequently. She has tried pain relief but is allergic to strong forms and finds no benefit from weaker forms, despite pain team input. Her function is variable as a result, with her having roughly half good and half bad days a week. On good days she can manage her stairs, shower and dress, and can walk 2 minutes to go shopping and then lean on a trolley for a short while to get items. However, she has a nap in the afternoon due to fatigue. She may go to her exercise class on a good day however she will then be in pain for the following day and not be able to do much at all. On bad days she will barely be able to get around the house due to her pain, fatigue and paralysis on the one side of her body.

Observations and examination findings were consistent, in that she walked 20 metres with a slow and abnormal gait and appeared fatigued.

Her history describes on good days she can sit for under an hour before having to get up and move around due to the pain, and on bad days she will spend most of her time in bed and barely be able to sit at all. Due to the frequency of her bad days and the significantly reduced mobility on these, the effect of fatigue even on good days, and my clinical knowledge of her conditions, it is unlikely that she would be able to reliably or repeatedly mobilise more than 100 metres- as her migraines and her fibromyalgia fatigue effects will not necessarily fall on the same days. Due to upper limb problems and fatigue, it is unlikely that she would be able to self-propel a wheelchair in order to improve her mobility."

26. In August 2018 the Claimant appears to have gone on a trip to Scotland by car.

27. In October 2018 the Claimant went to Switzerland for her 35th birthday Vol 2 468-470. One post reads:

"*Life is just one big adventure: following one of my attacks this morning I'm a little out of sorts and a tad disoriented so I've just spent a good while on a train going in the wrong direction across Switzerland*  *....its a good job its such a beautiful place* ♡

28. Further video surveillance of the Claimant captured her on the 1st February 2019. It was the day of her Welsh Language exam. The exam had a morning and an afternoon component and at one point the Claimant is shown going up snow covered stairs without using the handrail. In oral evidence the Claimant described this as being a good day and that she did not use the handrail because she did not want to get snow or ice on her hand.

29. In February 2019 the Claimant went to Italy with her niece. The trip involved travelling to Venice and then on to Rome for the Six Nations match between Italy and Wales. In a social media post dated 9th February 2019 Vol 2 490 she said:

"The amount of pain I'm in now is indescribable...but I had a wonderful weekend celebrating my beautiful niece and making some great memories with her 😂."

30. Later in February 2019 the Claimant watched the Wales v England Six Nations match at the O'Neills public house in Cardiff.

31. In June 2019 the Claimant attended a Pink concert at the Principality Stadium.

32. Proceedings were issued on the 15th July 2019.

33. In August 2019 she worked at the Leeds Music Festival with her friend Laura Sutton. She described how she had to arrange different accommodation to camping but in general terms the evidence before the Court from Laura Sutton was that the Claimant managed getting around the event.

34. On the 12th August 2019 the Claimant was examined for the purpose of this litigation by her expert in psychiatry, Dr Davies. As part of his assessment Dr Davies administered the PHQ-9 rating scale for recent symptoms, the Claimant scored 22/27 representing a persistent lack of capacity for enjoyment CB 514. He also recorded anxiety about driving and an apparent assertion that she had not driven further than Swindon. As regards activities of daily living she said:

"On a bad day she will not dress and wash. Usually she keeps batch cooked meals, though on a very bad day her mother will bring food. She does not like to ask for help, and some people, e.g. her sister and brother, have refused so she has stopped speaking to them as a result. However, on a good day she will get up at 8 and do some exercise at a class, though usually will not manage all

of the exercises. She might put the washing on, do some reading or shop at a local Tesco before cooking tea."

35. In February 2020 the Claimant went to a pub in Cardiff to watch the Six Nations match between Wales v Ireland.

36. On the 21st May 2020 the Claimant attended upon the Defendant's expert in psychiatry Dr Neal by video conference. CB 786. At CB 792 he noted:

"*She told me since the accident she has fallen out with her sister and brother because they find it difficult to understand how she has become so disabled by the accident and this has caused her some stress."*

37. At CB 801 she told Dr Neal that her sister had accused her of "*faking her symptoms*" and at CB 802:

"....prior to the COVID lockdown she would go to friends' houses and see them. She would go to a quiet restaurant or a pub to see a friend. She told me she prefers to avoid noisy places as she cannot cope with the noise.

She told me she had been able to go to a music festival, but she had to have special arrangements to attend. She had to spend a long time in the accommodation, they had booked, resting. She had to wear ear defenders. She had to have someone with her all the time. She had to stay in a place to watch the festival away from all the crowds."

38. On the 28th and 29th May 2020 the Claimant's "Strava" exercise app showed her undertaking a 1.89 and 1.43 mile walk on each day to her local "Thomastown Park". The walks took 40 minutes and 31 minutes respectively. These do not seem to be particularly slow walks.

39. On 16th June 2020 she was again assessed by the DWP in relation to Employment and Support Allowance Vol 4 pg213. Her description of a typical day is recorded at pg 216 to include the following:

"*On a good day she can go up and down the stairs slowly, but most days she will stay downstairs for the whole day as she is too fatigued to use the stairs. Uses two handrails on the stairs. Has a downstairs bathroom. Spends most of*

her time at home reading or watching TV but has to change position frequently due to muscle pain and stiffness.

May try to go for a short walk on a good day, about once a week, around her local area. Finds she usually has to stop and rest due to fatigue and pain after walking for about 2 minutes. Walks at a slow pace. On a bad day, about 5 days a week she is unable to leave the house due to pain and fatigue.

Friend was taking her to exercise class last once a week before lockdown. Would only be able to go on a good day and would sit in a chair doing light exercises but was unable to finish the whole class due to fatigue so would only do part of it. After doing exercise class, she would go home and lie down or sit at home for the rest of the day due to increased fatigue."

40. Under ***Description of Functional Ability*** it is noted as follows:

"*Will go shopping on a good day, maybe once a week, and will buy a small amount (1 light bag). Walks to Tesco which takes about 5 minutes at a slow pace with one stop due to fatigue and breathlessness. Has never had any breathing problems but finds breathlessness is caused by fatigue. Usually has to stop and rest every 1-2 aisles when walking around supermarket on a good day."*

41. On the 7th July 2020 the Claimant saw the Defendant's expert in Pain Management, Dr Neal Edwards CB 954. At paragraph 2.03 he sets out the Claimant's description to him of her function. He records:

*"**walking***

Maximum of 100yds on a good day then she would have to stop for a few minutes before starting again.

Hobbies and social activities.

Prior to the index accident

She enjoyed running, socialising, travel, parties, going to music festivals. She was very socially active.

Since the accident

She has become socially isolated and is unable to undertake the activities that she did.

42. On the 15th July 2020 the Claimant went to see the Defendant's orthopaedic expert, Mr Atkins CB 720. His report contains the following history:

43. *Walking: Miss Thomas is able to walk. She will need to take frequent breaks. For example, she will often walk to the park, which is one street over from her house. In order to do this, she will take her first break at the end of her road, which is approximately 100 yds. She might be able to walk a little further than this but has found that if she forces herself to walk further, her pain is made much worse and she will end up in bed for a week. She therefore avoids walking further than this. She now walks slowly. Prior to the accident she was unlimited in walking.*

Outside steps: Miss Thomas is able to negotiate outside steps but only on a good day. There are steps going down to her house so on a bad day she is unable to leave her house. She will use a rail if one is available. There is no rail on the steps leading down to her house so even on a good day she has to use the wall to assist her to negotiate them.

Standing: Even on a good day, this is limited to 10-15 minutes before she has to sit down. On a bad day she is unable to stand unaided at all.

44. On the same day as this consultation the Claimant was again the subject of surveillance. She is seen walking apparently normally but slowly with friends. She attends an outdoor café at which she uses a flight of stairs without using the handrail.

45. The Claimant's first statement in these proceedings is dated 16th July 2020. It is a long and detailed document and appears at CB 73. In cross examination it was put to the Claimant that it was a generally negative document and in my view that is a fair description. By way of extract it contains the following:

50. A good day for me would now include attending an exercise referral class or taking a short walk in my local park, seeing a friend for coffee, carrying out some work (over the span of a couple of hours), and cooking dinner and relaxing for an hour or two in front of the tv before bed. However, on a bad day I would be restricted with movement, in severe pain and unlikely to move much further than my bed or sofa. A bad day would be as a result of something arising from one of my triggers, which I now mention below."

51……..Physical movement: where the more I do the worse I seem to suffer. So if for example I was to walk 10k today something I was easily capable of before the accident, then my pain would increase, my movement would become restricted, it would bring on a migraine and potentially any of the symptoms listed above that I have experienced during an attack, as that distance is far beyond my capability now.

56. As a result of the COVID-19 pandemic, I found that at the beginning of lockdown, my body reacted well to the slower pace so I was getting fewer attack and less pain but my previous routine was lost and my body slowly adjusted to doing less. Therefore each time the restrictions were lifted, and I have tried to do more, such as, going for a walk, or then to the shop in the same day, I've been suffering more as I'm no longer used to doing that level of activity. I feel I have gone backwards in my progress as a result of lockdown.

61. Living with a chronic illness is kind of like constantly living in lockdown. I have already missed events, friend's weddings, parties or just going out due to my chronic illness. However, I do what I can and try to adapt and live the best and fullest life I can. Finding the right balance, whilst living a life you enjoy is very difficult when you have a chronic illness. Since the date of the accident I have not experienced a pain free day at all."

46. On the 27th July 2020 the Claimant posted on social media a post that demonstrated that on the 26th July 2020 she had undertaken and completed what became identified as "The Four Waterfalls Walk" in the Brecon Beacons National Park. It appears at Vol 2 pg 575 and was disclosed following an application in April 2021. At Vol 2 575 it reads:

"Today I pay the price. But yesterday was worth it. Walking behind the waterfalls."

At CB 207 there is a full "blog" related to the post. It describes in some detail having to have a rest day on the day following the walk.

47. It is fair to say that the "Four Waterfalls Walk" is an important part of the Defendant's case and one in respect of which the Claimant was cross examined closely. It also plays an important part in the medical evidence available to the Court. The walk itself is illustrated in a series of photographs that appear at various sections of the trial bundles including CB 202 – 205 and Vol 2 575 itself. The nature of the walk is best gleaned from maps that appear at Vol 6b pages 97 and 98. The maps are copies of maps that appear at two points on the walk. Page 98 was displayed at the start of the walk undertaken by the Claimant namely Gwaun Hepste. The map shows an out, circuit and then return red route.

It is common ground that this was the route decided upon by the Claimant, her friend Laura Sutton and Laura's partner, Chris. The route is described on the face of the map thus:

Hard

Distance **5.5miles/9km**

Time **3-4 hours**

48. Leading from the red route there are a number of green routes which can take a walker, should they desire, down close to the 4 waterfalls that give the walk its name. About ½ way along the red route is one of the optional green routes that lead down to the Sgwd y Eira falls. The map situated at the start of this pathway reads:

Strenuous

Steps **170**

Length **984 ft/300m (each way)**

Time **8 mins down + 15 mins back**

Height up and down **330ft/100m**

49. It also contained the following description of the route:

"**Trail Surface**

120 steps on a steep, zig zag path to the waterfall. Very rough section of path (walking over and around large stones) from the bottom of the steps to the waterfall. Flooding after high rainfall. The path behind the waterfall is rough, slippery and has a low roofed section (mind your head)."

50. The Claimant accepts, as her posted photographs revealed, that she elected to take on the optional strenuous detour and to navigate across the very rough section to the slippery path behind the waterfall.

51. The Claimant did not take any other detour but completed the rest of the walk back to the car park. She says it was hard work, she walked slowly and rested when she needed. Laura Sutton in her oral evidence said that she hadn't looked at the nature of the walk before she went out that day but she assumed that Claire and Chris would have done so. She said that she would have wanted Claire to be happy with the walk. She said that she knew that Claire could not walk as far as herself but that her knowledge of Claire from the Leeds Festival made her feel that this walk was something that she could manage.

52. The Claimant saw her own pain expert Dr Mark Miller on the 4th August 2020. As it transpires and with the consent of the Claimant the examination was recorded. His report noted complaints extracted from paragraphs 2.2 to 2.4 at CB 660 as follows:

"The claimant informed me that she has developed widespread pain affecting her whole body. The only area that does not hurt is across the front of her abdomen and chest wall or thorax...."
"....It has become worse with the passage of time. She describes good days and bad days. She tries to remain positive.
"The claimant informed me that restricts but does not stop her from doing "everything", specifically she mentioned work social activities, going on holiday and it affects her sleep."

53. Dr Miller told me that he was surprised by her presentation on examination. At paragraphs 3.3 and 3.4 of his report he noted some inconsistent complaints of pain and in oral evidence he identified positive Waddell's test results shown on the video. (Waddell's tests on examination are intended to identify inappropriate complaints of symptoms. An example would be axial compression of the spine. Such compression should not result in pain, if a complaint is made then this is an inappropriate complaint).

54. On the 25th November 2020 the Claimant completed a Personal Independence Payment (PIP) review, the document is signed on Vol 4 page 155. At Vol 4 page 165 she states:

"As my conditions fluctuate so much day to day, the amount I can walk varies a lot. On a bad day I will not be able to walk properly from my sofa to the toilet without holding on to the surfaces along the way for support. On a good day I may be able to go for a walk in the local park but will need to take breaks but afterwards I will be so worn out + in pain I will likely end up in bed. This is something I struggle with a lot."

55. During COVID face to face assessments for PIP were suspended and a telephone assessment was arranged for the 17th March 2021 (Vol 4 Pg 30). The assessment records:

"She does try to go for a short walk once a week and she will drive to the local park because it is flat. She will complete a 10 minute walk at a slow pace but doesn't use any aids or require any rests. This activity does not affect any other activities for the rest of that day."

56. As a result of the assessment the Claimant's PIP was stopped from 13th April 2021 Vol 4 page 221. The Claimant sought a mandatory review of the decision and she filed a detailed signed statement dated 4 May 2021 Vol 4 227. Under "Moving Around" she stated:

57. *"There are a lot of other assumptions about walking and how far. The claimant clearly indicated this is something that varied every day. The claimant has stated she has to take breaks while walking on the few days she can walk. She also has a history of falls, and even on good days she will walk short distances and will do so at a slow pace. Thereafter even on her good days, it cannot be done repeatedly, safely or in a reasonable manner. The claimant did advise the assessment officer that she has had to attend A and E because of falls and she limits using stairs due to the risk of falls and the pain involved."*

58. The review was successful and the assessor awarded standard PIP payments to recommence. The decision maker concluded as follows at Vol 4 253:

"we therefore have taken all the evidence into account and accept that on occasional days you cannot walk far but on the majority of days you are able to stand and move more than 20 metres but less than 50 metres unaided."

59. On the 19th May 2021 the Claimant saw Dr Davies again. He records her telling him that save for a trip to Ammanford and travelling back from the Leeds Festival as a passenger she had not travelled far by car.

60. Following the disclosure of surveillance evidence the Defendants made an application in April 2021 for disclosure of social media posts. The matter came before District Judge Vernon on the 26th May 2021 and he vacated a trial listed for 27th September to 1st October 2021 and ordered disclosure of social media posts with a privacy setting. He permitted the Claimant to serve an up to date statement dealing with surveillance and social media.

61. On the 24th June 2021 the Claimant signed her supplemental statement (CB 116) dealing with social media. It did not specifically deal with the Four Waterfalls Walk. On the 24th November 2022 she filed a second supplementary witness statement dealing with this walk (CB 191). The essence of the statement was to the effect that she had not appreciated the extent of the walk before she started, that this was a good day, that she took plenty of breaks and that she paid for it afterwards.

The medical evidence

62. Despite there being 5 pairs of expert witnesses in this case, analysis of the evidence can be taken relatively shortly. That is because there was a large measure of agreement between the respective experts. It is also a consequence of the particular feature of this case namely that no organic explanation for symptoms can be put forward. It is therefore agreed that the Claimant's alleged

disability can only be explained by psychiatric evidence if at all. Of course if it is so explained then it is equally as real and worthy of compensation as any other injury causing disability.

Orthopaedic evidence

63. The orthopaedic experts Mr Kumar and Professor Atkins provided a joint memoranda at page 1057. They agreed that there was no orthopaedic reason why the Claimant should be limited in walking mobility. Their assessment of the surveillance evidence was that it provided no evidence of disability and as such was inconsistent with the level of disability stated by the Claimant. The experts agreed that as a consequence of the accident the Claimant suffered soft tissue injury to the cervical spine and to the shoulder and this would have been likely to produce symptoms for a matter of months. These experts were not called to give evidence.

Neurology

64. The neurologists, Dr Joseph (Claimant) and Dr Clarke (Defendant), agree that there is no neurological reason for any ongoing symptoms. Dr Joseph was prepared to accept that the Claimant suffered a minor head injury but that symptoms should have resolved by 3 months or so. He thought that a combination of symptoms might have lasted for about 6 months. At paragraph 20.38 of his report dated 22 November 2021 (CB 501) he said:

> *"the video evidence for times where she is seen to be active or out of her home therefore does appear to present a mismatch between her accounts of the "disabilities" and abilities. Having reviewed these videos, I find no evidence to support any physical disabilities or limitations on her life based on the video evidence."*

He did acknowledge the complaint of variable symptoms and that advice to people in the Claimant's position would be to try to get out and do things.

65. Dr Clarke was more damning. He recognised that it was ultimately a matter for the Court to assess reliability but at CB 784 he expressed the view that having seen the surveillance evidence he considered the complaints made by the Claimant to be misleading.

Neuropsychology

66. Dr Ryan Morgan (Claimant) and Professor Powell (Defendant) produced a joint report dated 3 February 2022 CB 1087. In addition to their reports prepared for the purposes of the litigation they gave oral evidence. It was apparent that they were limited in what it could say and they readily deferred to the psychiatric evidence. In essence Dr Tracey Ryan Morgan accepted that her role had been to administer the usual battery of tests in order to establish whether there was any cognitive deficit consequent upon head injury. She found that there was none. She thought there was a discrepancy between the Claimant's presentation to her and what could be gleaned objectively, namely the complaint that it hurt when she concentrated.

67. The agreed position of the neuropsychologists can be summarised as follows:

> "*we agree that Miss Thomas did not sustain a traumatic brain injury in the accident on 22.7.16, has not sustained any cognitive impairment, and that from a neuropsychological perspective there is no cognitive reason why she should not return to full time work of the type she did prior to the accident.*"

68. Whilst each expert does go on to express a view about how it comes about that there is such a discrepancy between reported symptoms and the nature of the original injury, it is fair to say that each defer to the experts in psychiatry.

Pain experts

69. Dr Miller provided evidence on behalf of the Claimant and Dr Edwards on behalf of the Defendant in the field of pain medicine. It would again be fair to say that they each deferred to psychiatry in terms of the diagnosis of a SSD.

70. I have already highlighted the discrepancies on examination noted by Dr Miller. In oral evidence Dr Miller went on to say that in his experience of SSD "anything goes" but without a psychiatric explanation then his view of the surveillance and social media posts was "beyond surprise".

71. Once again Dr Edwards for the Defendant was more blunt. At paragraph 7 of the joint memoranda CB pg 1092 he expressed the feeling that he had been misled by the Claimant in her description to him of the level of her disability.

72. Accepting that issues surrounding the credibility of the Claimant are a matter for the Court, they expressed their agreed view thus:

> "*We agreed having considered all of the available evidence in this case from a pain medicine perspective we cannot attribute any reported symptoms of pain and disability at the time of our examinations to the index event.*"

Psychiatry

73. It follows from the matters set out above that ultimately the Claimant's case is built upon psychiatry alone. Without it there is simply no explanation for the

Claimant's presentation. Dr Stephen Davies provided evidence for the Claimant and Dr Leigh Neal for the Defendant.

74. In setting out the Claimant's case it is helpful to chart how Dr Davies expressed his view in the various reports prepared and orally before the Court.

75. Dr Davies first report is signed on the 6th September 2020. At paragraph 15.3 CB 528 he noted:

"*the claimant has a prior history of medically unexplained symptoms prior to the index incident. These are primarily gynaecological and abdominal symptoms, but include other symptoms including occasionally headaches and tiredness. It is not a matter for me as a psychiatrist to determine whether and to what extent there was an organic basis to these presentations though several of the letters suggest there was not an adequate medical explanation, psychiatric diagnoses can sometimes be present and might include somatoform disorders, factitious disorder or health anxiety. In my opinion the most likely explanation is that the claimant has had a long standing (pre existing) somatoform disorder for which I give a diagnosis of DSM 5 somatic symptom disorder. This would have continued had it not been for the index accident. There would be a range of opinion and some might conclude she had factitious disorder but there is not evidence to support this in terms of the accepted diagnostic criteria.*"

76. Dr Davies produced an updating report in September 2021. He identified some features of travel anxiety but discounted a diagnosis of PTSD. At paragraph 7.5 CB pg 565 he said:

"*I remain of the view that the most disabling psychiatric disorder is the Somatic Symptom Disorder (alternatively ICD 11 Bodily Distress Syndrome). I appreciate that the claimant does not accept that she has this disorder and she believes her health was good prior to the accident. The records prior to the accident are very suggestive of a pre-existing Somatic Symptom Disorder and in my view it cannot be said that she would not have developed this but for the index accident.*"

77. Dr Davies went on in his report to express the view that if there had been a real deterioration in disability complained of before and after the accident then the accident might have made a material contribution to this deterioration. At paragraph 7.8 he explained:

"There may be a range of opinion on whether she has SSD. It is possible that some might conclude that she has Factitious Disorder though I have not seen evidence to conclude that. It is possible that some might conclude that her belief that she has a disability is accounted for by Delusional Disorder though I have not seen evidence to conclude that. If the view is taken that she is deliberately exaggerating her symptoms for monetary gain then it would be termed malingering. Reliability as a witness is a matter for the court to decide."

78. The preceding reports were obviously prepared without the benefit of the surveillance or social media evidence. Upon consideration of the same Dr Davies prepared a further supplemental report dated 9th October 2021 CB 569.

79. In the summary section of his report (CB 571) he refers to the limited psychiatric conclusions that can be drawn from social media and surveillance but goes on to set out the following:

"There is no suggestion from the social media posts of any sort of pre-accident psychiatric disorder including Somatoform disorder.

The material overall is not suggestive of a depressive disorder at a moderate or severe level as was recounted in terms of symptoms by the claimant to me, though would not rule out a mild level of depression being present at times (more in keeping with the medical records)

The extensive travel she has undertaken (including as far as Scotland for leisure in 2018) rules out travel anxiety by car and makes PTSD unlikely too, in my view.

If the court finds that the claimant has sought to mislead the court and clinicians about symptoms and disabilities, a diagnosis of Somatic Symptom disorder would not apply after the index accident.

80. In reaching his conclusions Dr Davies identified a number of issues of inconsistency including at para 6.4 CB 585:

"I view the range of activities noted on social media to be inconsistent with the score of 22/27 on the PHQ-9 rating scale completed for me in August 2019, reflecting symptoms over the past two weeks."

He says in terms:

"She was recorded in January 2019 to be well-kempt, able to converse confidently, coherently and spontaneously throughout. In terms of depression therefore the social media posts are more consistent with the medical records than the account of depressive symptoms given at interview to me and would not rule out a mild level of depression."

He refers to the complaint of travel anxiety and references long trips the Claimant had seemingly undertaken. In his view these were inconsistent with a diagnosis of travel anxiety at that time and was "*inconsistent with the account given to me*" CB 586.

81. In the joint memoranda prepared by the psychiatrists CB 1069 Dr Davies reflected on the discrepancies in presentation noted by the other experts and identified a series of his own CB 1081 to 1082. Dr Davies prefaced these by stating:

".... While it may be difficult to determine motives, the diagnosis of a somatoform disorder is not intended to apply to situations in which a person deliberately exaggerates or invents symptoms or fabricates evidence of disease..."

82. Dr Davies also expressed the view that whilst some day to day variability was seen with Psychiatric disorders generally the degree of variance he had identified was not "*typical of somatoform disorders*" CB 1082.

83. At CB 1083 he said:

"....having seen the additional experts reports, DWP evidence and looked again at the social media postings and surveillance, he takes the view that there is a strong possibility that the claimant has Factitious Disorder, which is difficult to diagnose. Confirmation would require careful diagnosis over time , outside of any medico legal process. If the claimant has Factitious Disorder, it was present pre-accident and it cannot be said that the accident has caused a deterioration directly but can be seen as providing a focus for symptoms to develop.."

84. Nevertheless, as I set about above at para 7 Dr Davies felt that if the Court regarded the Claimant as reliable in her account of symptoms then the most

likely diagnosis was that of a Somatoform Disorder. He maintained that view in oral evidence. Dr Davies explained that SSD was a disorder regarding the processing of information about an illness and that sufferers perceived themselves as more ill than they actually were. Referring to the most recent diagnostic criteria for Somatoform Disorder he confirmed that it was not a requirement for symptoms to be present all the time (1/2 of the number of days in a 3 month period- ICD X1). Understandably he was pushed in cross examination on the relevance of inconsistencies and the extent to which variability of symptoms were consistent with a diagnosis of SSD. He expressed the view that inconsistency itself could be consistent with the condition. He was, of course, referred to specific instances. He was referred to the visit to Italy for the Six Nations match and he was surprised that she went. The best that he could put it was that it would not rule out SSD. As to the "Four Waterfalls Walk", he thought this was at the extremes of what might be acceptable inconsistency. On variability of symptoms he put it this way; *"the more extreme the variability then the less likely the condition is SSD*".

85. Dr Neal produced reports dated October 2020 and September 2021. In his first report he was content to accept a diagnosis of Somatic Symptom Disorder and that the presence of unexplained symptoms before the accident meant that she probably would have had them irrespective of the accident (CB 817).

86. In the updating report he maintained his opinion of SSD but did raise the issue of the Claimant's reliability. Whilst he pointed to some inconsistencies that he perceived, he concluded that these were matters for the Court.

87. In the joint memorandum he went further. He said (CB 1077):

"....if there is a significant disparity between what is observed on the surveillance and the claimant's claimed level of physical disability, then this disparity cannot be explained by a Somatic Symptom Disorder or any other similar psychiatric condition."

88. As to the Four Waterfalls Walk he referred to the DWP assessments in June and November 2020 and said:

"...she admitted that on the 26th July 20, she had walked on the Four Falls Trail on a gravel path in the Brecon Beacons and she took around 4 hours to complete the walk. She is seen in a picture, on the walk, wearing a back pack. In Dr Neals opinion, this marked inconsistency does not have a psychiatric explanation and it cannot be explained by unconscious psychiatric factors."

In oral evidence he accepted that variability of symptoms is not inconsistent with SSD but he put it as follows. When the Claimant had a DWP assessment in November 2020 she knew that she had done the Four Waterfalls Walk but she didn't mention that level of function on a good day to them, and there is no psychiatric mechanism for that.

Conclusions

89. The Court is mindful of the different burdens of proof that arise in a case of this sort. It is important to bear them in mind throughout the process of determination. Nevertheless there is bound to be some overlap of consideration in these circumstances. For example Dr Davies quite properly accepts that in order to reach a conclusion that the Claimant has SSD then the Court would have to conclude in general terms that the Claimant's account is reliable. He recognises that without a diagnosis of SSD then the Court is left with a factitious disorder or malingering as the only available conclusions and each of these involve sufficient conscious dishonesty as to require the Court to make a finding of fundamental dishonesty and therefore dismiss the case. It is difficult to see how the evidence would produce a half-way house conclusion. The position in

this case is stark. There is no organic or physical explanation for symptoms that can be put forward.

90. It follows that the Claimant's credibility as a historian is at the very centre of the resolution of the case. It is also fair to say that most if not all experts regarded there to be a disparity between the complaints of symptoms made to them either in history or examination and the level of function observed on video and demonstrated by social media posts. The Defendant argues that such discrepancy is gross. The Claimant contends that the same is explicable by variation in symptoms and good days and bad days and furthermore that any exceptional activity must be seen against a background of how it makes her feel on the following day(s).

91. I have set out above the chronology in order to see the reported symptoms in the context of surveillance and social media. The following points are in my judgment most relevant when it comes to assess credibility.

92. In my view there is a significant difference between the description of symptoms given to the DWP in the summers of 2017 and 2018 and that which is recorded in the surveillance evidence and social media at the time. The Claimant is observed taking care of her nephew on two consecutive days and on the first day the park activities involve lifting him in and out of a swing and pushing backwards and forwards without any apparent difficulty and seemingly quite freely. In other footage she walks back and fore to exercise class about 1km each way. In my judgment it is also relevant to note that her sister felt that she was able to carry out these childcare duties.

93. I do understand that the Claimant would want to do as much as she could with her nephew and that it was important to her. I also understand that DWP assessments might encourage her to over emphasise the level of disability. However I find there to be no comprehensible explanation for the difference in the level of symptomatology contemporaneously complained of to the DWP even on a good day.

94. Next in my judgment the Court must consider the apparent discrepancy between the complaints made to Dr Davies in August 2019 and the activities revealed on social media. This discrepancy was highlighted by Dr Davies in the joint memorandum he produced with Dr Neal (CB 1081). Put shortly the Claimant's activities leading up to her interview with Dr Davies were inconsistent with someone who suffered a persistent lack of capacity for enjoyment as revealed by her PHQ-9 rating scale result. In the previous 12 months she had apparently gone to Switzerland, sat and passed her Welsh exam, gone to Italy for the Six Nations match, attended a Pink concert at the Principality Stadium and attended the Leeds Music Festival as a volunteer.

95. Again in my judgment there is no real explanation for this discrepancy and it tends to undermine the Claimant's credibility.

96. Thirdly, when the Claimant saw Dr Neal in May 2020, she told him that she avoided noisy places as she could not cope. This in my judgment is not consistent with her attendance at the events set out in the previous paragraph even if she did wear hearing defenders on occasions.

97. Next, I have considered the Four Waterfalls Walk. I agree with the submissions made on behalf of the Defendant that this represents an important element of

the case that demanded an explanation. The details of the walk are set out above, but in my view the following points are of most relevance. Firstly the Court must consider why the Claimant even contemplated the walk if her condition was as set out in other documentation including reports to medical expert, the DWP and in her first statement made at the time. Secondly, the Court must consider why her friends would have considered her capable of undertaking the walk if her condition was as reported. Thirdly the Court must consider why she went on to complete the optional additional strenuous detour to the falls themselves.

98. The walk in total lasted about 4 hours. In my judgment undertaking the same was in sharp contrast to what the Claimant told the experts Atkins and Neal at almost exactly the same time and what she described in her witness statement to the Court. The Claimant explained that this was really a one off and something that she paid for with extreme symptomatology. She had tried to push herself, to try to do something that she really wanted to do. It should not, she argued, be regarded as something that was reflective of her true level of mobility.

99. The problem with this explanation is that it does not appear until the very latest statement when she had been challenged about the walk. It does beg the question as to why did the Claimant not give an account at an earlier stage.

100. It does also have to be seen against the agreed background of there being no organic reason why she could not in fact undertake the walk. In other words the absence of the straight jacket of SSD on the day in question does require an explanation, when the inconsistency in contemporaneous presentation is so

stark. In that respect I am satisfied that the Claimant did tell the experts that her mobility was restricted to the extent that they have recorded. I accept that they may have pushed the Claimant to an estimated figure for distances, but I am equally satisfied that the impression that was being given was one of a significant general restriction even on a good day and that this is grossly inconsistent with a decision to undertake the Four Waterfalls Walk.

101. At the PIP assessment in November 2020 the Claimant knew that she had undertaken the walk and yet she did not mention that level of function, even on a good day. In evidence she contended that in describing a good day she would not necessarily include a day such as the Four Waterfalls Walk because she was so worn out afterwards. Rather she would include days when her efforts did not have a significant adverse effect afterwards. The problem with that assertion is that it is contrary to what is actually recorded. It will be seen from the extract set out above in paragraph 54 that she indicated that on a good day she could walk to the local park, she had to take breaks and would then end up worn out in bed. In my judgment it is hard to reconcile this with what happened on the 26th July, only some 4 months earlier.

102. It must also be remembered that in August 2020 the Claimant had been seen by Dr Miller, her pain expert. On examination he had noticed inconsistent complaints and Waddell positive results. Whilst I would be very cautious in relying upon these findings in isolation, they do, in my judgment form a relevant part of the picture for which there can be no psychiatric explanation.

103. Dr Davies' evidence for the Claimant was to the effect that the diagnosis of SSD depended upon the Court being satisfied that the Claimant's account of her

symptoms was reliable. In considering this question, it is only right that I take into account that the Claimant is someone who had previously held down a very responsible and trustworthy job and to that end I was provided with a letter of reference. I weigh the same in the balance. Equally I must weigh in the balance the fact that the Claimant did on occasions post that having undertaken activities she was then suffering symptoms. However, if I ask myself whether the analysis of the evidence set out above is consistent with a reliable account of symptomatology then I am driven to the conclusion that it is not. Whilst not a matter for the medical experts to resolve, it is clear from the reports of all experts instructed that to a greater of lesser extent they found inconsistency in the Claimant's presentation and the objective evidence. As Dr Davies (who it must be remembered was giving evidence for the Claimant) put it, the greater the variability of symptoms the less likely it is that the Claimant's condition is SSD. Here I am satisfied that the claimed level of symptom variability is very high indeed.

104. Of course the Defendants invite me to conclude not only that the Claimant does not make out her case but that the Court should be persuaded that in presenting her claim she has been fundamentally dishonest. In that respect I, of course remind myself, that the burden of establishing the same rests with the party asserting fundamental dishonesty.

105. The test of fundamental dishonesty is set out above. In my judgment if the Court is satisfied that the Claimant has not given a true account of her symptoms to the experts and/or to the DWP whose reports have formed part of the Claimant's case presented to the Defendants and to the Court, then she would have been

dishonest in relation to matters that go to the heart of the litigation and therefore fundamentally dishonest. There is no real argument contrary to this put forward by Claimant's counsel, nor, in my view, could there be.

106. In considering the same I am mindful again of Dr Davies assessment in his report, that a factitious disorder is a strong possibility in the Claimant's case. Indeed this would potentially explain some pre accident complaints. I am also mindful of the agreement between the experts that such disorders are nevertheless manifestations of conscious untruthfulness or exaggeration rather than an unconscious condition like SSD. As such, and again there is no argument contrary to this, notwithstanding its designation as a "disorder", a factitious disorder would not amount to a defence to a claim of dishonesty.

107. The difference between a factitious disorder and frank malingering is motivation. On the one hand it could be said that in bringing a compensation claim there is an obvious indication of motivation. Conversely the history of some unexplained symptoms prior to the accident and the very unusual way in which they appear to have manifested themselves, including the Claimant falling out with some family members who did not seem to accept that she had such symptoms, tend to point to an unexplained motivation.

108. Having conducted the analysis set out above I am driven to the conclusion that the Defendants have established on the balance of probability that the Claimant has not presented a truthful account of her symptoms, to the medical experts in this case and/or to those to whom she reported the extent of the same following the accident. I am also satisfied that in so doing the Claimant's untruthfulness

went to the heart of the claim, and as such I must conclude that she has been fundamentally dishonest. The law requires me therefore to dismiss her claim.

109. The law also requires me to go on and assess the value of any part of the claim that the Claimant has established to be honest. To that end there are a number of factors to be taken into account. Firstly there was a soft tissue injury to the cervical spine and shoulder. The orthopaedic experts attributed symptoms for a matter of months perhaps 6. The psychiatrists (Davies and Neal) seemed to agree that there is travel anxiety for about 12 months with some adjustment disorder.

110. These injuries would give rise to an award of general damages for pain suffering and loss of amenity of no more than about £4,500 and that is what I assess them to be.

111. In addition there requires to be an assessment of any award of special damages that would have been made. The counter schedule in this case suggests that the issue of loss of earnings during the 6 months post-accident should be approached by reflecting that there was a chance only that the Claimant would have secured employment in the 6 months following the accident. They suggest that the proper figure should be 2 months loss based on £20,407 net earnings. The basis of the assessment is that the Claimant would not have obtained work for the first 2 months and then would have had a 50% chance of gaining employment over the following 4 months, thus 2 months.

112. It is a very small point in the context of this case but in my view that would represent a degree of double discount for risk. The better approach is to allow a 50% chance for the whole 6 month period, therefore £5,101.75.

113. Finally I accept the Defendant's analysis of the cost of care in the sum of £317, certainly I am not persuaded that the Claimant has established that the figure should be higher.

114. The total assessment amounts to £4,500, £5,101.75 and £317, totalling £9,918.75.

115. Finally I make the following observations. This is a decision that I reach with a heavy heart. The fall for the Claimant is significant. Whilst it is not necessary for me to conclude whether she has a factitious disorder or whether she is a frank malingerer, I strongly suspect it is the former. To that end, and whilst it is not a defence to the allegation made, the contents of this judgment and the consequences need to be dealt with by the Claimant's representatives with the Claimant with care, support and sensitivity.

116. In light of the judgment above, the parties should agree an order and file the same at Court within 7 days of the handing down of the same. In the absence of agreement a short hearing will be arranged.