Neutral Citation Number: [2018] EWHC 1288 (QB)

Case No: B69YM467 (M17Q090)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Manchester District Registry

Bridge Street West
Manchester M60 9DJ

Date: 24/05/2018

Before :

MR JUSTICE MARTIN SPENCER

- -

Between :

Mr Mirajuddin Molodi	**Claimant/ Respondent**
- and –	
(1) Cambridge Vibration Maintenance Service and (2) Aviva Insurance Limited	**Defendant/ Appellant**

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Mr Paul Sweeney (instructed by **RKS Solicitors**) for the **Claimant/Respondent**
Mr Daniel Wood (instructed by **DAC Beachcroft LLP**) for the **Defendant/Appellant**

Hearing dates: 16 March, 19 March and 26 March 2018

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Judgment Approved

Mr Justice Martin Spencer:

Introduction

1. Pursuant to permission granted by Mr Justice Burton on 12 October 2016, the Appellant/Defendant appeals against the judgment and order of HHJ Main QC dated 18 April 2016.

2. By that order, HHJ Main QC gave judgment for the Claimant and awarded him damages of £4,397 comprising £2,750 for pain, suffering and loss of amenity together with £1,647 for special damages and interest, these damages being awarded for personal injuries and loss sustained as the result of a road traffic accident on 4 February 2015. By their Notice of Appeal dated 6 May 2016, the Defendants seek an order that the Claimant's claim be dismissed.

The facts

3. The Claimant was born on 2 March 1983 and on 4 February 2015, when aged 31, he was driving his VW motorcar along Ordsall Lane, Manchester when he was involved in a collision with a Ford Transit van being driven by Mr Daniel Chapman in the course of his employment with the First Defendant, Cambridge Vibration Maintenance Service. The Second Defendant, Aviva Insurance Limited is the motor insurer of the Ford Transit van.

4. The circumstances of the accident betray full responsibility and liability on the part of Mr Chapman. He was attempting to follow the directions given by a satellite navigation system and when he had crossed a set of traffic lights, he realised that he should in fact have turned left at the said lights instead of going straight over. He therefore intended to do a "U-turn" in the road, returning to the traffic lights and turn right. He came to a stop, waiting for a car approaching from the opposite direction to pass so that he could carry out his manoeuvre. He was some 45 metres or so beyond the traffic lights. Once the car had passed, he started to carry out his U-turn. Unfortunately, he had failed to check his mirror first and did not realise that the Claimant was attempting to overtake his stationary vehicle. He started his manoeuvre, the Claimant sounded his horn and there was then contact between the two vehicles. According to Mr Chapman, this was only a minor impact such that he had not been entirely sure whether any contact had been made at all. Mr Chapman's brother, Matthew Chapman, was his front seat passenger. Matthew Chapman said:

> "There was a minor collision between the vehicles. It was so minor that I did not even flinch in the van and I would not have even known there had been a collision but for the clipping noise and the Claimant beeping his horn. … I stayed in the vehicle while my brother spoke to the other driver because it was something and nothing. As I say, it was so minor and therefore I had not even thought about anybody being injured. … I'm adamant that no injuries were suffered in this collision; it was too minor for there to have been."

5. The Claimant, however, gives a different account. He says:

> "The impact of the accident was enough to move me about in the car. I cannot remember how I moved in the car. I do recall that loose items such as my keys, money and other loose items became out of place. … The accident caused me pain and suffering. The next day I started to experience pain in my back, neck and shoulders. My right hand also started to hurt. As a result, I decided to see my GP. I explained these circumstances to my GP and was told to take painkillers."

6. The Claimant consulted his GP on 5 February 2015, the day after the accident, who made the following note:

> "<u>Problem</u> RTA – road traffic and other transport accident (first)
> <u>History</u> He was driving the car doing taxi/customer was on back/only one seat belt was on
> Someone come in red light in front of car tried to do U-turn
> Had whiplash injury
> Headache

Police was inform as third party accepted the fault
Not been to hospital
Examination low back pain
Pain at neck, shoulder and back
Medication Naproxen 500mg gastro-resistant tablets 1 to be taken twice a day 28 tablet
Ibuprofen 5% gel apply up to 3 times a day 50g
Comment advised not to take Paroxetine for time being
Suffering with ejaculation problem/awaiting for appointment from MRI
Advised to return if problem persists or deteriorates."

Although the Claimant attended his GP regularly, he did not seek any further advice or treatment for the injuries said to have been sustained in the accident.

7. On 17 March 2015, a "Claim Notification Form" ("CNF") was sent to the Frist Defendant's insurer, the Claimant having consulted RKS Solicitors of Dewsbury, West Yorkshire. Section B of the CNF deals with the injury and medical details. This alleged that the Claimant had suffered a soft tissue injury in the form of whiplash injuries. In answer to the question: "Has the Claimant had to take any time off work as a result of the injury?" The answer given was "No". In answer to the question: "Has the Claimant sought any medical attention?" The answer was again "No". Section F gives the accident details. This stated that, at the time of the accident, the Claimant was the driver. Section 5.2 states: "If the Claimant was the driver or a passenger how many occupants were in the Claimant's vehicle?" To which the answer given was "One". This CNF was endorsed with a statement of truth in the following terms:

> "I'm the Claimant's representative. The Claimant believes that the facts stated in this claim form are true. I'm duly authorised by the Claimant to sign this statement."

8. On 2 April 2015, the Claimant attended Deco Medicals for a physiotherapy assessment. Given that there is no indication that the Claimant had been referred by his GP for physiotherapy, it is to be assumed that this physiotherapy assessment was at the behest of RKS Solicitors. The findings on initial examination were noted as follows:

"Present condition – cervical pain with a restriction end of range. Lower back pain and shoulder pain.
Limited range of motion in thoracic region
Right shoulder ache and stiffness
Pulp – tenderness in upper limb region and left cervical C2 - C5 region
Tenderness in C2 – C5 region
Upper fibres of trapz tightness."

The details of treatment to be provided were: manual therapy, soft tissue mobilisation and home exercise programme. The number of treatment sessions recommended was 12. The first treatment session was that day and there were then weekly treatment sessions which ended with the 12th on 18 June 2015.

9. On 30 March 2015, the Claimant attended Dr Emmanuel Idoko for a medical report on the instructions of RKS Solicitors. The symptoms recorded by Dr Idoko related to the right hand, the right shoulder and the neck, upper and middle back. The Claimant told Dr Idoko that he had developed severe pain, stiffness and discomfort in his upper and middle back within 24 hours of the accident which had improved and was currently moderate. He told Dr Idoko that he had also developed severe pain, stiffness and discomfort to his right hand within 24 hours after the accident which had improved and was currently mild to moderate. He reported having developed severe pain, stiffness and discomfort to the right side of the neck within 24 hours of the accident which had improved and was currently moderate. Finally he reported having developed severe pain, stiffness and discomfort to the right shoulder within 24 hours of the accident which had improved and was currently mild to moderate. At the time of Dr Idoko's examination, the Claimant was reporting continued pain, stiffness and discomfort in his right neck, right shoulder, right hand and in his upper and middle back. In relation to the employment position, Dr Idoko noted:

> "**Taxi driver** time off: Yes
> He is currently self-employed as a taxi driver
> Had taken 3 days off because of the accident
> He had reduced his hours for 2 weeks."

He reported suffering on-going moderate discomfort with mild to moderate restriction of sleep. He told the doctor that he had been unable to do gym activities since the accident:

> "He usually does this activity few times a week before the accident. It has not improved."

10. In relation to the Claimant's past medical history, the Claimant told Dr Idoko that he had had a road traffic accident in which he had sustained whiplash injuries from which he had fully recovered. In answer to a Part 35 request for further information, Dr Idoko stated:

> "He had stated **only one** previous accident details when asked about previous accidents and injuries." (emphasis added)

Dr Idoko predicted recovery in relation to the right hand and shoulder within six months of his examination (that is by about the end of September 2015) and full recovery from the pain in the neck and upper and middle back within 12 months of the examination (that is by the end of March 2016).

11. A claim form was issued on 31 July 2015 and the Particulars of Injury were stated as follows:

> "6 … Details of the Claimant's personal injuries are set out in a medical report prepared by Dr Emmanuel Idoko dated 30 March 2015, a copy of which is served and attached therewith.
>
> 7. The Claimant particularises his injuries as follows:
> i) Pain stiffness and discomfort to right hand for 7 months;
> ii) Pain, stiffness and discomfort to the right shoulder for 7 months;

iii) Pain stiffness and discomfort to the neck, upper and middle back for 13 months."

Special damages of £2,513 were claimed including £1,293 for vehicle damage and £1,160 for the cost of physiotherapy.

12. A defence was served on 18 September 2015 which admitted primary negligence only and disputed that the accident had occurred at sufficient speed for injury to occur. The Defendants averred that the contact between the vehicles was minimal and that no injury could have been caused or was reasonably foreseeable given the absence of any significant force in the collision. Injury loss and damage were denied and it was pleaded that "It is not accepted that the Claimant suffered any injury in this accident." In the defence, the following points were made:

> "8.1 No visible damage was caused to the First Defendant's vehicle and no repairs were, or required to be, carried out.
>
> 8.2 The Claimant stated to the medical expert that he made GP visit, which contradicts his Claims Notification Form.
>
> 8.3 The Claimant stated to the medical expert that he had three days off work (as well as reducing his working hours) which contradicts his Claim's Notification Form. There is also no claim for loss of earnings.
>
> 8.4 The Claimant now claims for 12 sessions of physiotherapy despite the CNF stating there were no rehabilitation needs.
>
> 8.5The First Defendant's driver and his passenger were not injured and have not intimated claims. The First Defendant's driver refers to a passenger in the Claimant's vehicle who has also not made a claim. Additionally, the Claimant's CNF refers to him being the only occupant."

13. On 12 January 2016, the Claimant made a witness statement in the proceedings in support of his claim. He agreed that he had one passenger in the vehicle with him. In relation to the damage to the vehicle, the Claimant said:

> "The other side are taking issue with the fact that I had not provided a repair invoice. I do not understand why this is such an issue. I don't understand why I should repair something out of my own pocket when the accident was not my fault."

Thus, the Claimant appeared to be saying in this witness statement that he had not had his vehicle repaired.

14. The Claimant said in his witness statement that, as a result of the accident, he was unable to work his normal hours for about two weeks: he had to reduce hours because of the pain he was suffering and for three days immediately after the accident, he did not work at all. He said that he had needed the assistance of his wife to assist him with lifting items for a period of about a month and at the time of the statement, "I can confirm that I am still experiencing some pain to my neck and shoulders. However, these seem to be much better than before and [are] gradually improving."

15. So far as previous accidents are concerned, he said at paragraph 18:

> "I was involved in a previous accident which has been settled and for which I recovered, the date of which I cannot recall. I can confirm that the injuries sustained in that accident were not affecting me at the time of the index accident."

Thus, the Claimant, having told Dr Idoko that he had only been involved in one previous accident, confirmed this in his witness statement, which he signed and was endorsed with a statement of truth. This was, in fact, not true. The Defendant insurance company has uncovered details of previous accidents: an accident on 10 June 2014 involving Esure Motor Insurance; an accident 2 May 2013 involving Haven Insurance Company Limited which was settled; an accident on 4 April 2013, again involving Haven Insurance Company Limited, which was settled; an accident on 28 February 2013 involving Ageas Insurers which was settled; an accident 27 November 2012 involving Haven Insurance Company Limited which was settled; and an accident on 18 November 2009 involving Axa Insurance which was settled. Mr Wood submitted that the Claimant had been involved in at least five previous accidents, probably more, but he had failed to tell Dr Idoko, he lied in his witness statement and he failed to make any disclosure of documents relevant to the previous accidents.

The trial

16. The matter came for trial before HHJ Main QC on 18 April 2016. Towards the start of the trial the Claimant, Mr Molodi, gave evidence. He confirmed the truth and accuracy of his witness statement. He also affirmed the truth and accuracy of Dr Idoko's medical report.

17. Mr Molodi was then cross-examined by Mr Wood. I have read the transcript of cross-examination and the general impression I get was that the Claimant was evasive in his answers, not answering the questions he was asked and avoiding addressing the points that were put to him. For example, the Claimant was asked how many collisions he had been involved in and he answered "Five" these being in 2008, two in 2012, one in 2013 and one in 2015. He was then asked how it was that Dr Idoko had said in his medical report, confirmed in his answers to Part 35 questions, that he had been told that the Claimant had been involved in only one previous accident. The Claimant insisted that he had told Dr Idoko that he had been involved in four previous accidents, not just one. He was then referred to his evidence-in-chief where there had been the following exchange:

> "Q: Would you confirm that there is also a medical report in this bundle which you do not need to read now, it is at page 49 if you want to glance at it?
> A: Yes.
> Q: Have you read that before today?
> A: Yes.
> Q: Are you happy to rely on the contents?
> A: Yes."

Mr Wood therefore asked Mr Molodi why he had adopted the medical report and not pointed out it was wrong when it referred to only one previous road traffic accident to which Mr Molodi answered:

"A: I don't know I actually told him on the first place when I had been examined by him.
Q: It is not the question Mr Molodi.
A: Yeh."

18. Mr Molodi was cross-examined about the passenger in his vehicle at the time of the index accident: he said that he had given that person's name and phone number to his solicitors but could not explain why the CNF had suggested that Mr Molodi was the only person in the vehicle at the time of the accident nor why the details of his passenger had not been disclosed. The Claimant was also cross-examined about previous accidents in which he had been involved and which had resulted in claims by him. Records from a "CUE search" showed that there had been previous incidents on 10 June 2014, 2 May 2013, 4 April 2013, 28 February 2013 and 27 November 2012. Mr Molodi agreed that he had made claims arising out of the incident in May 2013 and April 2013 and had received between two and three thousand pounds compensation in respect of each of them. Details of these accidents, the medical reports obtained in them and the compensation received had not formed any part of the Claimant's disclosure.

19. In relation to the injuries sustained in the index accident, Mr Wood asked the questions:

"How long did you say the symptoms from this incident lasted?"

To which Mr Molodi answered:

"The shoulder and the neck and upper back, about six to seven months."

However, he then said that was only in relation to the shoulder and neck and the pain in the upper back had been 12 – 13 months. He was asked how it was that, in his witness statement dated 12 January 2016, some 11 months after the accident, he had stated that he was still experiencing pain in his neck and shoulders. He was understandably unable to give a coherent answer to that question.

20. In relation to his medical history, it was pointed out to Mr Molodi that he had a long history of lower back pain going back to 2003. Mr Molodi said:

"I've been recovered. I had that time for back pain. If you are looking at, I never complaining after it too much."

21. In relation to the vehicle, Mr Molodi said that he had had his vehicle repaired by a friend of his and that it had cost him about £400. Again, there had been no disclosure of any documentation relating to the repair. There was then this exchange:

"Q: Let us move on from that. The final point, why, if it only cost you, you now say, £400 are you claiming for nearly £1,300.
A: My friend repaired it, if I could take into the other garage it probably cost me that £1,300 including VAT.
Q: So you are happy to put that additional money in your pocket even though it did not cost you that?
A: I did not get that money anyway, I mean …

Judge Main: You are claiming it.
A: Yes.
Q: You are claiming £1,300 for a loss of £500: why?
A: The engineering actually gave that statement …
Q: I know where the evidence has come from, the question is, why are you claiming it?
A: I mean because of his damage my car I spend this £400. Probably, if I take in the garage, not my friend that could have cost £1,300."

Again, Mr Molodi was unable to give any coherent explanation for why he had claimed £1,300 in respect of repairs which had only cost him, on his evidence £400.

The evidence for the Defendants

22. On behalf of the Defendants, evidence was called from Daniel Chapman, the driver of the vehicle and his passenger, Matthew Chapman. They both affirmed the truth and contents of their witness statements which stood as their evidence-in-chief. Daniel Chapman was cross-examined about the fact that he had thought that the passenger in Mr Molodi's vehicle was a female Asian lady when in fact photographs clearly showed that the passenger was male. There was clearly a dispute between the Claimant and the two witnesses for the Defendant as the extent of the collision and whether it could have caused the injuries of which Mr Molodi complained.

The judgment of HHJ Main QC

23. The Learned Judge set out the basis of the claim and referred to the different accounts of the accident given by the witnesses. The Learned Judge then considered the inconsistencies which, Mr Wood had submitted, bedevilled the evidence of the Claimant, including the nature of the injuries which were reported arising out of the Claim Notification Form and to Dr Idoko and as recorded in the GP records. He referred also to the fact that the Claimant had had at least four previous accidents, which had not been reported to Dr Idoko. He referred also to the Claimant's long history of low back pain which had required on occasions medication and two separate courses of physiotherapy. He then said:

> "28. Accordingly, there are grounds for Mr Wood to be critical of the Claimant, that he has given an incomplete and rather tailored and limited history on its face, if the account of Dr Idoko is to be relied upon. I accept that there are instances that doctors can be told something and they do not report. Indeed, I've not heard from the relevant doctor to confirm in the witness box the accuracy, for example, of section D of the past medical history, but in part his evidence has been substantiated and supported by some Part 35 questions which he answered on 16 February 2016 when he, in replying to questions put to him, stated that he did request the history and the only account that was given to him is that which has been recorded."

Having referred to answer 7. in the Part 35 answers, the Judge went on to say:

> "30. It is not just that. The fact is that in the course of his evidence, as Mr Wood has also observed, he has given inconsistent accounts. In the course of his evidence when seemingly answering a straightforward question as to how long

his symptoms lasted in respect of his shoulder, his neck and his back, Mr Molodi stated that he had basically recovered from those injuries within six to seven months of his accident, but that so far as the report was concerned and opinions expressed by Dr Idoko, he changed that very quickly to say that a six to seven months recovery period was correct in so far as his right shoulder and his neck was concerned, but overall his upper back did not resolve until 12 – 13 months after the accident which, to that extent, fitted in with the time frame which at least in part had been set out by Dr Idoko.

31. Now that is not consistent with the statement that the Claimant has provided in his proof of evidence and particularly the provisions that he set out in paragraph 17 of that statement."

The Learned Judge acknowledged the inconsistency between the Claimant's witness statement, his evidence in court and what he had told Dr Idoko and said:

"32. … either way, it clearly inconsistent with what he is saying now in the witness box and that has raised the question mark as to his reliability more generally.

33. Not just that, turning to the special damages, it is submitted that on any basis, although the claim for special damage, so far as the losses arising from the accident are concerned, are particularised in the schedule as to some small sum for out of pocket expenses for painkillers and for travelling expenses which I will turn to briefly later, the cost of repairs in respect of his vehicle as set out by a firm of motor assessors in the form of Davies and Grey in respect of damage which was seen on inspection of that vehicle in February 2015 of £1,293 including [VAT] are claimed. Whereas, in the Claimant's statement he implies, if not suggests outright, that the vehicle had not been repaired, paragraph 11 states: '*The other side are taking issues with the fact that I have not provided the repair invoice. I do not understand why this is such an issue. I don't understand why I should repair something out of my own pocket when the accident was not my fault.*'

34. The implication was that the vehicle had not been repaired and there was no repair invoice as a consequence of there being no funds which the insurers had paid to repair the vehicle. However, in the course of his evidence, the Claimant stated that in fact he had had his vehicle repaired. He had taken it to a friend who had undertaken the repair for him for a cost of £400. He had done it after Davies and Grey had reported, following their inspection of February 2014 shortly afterwards and therefore, by the time he came to make his statement in January 2016, it had been repaired (presumably for many months), yet the statement is entirely silent on it – it does not refer to the amount that was paid, how it was paid, to whom, when the work was done and what work was done – there are no documents disclosed – there is no confirmation of any payment because those are all cash transactions which have not been otherwise evidenced."

24. Having then referred to the claim for physiotherapy treatment, the Learned Judge said:

"36. Standing back from all this, I do not propose to say anything further on the evidence. I have to establish in my own mind, as a matter of fact, as to whether the nature of the impact in the course of this collision is such which not just gives rise to a real plausibility of the occupant of the Claimant's vehicle being injured, but also as a matter of fact, of him having actually sustained injury."

The Learned Judge then referred to the fact this was not a case where the special directions applicable to "Low velocity injury" had been applied so that he only had the report from Dr Idoko, who had admittedly been given an incomplete history and which was in part misleading and no engineering evidence. He said:

"I liken it to dealing with the evidential issues with 'one hand tied behind my back!'".

Having then referred to the weaknesses in Molodi's evidence, the Judge stated as follows:

"41. Therefore, to that extent, he has not come across well in terms of the consequences of the accident but I find, as he sought to explain the collision, I thought he was relatively straightforward and gave me an account which was relatively straightforward – as an example and not least, when he sought to explain with reference to the photographs where the point of impact was, which presumably was the bumper area of the front nearside of the van and how it did cause crazing damage, at least scratching the wheel trim and some minor scratches around the wheel arch. The Claimant's account does I find explain consistently how he was struck, as he sought to overtake a vehicle that he thought was effectively pulling into the nearside, but then turned across his path with a glancing sort of blow. …

46. The point is, am I satisfied that there is sufficient here from the Claimant's perspective to bring about plausibility that he may have been injured and that the probability is that he was injured as a consequence of this accident? Let me be clear, I am so satisfied, and there is insufficient evidence here raised by the Defendant and in the Defendant's account to cause me to have any real concern about that.
47. The next question is am I satisfied that Mr Molodi suffered the extent and [effect] of his accident as he has suggested later on to his GP and has continued to suffer the effects of it as the GP had originally suggested. I'm not satisfied that is so and I suspect there has been a measure of exaggeration so far as Mr Molodi is concerned."

25. At paragraph 50 of his judgment, HHJ Main QC dealt with the Claim Notification Form and he said as follows:

"I have hardly seen a Claim Notification Form in the last number of years where the detail of the accident as I found it on the evidence, often on objective evidence, is properly recorded in the Claims Notification Form. The process itself is often, because of its nature, littered with inaccuracy, partly because the forms are filled out by relatively lowly junior people in the office who are not qualified, partly because they do not take sufficient care over setting out the details and sometimes as they type it up they make mistakes. I see it in almost

every case. The fact that there is no mention made of the right hand does not of itself concern me. The other injuries are broadly referred to."

26. Then, the Learned Judge made his findings as follows:

> "51. I'm satisfied that it is more probable than not that Mr Molodi did suffer some relatively short term injury to his right hand, that he did have some relatively short term issue relating to his right shoulder and also suffered in respect of his neck and, to an extent, his upper back. I'm not satisfied in the event, given the concerns I have over the lack of the history presented to the GP, Dr Idoko and the failure on the part of the Claimant to give a consistent account in his later evidence, that in fact he had suffered for the length of time which is presented as part of his claim, as part of the medical evidence and in the Claimant's statement.
>
> 52. Mr Wood effectively invites me to find, even if I find there is some cause as to some injury, that I should effectively reject it on the basis that he is so otherwise inconsistent that I simply cannot reliably find what his injuries are and, therefore, he has not proved his case. I do not take the view that is appropriate from the facts here because I'm satisfied that there was sufficient here because I take the view that Daniel Chapman probably did turn more into that vehicle which did cause some more sideways movement on the vehicle that could easily explain and does explain on balance the fact of the soft tissue injury in this accident.
>
> 53. The fact that the Claimant has now refined his evidence, as I have stated, when he talks about neck and shoulder, six to seven months, I'm satisfied that that should be in fact be his ceiling in respect of all his injuries. In so far as the fact, it is a fact as he presented that he had a longer period of discomfort in his upper back, I'm not going to award him that and that reflects the fact he is inconsistent witness."

27. The Learned Judge then went on to make an award of £2,750 for pain and suffering together with some small sum for interest, £400 in respect of the vehicle costs, the physiotherapy costs as pleaded and £35 for out-of-pocket expenses, a total judgment in the sum of £4,397.

The submissions on behalf of the Defendant/Appellant

28. Mr Wood, on behalf of the Appellant, submitted that he was not precluded from alleging fundamental dishonesty against the Claimant by reason of the failure to plead fraud or dishonesty and he submitted that the pleadings, as they stand, do not prohibit me, as an Appellate Court from making determinations of fundamental dishonesty. He referred to *Kearsley v Klarfeld* [2005] EWCA Civ 1510 at paragraphs 40 onwards and in particular paragraph 49 where Brooke LJ said:

> "There is no substantive obligation on the Defendant to plead fraud so long as his reasons for resisting the claim are clearly stated in accordance with CPR 16.5".

He also referred to the decision of the Court of Appeal in *Howlett v Davies*[2017] EWCA Civ 1696 where Newey LJ said at paragraph 31:

> "31. Statements of case are, of course, crucial to the identification of the issues between the parties and what falls to be decided by the court. However, the mere fact that the opposing party has not alleged dishonesty in its pleadings will not necessarily bar a judge from finding a witness to have been lying: in fact, judges must regularly characterise witnesses to have been deliberately untruthful even where there has been no plea of fraud. On top of that, its seems to me that where an insurer in a case such as the present one, following the guidance given in *Kearsley v Klarfeld,* has denied a claim without putting forward a substantive case of fraud but setting out 'the facts from which they would be inviting the judge to draw the inference that the plaintiff had not in fact suffered the injuries he asserted', it must be open to the trial judge, assuming that the relevant points had been adequately explored during the oral evidence, to state in his judgment not just that the claimant has not proved his case but that, having regard to matters pleaded in the defence, he has concluded (say) that the alleged accident did not happen or that the claimant was not present. The key question in such a case would be whether the claimant has been given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence."

29. So far as the principles of dishonesty and the concept of "fundamental dishonesty" in personal injury litigation are concerned, Mr Wood referred to *Gosling v Screwfix* an unreported decision of HHJ Maloney QC dated 29 April 2014 where that judge held that exaggeration alone can give rise to a finding of fundamental dishonesty.

30. The concept of "fundamental dishonesty" has come to the fore in recent years by virtue of the provisions of Section 57 of the Criminal Justice and Courts Act 2015 which gives the court the power to dismiss a claim for personal injuries where the court is satisfied that the Claimant has been fundamentally dishonest in relation to the claim. Furthermore, the same concept is used in relation to costs where a claimant is protected by the provisions of "qualified one way costs shifting". CPR 44.16 (1) provides:

> "Orders for costs made against the claimant may be enforced to the full extent of such powers with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest."

That was the issue in *Howlett's* case. Mr Wood also referred me to the decision of Julian Knowles J in *London Organising Committee of the Olympic and Paralympic Games (in liquidation) v Haydn Sinfield* which concerned an allegation of fundamental dishonesty for the purposes of Section 57 of the 2015 Act.

31. In addition, in relation to the legal concepts, Mr Wood referred me to the decision of the House of Lords in *Benmax v Austin Motor Company Limited* [1955] AC 370 which concerned the distinction between primary findings of fact by a trial judge and inferences drawn and the decision of the Court of Appeal in *Yaqoob* [2006] EWCA Civ 885 where, he submitted, it is established that a trial judge is required to resolve conflicts of evidence, not simply state them.

32. In his written skeleton argument, Mr Wood submitted that HHJ Main QC failed to pay sufficient regard to the inconsistencies and contradictions in the Claimant's

evidence and pleaded case together with his propensity for exaggeration. He relied upon the following matters:

- The claim for £1,300 damage when in fact the Claimant had had his vehicle repaired by a friend for about "£400";

- The contradiction between the CNF and the Claimant's evidence in relation to whether the Claimant was the only occupant or whether he had a male passenger;

- The CNF stating that the Claimant had no rehabilitation needs when the Claimant then made a claim for 12 sessions of physiotherapy;

- The Claimant's assertion that he had time off work in his evidence when the CNF stated there was no time off work and the fact that the Claimant had made no claim for loss of earnings despite stating in his witness statement at paragraph 15 that as a result of the accident he had been unable to work his normal hours for about two weeks and for three days after the accident did not work at all;

- The fact that the Claimant told his medical expert that he had only had one previous accident, confirmed in his witness statement at paragraph 18 when in fact he had been involved in at least four previous accidents and probably more, possibly as many as seven (in fact, Mr Sweeney, for the Claimant, conceded there had been five and perhaps six) previous accidents.

33. Mr Wood thus submitted that the aforementioned matters should have led the Judge to make a finding of fundamental dishonesty and to have dismissed the claim. In addition, he submitted that, in reaching his decision, HHJ Main QC relied on information that was outside the scope of the evidence and the proper ambit of "judicial knowledge" and failed to pay sufficient regard to direct evidence (from the Defendants' witnesses) demonstrating the minor nature of the accident. He submitted that the Judge's findings at paragraphs 43-46 of his judgment effectively amounted to a reversal of the burden of proof.

The submissions on behalf of the Claimant/Respondent

34. For the Claimant, Mr Sweeney submitted that all the points which have been made by Mr Wood in this appeal were fully and squarely before the Learned Judge. He said that it is within a judge's discretion in a case such as the present, following the "fast track", to reach robust decisions as to the circumstances of the accident and the length of time that the injuries were suffered: he submits that this is the sort of finding that is made on a daily basis up and down the country by County Court judges. He submitted that the Judge had given full and proper consideration to the various matters relied upon by Mr Wood and then, at paragraph 36 asked himself the right question:

> "Standing back from all of this, I do not propose to say anything further on the evidence. I have to establish in my own mind, as a matter of fact, as to whether the nature of the impact in the course of this collision is such which not just gives

rise to a real plausibility of the occupant of the Claimant's vehicle being injured, but also as a matter of fact, of him having actually sustained injury."

Mr Sweeney submitted that the Judge was entitled to decide that, despite the inconsistencies, the Claimant was a credible and straightforward witness and that his findings as reflected in paragraph 41 of his judgment are unimpeachable. Mr Sweeney submitted:

> "Judge Main has given sufficient weight to the inconsistencies in coming to his conclusion he's entitled to do so in a robust manner without half an eye on an appeal at court. This is something which happens all the time. There are always inconsistencies, but they are not necessarily sinister. The inconsistencies were acknowledged by the Judge and were taken into account."

35. Mr Sweeney further submitted that the Judge made no finding of dishonesty: none was pleaded. He was critical of the late introduction of this allegation in the closing submissions. He was critical of Mr Wood for "concentrating on minutiae" and submitted that the case should be looked at as a whole, as the Learned Judge had done.

36. In relation to Section 57 (2) of the 2015 Act, Mr Sweeney submitted that there would be substantial injustice if the whole claim was disallowed because of "fundamental dishonesty". He submitted that the complaint here is on the periphery of what the claim is about. In supporting the approach of the Learned Judge to this case, he relied upon the decision of the House of Lords in *Piglowska v Piglowski* [1999] UKHL 27 where Lord Hoffman had said:

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as given by the District Judge. These reasons should be read on the assumption that unless he has demonstrated the contrary, the Judge knew how he should perform his functions and which matters he should take into account. … An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself. "

In addition, Mr Sweeney drew to the court's attention the dictum of Lord Reid in *Benmax v Austin Motor Company Limited* [1955] AC 370 at 375 where he said:

> "But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No-one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is or is not trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that: the trial judge may be led to a conclusion about the reliability of a witness' memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by

> the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have a formed a wrong impression, but an appeal court is and should be slow to reverse any finding which appears to be based on any such considerations."

37. However, Mr Wood submits that this is one of those rare cases where the weight of the other evidence, and in particular the inconsistencies and the failure truthfully to account to the medical expert in relation to previous medical history and previous accidents and the dishonesty in relation to the special damages are such as to justify overturning the finding of Judge Main QC that, having heard the Claimant, he could rely on his evidence as to the fact that he had been injured and as to the duration of his symptoms.

The Appellate Jurisdiction of the High Court

38. By CPR 52.21, an appeal to this court from the County Court is limited to "a review of the decision of the lower court". Pursuant to 52.21 (3) the Appeal Court will allow an appeal where the decision of the lower court was either wrong or unjust because of a serious procedural or other irregularity in the proceedings. By 52.21 (4) the Appeal Court "may draw any inference of fact which it considers justified on the evidence."

39. The scope of an appellate court was further elucidated by the House of Lords in *Benmax v Austin Motor Company Limited* [1955] AC 370 where it was held that there is a distinction between the finding of a specific fact and the finding of fact which is really an inference drawn from facts specifically found. In the case of "inferred" facts, 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 where the finding could be founded on their credibility or bearing. In the course of his judgment, Viscount Simmonds LC cited from the judgment of Lord Cave LC in Mersey Docks and Harbour Board v Proctor [1923] AC 253 at 258-9 where Lord Cave said:

> "It is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly."

Viscount Simmonds went on to say:

> "This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts."

Thus, in the present case, it is submitted on behalf of the Appellant that it is in relation to the evaluation of the facts which he found that Judge Main QC principally went wrong although there is also a challenge to his perception of facts.

Discussion

40. In my judgment, the first point to make is that, this being a case where the Defendants are alleging that this was a "low velocity impact" case where the nature of the impact was such that it was impossible or very unlikely that the Claimant suffered any injury or any more than trivial injury, it is unfortunate that the usual procedure for such cases was not pursued. In *Casey v Cartwright* [2006] EWCA Civ 1280, the Court of Appeal gave guidance for Defendants who wished to raise causation as an issue. It was said that if a Defendant wished to raise the causation issue, he should satisfy certain formalities:

    i) To notify the other parties in writing within three months of receipt of the Letter of Claim that he considered the matter to be a low impact case and that he intended to raise the causation issues;

    ii) The issue should be expressly identified in the defence, supported in the usual way by a statement of truth;

    iii) Within 21 days of serving such a defence to serve on the court and the other parties a witness statement which clearly identified the grounds on which the issue was raised, and which dealt with the Defendant's evidence relating to the issue, including the circumstances of the impact and any resultant damage.

    iv) Upon receipt of the witness statement, the court would, if satisfied that the issue had been properly identified and raised, generally give permission for the Claimant to be examined by a medical expert nominated by the Defendant. If upon receipt of any medical evidence served by the Defendant following such an examination, the court was satisfied on the entirety of the evidence submitted by the Defendant that he had properly identified a case on the causation issue which had a real prospect of success, then the court would generally give the Defendant permission to rely on such evidence at trial.

41. In the present case, the Defendants submitted a witness statement by a Mr Gary Orritt dated 25 September 2015 which was made in accordance with the principles in *Casey v Cartwright* and in which he stated:

    "3. The defendants aver that the vehicles merely touched as a result of the accident. This statement is made in accordance with the case of *Casey v Cartwright* [2006].

    4. Without prejudice to the assertions in the defence, the defence allege that this was a low speed impact case …

    6. On the basis of the above the defendant avers that this was a low speed collision and challenges the claimant that the accident was such that any and/or the extent of the alleged injuries could have been caused in the collision."

Despite the above, by his order dated 26 November 2015, the District Judge allocated the claim to the fast track and issued standard directions for fast track cases. These included provision for the Defendants to raise written questions of the expert report of Dr Idoko but stating:

> "No other permission is given for expert evidence."

42. In my judgment, Mr Wood was correct in submitting that, given it is for the Claimant to prove his case and that case depended very largely upon his credibility and reliability, it was open to the Defendants to submit that, by reason of demonstrable untruths, inconsistencies and general unreliability, the claim should be dismissed. If I am satisfied that no reasonable judge, in the position of HHJ Main QC, could have failed to accede to the submission that the Claimant had failed to prove his case, then I would be entitled to allow this appeal and overturn the Judge's order. However, where the trial judge has heard the evidence and has not concluded that the claimant was dishonest, I direct myself that it would require a very clear case indeed for an appellate court effectively overturn the trial judge's conclusion in that respect and find that the claimant was dishonest despite not having seen the witnesses give evidence.

43. It seems to me that there are four possible courses which I can take on this appeal:

    i) Dismiss the appeal and uphold the decision of HHJ Main QC;

    ii) Allow the appeal and remit the case for re-hearing;

    iii) Allow the appeal and dismiss the claim on the basis that the Claimant failed to prove his case;

    iv) Allow the appeal, dismiss the claim and make a finding of dishonesty or fundamental dishonesty on the part of the Claimant.

44. Before considering the particular issues in this case, it is also pertinent to recognise the problem that fraudulent or exaggerated whiplash claims have presented for the insurance industry and the courts. This was recognised in March 2018 when the Ministry of Justice published a Civil Liability Bill which aims to tackle insurance fraud in the UK through tougher measures on fraudulent whiplash claims, proposing new, fixed caps on claims and banning the practise of seeking or offering to settle whiplash claims without medical evidence. The problem of fraudulent and exaggerated whiplash claims is well recognised and should, in my judgment, cause judges in the County Court to approach such claims with a degree of caution, if not suspicion. Of course, where a vehicle is shunted from the rear at a sufficient speed to cause the heads of those in the motorcar to move forwards and backwards in such a way as to be liable to cause "whiplash" injury, then genuine claimants should recover for genuine injuries sustained. The court would normally expect such claimants to have sought medical assistance from their GP or by attending A & E, to have returned in the event of non-recovery, to have sought appropriate treatment in the form of physiotherapy (without the prompting or intervention of solicitors) and to have given relatively consistent accounts of their injuries, the progression of symptoms and the timescale of recovery when questioned about it for the purposes of litigation, whether to their own solicitors or to an examining medical expert or for the purposes of witness statements. Of course, I recognise that claimants will sometimes

make errors or forget relevant matters and that 100% consistency and recall cannot reasonably be expected. However, the courts are entitled to expect a measure of consistency and certainly, in any case where a claimant can be demonstrated to have been untruthful or where a claimant's account has been so hopelessly inconsistent or contradictory or demonstrably untrue that their evidence cannot be promoted as having been reliable, the court should be reluctant to accept that the claim is genuine or, at least, deserving of an award of damages.

45. In the present case, in my judgment, HHJ Main QC adopted a much too benevolent approach to evidence from a claimant which could be demonstrated to be inconsistent, unreliable and, on occasions, simply untruthful. The most glaring example of this relates to Mr Molodi's clear lie to Dr Idoko, confirmed by Dr Idoko in his Part 35 answers, that he had been involved in only one previous accident when, as conceded by Mr Sweeney, there had been five or six previous accidents or, on Mr Wood's submissions, some seven previous accidents. Not only had the Claimant lied to Dr Idoko in this regard, but he had also maintained that lie in his witness statement, endorsed with a statement of truth. Even when he gave evidence before HHJ Main QC, the Claimant confirmed that he was happy to rely on the contents of Dr Idoko's report even though he must have known that it was wrong in a fundamental respect.

46. The medical evidence is at the heart of claims for whiplash injuries. Given the proliferation of claims that are either dishonest or exaggerated, for a medical report to be reliable, it is essential that the history given to the medical expert is as accurate as possible. This includes the history in relation to previous accidents as this goes to fundamental questions of causation: whether, if there are ongoing symptoms, those are attributable to the index accident or to previous accidents or to some idiopathic condition of the claimant. Furthermore, the knowledge that a claimant has been involved in many previous accidents might cause a medical expert to look rather more closely at what is being alleged on the incident occasion to see whether the claimant is being consistent and whether his reported injuries are in accordance with the reported circumstances of the accident. Once, as here, the Claimant could be shown to have been dishonest in respect of a fundamental matter and then to have maintained that dishonesty through his witness statement and into his evidence before the Court, it is difficult to see how the Learned Judge could have accepted any other part of the Claimant's evidence or the medical report itself – and, without these, there was nothing left.

47. However, the Claimant's dishonesty did not stop there: Mr Wood demonstrated clearly that £1,300 special damages were claimed in respect of a loss which, when investigated in cross-examination, turned out to have been only been £400. There were fundamental inconsistencies between what the Claimant was saying in his witness statement and evidence, and what he had said in the Claim Notification Form. There were inconsistencies in relation to the period before recovery from the injuries. Finally, it appeared that the Claimant had undergone a course of physiotherapy more for reasons to do with his claim rather than for genuine medical reasons.

48. Mr Wood submits that, pursuant to Section 57 of the Criminal Justice and Courts Act 2015, I should allow this appeal and dismiss this claim for personal injuries on the basis that I am satisfied that the Claimant has been fundamentally dishonest in relation to the claim. I agree with this submission. As in *LOCOG v Sinfield* [2018] EWHC 51 (QB), so here, the Defendants have proved on the balance of probabilities

that the Claimant acted dishonestly "in relation to the primary claim and/or a related claim, and that he has thus substantially affected the presentation of his case, either in respect of liability or quantum, in a way which potentially adversely affected the Defendant in a significant way, judged in the context of the particular facts and circumstances of the litigation" (see paragraph 83 of the judgment of Julian Knowles J.) In my judgment, there was fundamental dishonesty here on the part of Mr Molodi in the respects I have identified and, on that basis, the Judge should have dismissed the entire claim by reference to Section 57 (2). Indeed, I go further and, irrespective of the provisions of Section 57, in my judgment the Learned Judge should have dismissed the claim because, as Mr Wood submitted, the Claimant had failed to prove his case.

49. In essence, I agree with, and adopt for the purposes of this judgment, the arguments and submissions made by Mr Wood on behalf of the Defendants/Appellants, as set out at paragraphs 28 to 33 above. Although I have not seen the witnesses, and bearing fully in mind the strictures of Lord Reid as set out in *Benmax* (see paragraph 36 above), I nevertheless consider that this is one of those rare cases where the weight of the other evidence, and in particular the inconsistencies and the failure truthfully to account to the medical expert in relation to previous medical history and previous accidents and the dishonesty in relation to the special damages are such as to justify overturning the finding of Judge Main QC that, having heard the Claimant, he could rely on his evidence as to the fact that he had been injured and as to the duration of his symptoms. On the basis of matters which were either admitted by the Claimant or were shown beyond peradventure to be the case, it also seems to me that a finding of fundamental dishonesty should have been made on the part of the Claimant.

50. For these reasons, I allow the appeal and dismiss the claim.