Neutral Citation Number: [2022] EWHC 2648 (KB)

Case No: QB-2018-005174

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/10/2022

Before :

MR JUSTICE COTTER

- -

Between :

BRIAN MUYEPA	**Claimant**
- and -	
MINISTRY OF DEFENCE	**Defendant**

- -
- -

Laura Collignon and Michael Smith (instructed by **Bolt Burden Kemp Solicitors**) for the **Claimant**
Andrew Ward (instructed by **Keoghs LLP**) for the **Defendant**

Hearing dates: 27th, 28th, 29th, 30th June 2022 & 4th, 5th, 6th, 7th, 8th, 11th, 12th & 14th July 2022

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Approved Judgment

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

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Mr Justice Cotter:

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Introduction

1. By proceedings issued on 20 July 2018, the Claimant seeks damages for personal injury and consequential losses as a result of the Defendant's alleged breaches of statutory duty and common law duty of care, which resulted in him suffering a Non Freezing Cold Injury ("NFCI")[1]. He alleges that he initially sustained a NFCI to his hands and feet whilst participating in a Potential Non-Commission Officer ("PNCO") promotion course at Sennybridge in Wales in February/March 2016. He was diagnosed with the condition and a recommendation was made that he should not work in cold environments. On two occasions during 2016 he worked in the Ascension Islands in a warm climate and the condition improved. On his return to the UK the condition significantly worsened after he had worked in a cold environment in hangars over the winter 2016/2017. A Medical Board held on 23rd June 2017 downgraded him and he was medically discharged on 16th January 2018[2]. It is his case that ongoing symptoms from the NFCI have left him severely disabled.

2. It is the Defendant's case that if the Claimant's claim is genuine there was a breach of duty. If, however, the Claimant deliberately engineered an NFCI injury to advance a fraudulent personal injury damages claim, then there were no reasonable steps that the Defendant could have taken to prevent the injury such that it would not be in breach of duty to the Claimant. In any event it is the Defendant's case that the Claimant has either created, or consciously and significantly exaggerated NFCI symptoms to such an extent that he has been fundamentally dishonest and the claim must be dismissed.

3. The case turns on whether the Claimant has been honest about the existence, causation and extent of NFCI symptoms. In his final Schedule of Loss dated 4th May 2022, he claims damages of £2,977,821[3] a very significant sum. However if the Defendant's case is accepted he faces devastating personal consequences. Both sides' approach to the hearing reflected the importance of the case and the mills of this litigation have ground slowly; but they have ground fine. Over 12 days I heard from 29 lay witnesses and 10 expert witnesses.

Brief factual overview

4. The Claimant was born in Malawi on 5th June 1988. In 2004 following death of his mother, the Claimant arrived in the UK (aged 16) to live with his father who was

[1] The current agreed view is that local cooling of human tissue in an ambient environmental temperature range from just above freezing to approximately 15°C alters its physiological and functional characteristics. The risk of structural cell damage appears to be inversely related to tissue temperature and directly related to duration of cold exposure. The current view is that NFCI can cause lasting debility including numbness, paraesthesia, pain, hyperhidrosis, cold allodynia and proprioceptive changes. Vasoconstriction in response to further cold stimulus can result. NFCI is not a new condition. It was known as Trench Foot during WWI and later as Immersion Foot Injury. However, immersion in cold water is not always required and it can affect the hands as well as the feet. Hence, the modern nomenclature is NFCI.

[2] Having served for 10 years and 4 months

[3] This is a reduction from the sum claimed in his Interim Schedule of Loss dated 17th February 2021 of £3,766,615

working as a GP in Dover. The Claimant attended college in Dover. He completed a course in computer technology. On the 3rd September 2007 the Claimant enlisted in the Army aged 19 years as a Gunner in the Royal Artillery (on an open engagement due to end on 2nd September 2029). He completed basic training at Pirbright and then specialist training in RA communicator part 1 level 1 and SDC Land Rover training at Larkhill, Salisbury. He then joined 40 Regiment. In 2012 the Claimant moved to the 47 Regiment and trained as a Desert Hawk 3 operator (DH3) before converting to a watchkeeper.

5. Following domestic issues and court action he was placed on a three-year promotion bar. As at 2016, he had two children born on 1 November 2007 and 4 April 2012.

6. By the winter of 2016/2017 he remained on his entry grade but was taking the necessary preparatory steps for promotion. It is his case that he would have remained in the army for his full term had he not suffered an NFCI.

Lay witness evidence for Claimant

7. I heard from the Claimant, his wife Racheal Muyepa and also from

i. Christoper Olivant

ii. Clara Chibwana

iii. Alexander Chitenji

iv. Peter Makosah

v. Elizabeth Makosah

vi. Davie Chirwa

vii. Balena Mwalwanda

viii. Patricia Morgan-Lynch

ix. Austin Chiwala

x. Yamikani Guba

xi. Pesley Khonje

xii. Mada Brown

xiii. Peter Napolo

xiv. Wanga Nkalo

xv. Christa Nanton-Browne

xvi. Garfield Taylor

xvii. Princess Green-Taylor

xviii. Edwin Mtumbula

xix. Erness Chirambo

xx. Amos Khonje

xxi. Mervis Muyepa

xxii. Blessings Msowoya

xxiii. Cecilia Khan

xxiv. Martin Brown

xxv. Noel Chikoleka

I also heard from two lay witnesses called by the Defendant; Marlon Lessey and Alice Mgemezulu.

Expert evidence

8. I heard from the following experts who were called by the Claimant

   i. Dr David Carey (an expert in NFCI)

   ii. Dr Martin Baggaley (a consultant psychiatrist)

   iii. Dr Mike Sidery (an expert in chronic pain conditions)

   iv. Amanda Kerby (an expert in care and occupational therapy)

   v. Mr Craggs (an employment expert)

9. I also heard from the following experts called by the Defendant

   i. Dr Colin Mumford (a consultant neurologist)
   ii. Dr Trevor Friedman (a consultant psychiatrist)
   iii. Dr Neil Edwards (an expert in chronic pain conditions)
   iv. Jill Ferrie (an expert in care and occupational therapy)
   v. Mr Cameron (an employment expert)

The approach to the lay witness evidence

10. Given the polarised cases of the parties, what is at stake, the fact that at least one person took the oath and perjured themselves to advance or undermine a very large

claim, the large number of people interested in the case and also the content of the closing submissions it is, unusually, necessary to briefly set out my approach to evaluation of the lay witness evidence and the determination of factual findings. I do so with some considerable hesitation as Judges up and down the land deal with factual issues on a daily basis and much of what I will set out are elements of very basic Judgecraft.

11. In **Pomphrey v Secretary of State for Health & North Bristol NHS Trust** [2019] EWHC [2019] Med LR Plus 25 I stated as follows in respect of the determination of disputes as to the facts [4];

> "[31] I start with some very general and basic propositions. When evaluating the evidence of a witness whose testimony has been challenged it should be broken down into its component parts. If one element is incorrect it may, but does not necessarily, mean that the rest of the evidence is unreliable. There are a number of reasons why an incorrect element has crept in. Apart from the obvious loss of recollection due to the passage of time, there may be a process of conscious or subconscious reconstruction or exposure to the recollection of another which has corrupted or created the recollection of an event or part of an event.
>
> [32] The court must also have regard to the fact that there can be bias, conscious or subconscious within the recollection process. When asked to recall an event that took place some time ago within the context of criticism, people often take an initial stance that they cannot have been at fault; all the more so if the act in question was in terms of their ordinary lives; unmemorable. There is a tendency to fall back on usual practice with the tell-tale statement being "I would have" rather than "I remember that I did".
>
> [33] The approach to the exercise of fact finding in a complex case (when faced with stark conflicts in witness evidence) as necessarily requiring all the pieces of the jigsaw to be fitted together is often both flawed and an exercise in the impossible. This is because individual pieces of the jigsaw may be wrong, distorted to a greater or lesser degree, or absent. Indeed, it is not possible to make findings if the state of the evidence or other matters mean that it is not proper to do so (see generally **Rhesa Shipping Co SA v Edmunds (The Popi (M) [1985] 1 W.L.R. 948).** However, often a sufficient number of pieces may be fitted together to allow the full picture to be seen."

12. But what of the mendacious witness? When a witness admits to lying, or is proved to have lied, it does not axiomatically mean, that little or no reliance can be placed on any aspect of his/her evidence. First the motive and context of the untruthfulness must be considered. Then consideration given to the effect on credibility generally

[4] This expands upon what I had set out in **Busby -v-Berkshire Bed Company** [2018] EWHC 2976

and especially upon other evidence given by the witness concerning matters in dispute.

13. As for motive for lying the standard criminal directions to a jury require them to consider, if there have been deliberate lies, why a Defendant has lied? In answering this question, the jury is told to bear in mind that a Defendant who tells a lie is not necessarily guilty: sometimes a Defendant who is not guilty will tell a lie for some other reason. One reason may be to bolster a true defence. So it may be in a civil claim. A witness may lie to bolster an otherwise valid claim or defence to a claim. Alternatively, the lying may solely be to obtain a benefit to which they know they are not entitled or secure protection for themselves, or a person with whom they have a bond, in the knowledge that if the Court knew the true facts such protection would not be afforded.

14. In hospitals and GP surgeries there is a phenomenon which was described by Dr Mumford, an expert in this case, as "deceiving to convince". This phrase was adopted by Ms Collignon in her closing submissions in respect of any lie which the Court may find the Claimant or his wife told. However a person who is trying to convince a treating clinician that their medical condition is worse than it truly is in order to convince of the need for, or to speed up, treatment has a very different motive to a person who is deceiving medico legal experts and others as to the existence or extent of symptoms within the context of a personal injury, clinical negligence or benefits claim, with the sole aim of securing a level of damages or benefits they are unlikely to achieve were they not to deceive.

15. When referring to consideration of the context of the lying, I mean assessing when and how the untruthful evidence was given and also its relationship with other elements of the claim. In the present case the Claimant's wife, Mrs Muyepa, admitted that she and the Claimant had deceived the care experts as to where she was living at the time of their interviews to assess care needs. The motive for doing so was that if the care experts were aware of the fact that she had left her husband in December 2018 this undermined a claim that she was available to give him care and assistance around the clock (and also undermined the assertion that he was so significantly disabled he needed such care).The context was the knowledge (and in my view there must have been such knowledge) that past and future care would be valued by the experts and would be reflected in the damages claim. The Claimant and Mrs Muyepa knew that the deception would artificially inflate the claim. This was deception for financial gain in respect of significant elements of the claim. Subsequently a schedule was compiled and served based on an understanding which they well knew was false. The effect is that I have to consider all aspects of the evidence of Mr and Mrs Muyepa bearing in mind that they are prepared to lie not just to underpin, but to significantly inflate, any true claim. Before any consideration of the Defendant's case or challenge to the opinion of Ms Kerby, the financial impact on her evidence was considerable. The Claimant's schedule figures for care dropped by £675,363 when she was informed of the true position (which had only been detected by the Defendant through analysis of third party records).

16. Where witnesses are accused of lying (as the Claimant, Ms Muyepa, Mr Lessey and Ms Mgemezulu all were) cross-examination still remains the gold standard test (see generally the analysis of Mostyn J in **Carmarthen County Council v Y** [2017] EWFC 36 and Stewart J in **Kimathi & Ors v Foreign and Commonwealth**

Office [2018] EWHC 2066 (QB). I had the benefit of hearing from all four witnesses (and from the Claimant and Mrs Muyepa at some length). They were all robustly (but very fairly) challenged, and I listened very carefully to all that they said. Most first instance Judges across a range of jurisdictions undertake the assessment of veracity on a very regular basis and the proper approach as set out in a number of cases and articles requires no exegesis from me[5]. It is now well recognised that caution must be exercised before placing weight on *how* the evidence was given. Mr Ward referred in closing submissions to the difference between the Claimant and Mr Lessey when giving evidence. Ms Collignon, perhaps recognising that Mr Lessey was the most self-assured witness of the four witnesses directly attacked as liars, submitted that he appeared plausible because he was a calm and accomplished liar. However, the assessment of witness evidence is not a beauty parade and Judges should not treat it as such. As Peter Jackson LJ said in **B-M** [2021] EWCA Civ 1371 at pp.23-5:

> "No judge would consider it proper to reach a conclusion about a witness's credibility based solely on the way that he or she gives evidence, at least in any normal circumstances. The ordinary process of reasoning will draw the judge to consider a number of other matters, such as the consistency of the account with known facts, with previous accounts given by the witness, with other evidence, and with the overall probabilities. However, in a case where the facts are not likely to be primarily found in contemporaneous documents the assessment of credibility can quite properly include the impression made upon the court by the witness, with due allowance being made for the pressures that may arise from the process of giving evidence…."

17. Demeanour in court is not entirely irrelevant; it can on occasions be instructive. It is usually far easier to tell the truth than to lie. There may be pauses as a witness may try to think through implications and remain consistent. There may be a failure to answer a direct question by deliberately going off at a tangent; so appearing to answer; but not answering at all[6]. However, the way evidence is given or "demeanour" must not be given disproportionate weight. The difficulty some witnesses will have in giving evidence (for a range of reasons) must be taken into account. The overriding objective sets out that it is the aim of the Court to ensure a witness can give their best evidence, but the process often cannot be an entirely level playing field. Judges give due allowance for the fact that the court room is often an unfamiliar and frightening place for those who appear as parties or to give evidence, and that some witnesses will find the process more stressful and difficult than others particularly if they have a mental health issue such as depression. Allowances must also made for education and use of language. On the other hand some witnesses may be calm and assured, but calculated and accomplished liars. I took these matters into account when assessing all the witness evidence in this case.

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[5] There are numerous article and books that cover this issue. See e.g. Lord Bingham's essay "The Judge as Juror: The Judicial Determination of Factual Issues.

[6] See generally Lord Shaw in Clarke-v-Edinburgh Tramways [1919] SC (HL) 35 at p 36

18. Each Judge will have his or her own approach to the factors referred to by Jackson LJ. I usually take as a first step in the analysis of the veracity of a witness, establishing the relevant base of facts that cannot be in dispute; a set of foundations against which the reliability of the testimony can be assessed[7]. Establishing such facts does not rely upon witness recall; rather on what is established by scientific fact and/or the seemingly ever increasing amount of data we produce such as documents, photographs, emails, text messages, video and other footage.

19. The Defendant's records (only provided after an order by the Court) established that Mr Lessey's evidence as to the date of a meeting was incorrect. Social media clips and surveillance evidence established that what Mr Muyepa stated about his ability to walk without a stick was also incorrect. However, the mistake made by Mr Lessey was in my judgment a relatively minor one and did not substantially undermine his evidence (he corrected it in evidence in chief). The same cannot be said of the effect of what could be seen on the screen when taken against what the Claimant had claimed to experts, and within his witness statements, to be the limits of his mobility.

20. The next step I take is to consider the evidence of all of the witnesses in turn. Ms Collignon properly placed very great emphasis during her submissions upon the number of witnesses prepared to give evidence on behalf of the Claimant. It was the method used to seek to prove that the Claimant was essentially honest and Mr Lessey was a liar. However the assessment of evidence it is not purely a numbers game. It is necessary to carefully consider the evidence of each witness critically taking into account all relevant matters such as the following (this being a non-exhaustive list):

    (a) Motivation. What if anything has the witness to gain or lose through their evidence being accepted and is the witness trying to help the court independently of his or her personal interests/allegiance? As for the central witnesses, Mr and Mrs Muyepa had an obvious motivation to lie; all the more so when the sums claimed are so large. However Ms Collignon struggled with what Mr Lessey's motivation to come to court to lie may have been. He said that he came forward when he saw the case in the paper as he knew it was being advanced fraudulently and having been the victim of fraud himself in the past, he thought it "right" to say something. Ms Collignon suggested to him that he was motivated by jealousy to come to court and perjure himself. Mr Lessey dismissed the suggestion and it would be an extra ordinary step to take if that was the sole motivation.

    (b) Is there the potential for unconscious bias? Leggatt J (as he then was) in **Gestmin v Credit Suisse** [2013] EWHC 3560 (Com) referred to modern psychological thinking on frailty of memory and stated:

> "19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty…to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give

[7] See generally **Synclair v East Lancs NHS** [2015] EWCA Civ 1283 per Tomlinson LJ and the reference to Lord Goff's opinion in **Grace Shipping v Sharp & Co** [1987] 1 Lloyd's Rep 207 at 215-6

> evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces."

In my view unconscious bias has to be borne in mind in particular when considering the evidence of the Claimant's family and friends, particularly about events which were not particularly memorable at the time (such as what the Claimant did or did not do as one of many guests at a large scale wedding reception).

(c) Is the extent of the recollection (or lack of it) plausible?

I struggled with the plausibility of the evidence of some witnesses that they could recall (with certainty) whether or not another guest who was not the centre of attention danced at any stage during a large scale wedding reception.

(d) It is internally consistent (or has the witness changed his or her mind)?

A significant example in this case was the Claimant's failure to be consistent about whether his symptoms significantly improved in summer or not.

(e) To what extent is the evidence of any witness consistent, with and/or corroborated by, other evidence (lay, expert, documentary etc). This includes considering whether other witnesses broadly agree on matters (bearing in mind that more than one witness could be wrong but that evidence may provide cross/mutual support. Ms Collignon referred to the number of witnesses who stated that:

(i) The Claimant loved army life;

(ii) the Claimant had appeared a changed man since he left the army;

(iii) the Claimant used a stick and appeared disabled;

(iv) the Claimant showed others what he said were swollen feet

(f) Ordinarily it is harder when cross examined to lie in a consistent and plausible way than it is to tell the truth. I found that to be the case with the evidence of the Claimant, Mrs Muyepa and Mr Lessey.

21. Having heard all the lay and expert witness evidence I then considered how it fitted together and whether a sufficiently clear picture emerged (even if all the available pieces of the jigsaw did not fit together to show a completed puzzle). A clear picture did emerge.

22. Having set out general process of analysis I now turn to the detail of the evidence.

The Claimant's case

23. I start with the Claimant's evidence.

The Claimant's evidence

24. The Claimant gave evidence for well over a day (including breaks). The vast majority of his evidence concerned his alleged injuries.

25. Mr Ward suggested to the Claimant that he had dishonestly created or at the least exaggerated symptoms, an example being when he presented himself to Dr Carey (an expert instructed by his own solicitor) with an extreme and exaggerated level of symptoms. The Claimant said that he required assistance from his wife, and a stick, to get out of the car because he had been sitting down in the car for three hours and there were steep stairs which required him to be careful. He was in pain for the whole of the consultation which lasted approximately two hours. The Claimant said that he told Dr Carey that he could only walk a few metres before the pain became severe, that if the pain was not so bad he was able to push himself more but that when he walked he always required assistance; accordingly he used a walking aid whenever he walked. The Claimant confirmed that he used a stick every day and that the impression he gave to Dr Carey was that he always walked with a stick. He began doing so around April 2017. The Claimant explained that he had fallen on a few occasions and relied on a stick. He agreed that the stick was used to mobilise.

26. The Claimant said that when he presented himself to Dr Carey at the further examination on 17th August 2020, his position had not changed and he was still experiencing the same symptoms. The Claimant confirmed that again he needed both the assistance of his wife and his stick to get out of the car. The Claimant agreed that the impression he gave to Dr Carey was that he needed a stick to get around.

27. The Claimant also agreed that the impression he gave to Mrs Amanda Kerby, the Claimant's care expert, who visited the Claimant on 30th December 2019 (in between the examination and re-examination of the Claimant by Dr Carey) was that he needed a stick and the assistance of his wife to mobilise. He said that this was "on a bad day" but accepted that the report does not state anything about bad days. The Claimant said that his 'injury fluctuates' and on average at around that time he had a bad day 4-5 times a week. On a good day the Claimant explained that he would try to walk without assistance however he had anxiety as a result of having so many falls; hence the use of a walking stick. Referring back to Mrs Kerby's report the Claimant accepted that the report stated that he used a stick to mobilise indoors and to hold on to furniture.

28. I asked the Claimant as to what caused him to fall? The Claimant replied that he experiences sharp pain in his feet which causes imbalance. I asked the Claimant to expand upon this as there was an accusation against him that he had feigned/faked a fall. The Claimant said that if he feels a sharp pain in the sole of his foot he will try to relieve it by lifting his foot which is why he falls over. He added that it is not excessive pain in his feet but that the pain comes under his feet and his leg becomes wobbly causing him to fall down. The pain causes twitching in his leg and even if he is standing still this twitching causes him to fall down. It was very difficult to reconcile this evidence, which was somewhat difficult to follow, with any of the expert medical evidence.

29. The Claimant was taken to a photograph of him walking with a pram on 13th March 2017. He stated that he deteriorated suddenly between March and April 2017.

30. The Claimant was shown two videos taken from a 'renewal of wedding vows' reception on 1st June 2019. The first video showed the Claimant walking alongside another man from left to right of the screen. The second video showed the Claimant walking from right to left across the screen. In both videos the Claimant was walking unaided, freely and normally and without the use of a stick (he was carrying a drink in one video).

31. The Claimant said that what was shown was not his normal speed and not how he normally walked. He described his walk as like a 'penguin'. He said that he managed to walk to the toilet once or twice. He confirmed that he did not use a walking stick. The Claimant said that he was feeling better that day and he did not like using a stick because he was embarrassed by it. The Claimant did acknowledge in response to my observation that in the videos there was nothing about his gait which suggested something unusual. When I asked what he had to say in response to the assertion that to the non-expert eye he appears to be walking reasonably well, the Claimant responded that he had never said he cannot walk without a stick. When he was referred back to the contents of Mrs Kerby's report compiled after a visit some 6 months after these videos were taken, the Claimant said that his 'injury fluctuates'. He denied that he misled Mrs Kerby and that he could walk perfectly well without a stick. He denied that he was dancing at the reception or that he was standing at the bar for a long time[8].

32. When it was put to the Claimant that he had misled Dr Carey and Dr Mumford regarding his mobility, the Claimant replied that he had never specifically told one of the experts that he could not walk without a stick.

33. The Claimant was referred to the fourth joint statement of Dr Carey and Dr Mumford, and was asked to explain how it came to pass that the video footage of 1st June 2019 was in stark contrast to how he presented himself to the experts some 9 months later. The Claimant replied that his 'injury fluctuates' and varies. In effect "good days and bad days."

34. The Claimant was taken to Mrs Ferrie's care report and her video call with the Claimant on 8th May 2020. The current position as set out in the report at page 14, paragraph 7.04 was that the Claimant walked at all times with a stick. The Claimant denied that he had lied to her. He accepted that he told her he used a stick every day but not that he used a stick at all times of the day to walk. He said that he told Mrs Ferrie that when he went to stand up from sitting in a chair he used a walking stick and if there was a handle on the chair he would also use that to elevate himself. If there was no handle then he would receive help from somebody "if the day is bad". In response to the question why he did not tell Mrs Ferrie this would happen on a bad day, the Claimant's only reply was that he told her he needed a walking stick to stand up and sit down.

[8] The Claimant said that he did not know Alice Mgemezulu and that he was not aware of her until he had read her statement which contained the recollection that he had been dancing at the reception.

35. It was put to the Claimant that he went to the toilet at the wedding and sat up and down without assistance. The Claimant's retort was that when somebody is injured they adapt to survive.

36. The Claimant was shown a video from 23rd August 2019 of a BBQ at the Claimant's house[9]. He accepted that the video showed him dancing without a stick but said that it did not show him stand up and that he was not dancing how he used to dance. The Claimant added that it was a good day and that friends were around to socialise. After a long time of not enjoying himself, he felt free. The Claimant said that his stick was nearby and visible in the video.

37. The Claimant was asked why he had not told any of the experts that his 'injury fluctuates' and that he has good days and bad days? The Claimant replied that he did not have many good days. He said in his mind he has tunnel vision; he only has bad days. He denied that he was now trying to cover his tracks.

38. The Claimant was asked why he was wearing an apron in the video of 23 August 2019? The Claimant replied that he was helping to marinade the chicken. I asked the Claimant what would prevent him from cooking? The Claimant accepted that his hands remained strong but he said that his fingers no longer sensed heat quickly enough. When he realises something is hot, he is already burnt. I found this to be an unconvincing answer and unsupported by the expert medical evidence. He also referred to having several falls and fearing for his own safety when cooking.

39. The Claimant was taken to the benefits assessment at the Department of Work and Pensions ("DWP") on 2nd August 2019 and it was suggested that some of the answers were inconsistent with the footage of him dancing at the BBQ later in the month and walking at the reception a couple of months earlier. Again the Claimant's explanation was that his 'injury fluctuates' and what he feels today may be different to what he feels tomorrow.

40. The Claimant was then taken to the Personal Independence Payment ("PIP") review of 10th August 2020 where it was recorded that the Claimant used a walking stick all the time as opposed to other options which included being able to walk 20-50 metres and sometimes needing an aid or assistance. It was suggested that by indicating that he always needed an aid and assistance he was lying as the assertion was inconsistent with his case that his 'injury fluctuates'. The Claimant rejected that suggestion and said that he required assistance "most of the time". He said that he filled out the form taking account of how "he was feeling in that moment". It was pointed out that his evidence was inconsistent with photographs of him standing in 2018 and 2019. The Claimant replied that his stick was always around but not visible in the photographs.

41. The Claimant was then taken to the surveillance recorded on 3rd September 2020. It was suggested to the Claimant that the surveillance of him getting in and out of the vehicle was plainly inconsistent with his statement to Mrs Kerby that he was reliant upon being assisted to do so. The Claimant replied that on bad days, whenever he is in pain (he stated that it was pain in the legs and back which stops him from getting out of the car alone as opposed to his feet) he required assistance; so he referred

[9] This was posted live onto Facebook via the Claimant's wife social media account

again to "fluctuation" in his symptoms in respect of this issue although no reference to "good days" was made to the expert or within his statements.

42. The Claimant said that pain would transfer to his hips and back, but the genesis of the pain was always his feet. When I asked about the pain radiating up his body the Claimant replied that they felt like spasms, with some shaking, that would start from his knees and then result in pain in his lower back. He also confirmed that he would always walk with his stick in his left hand because he was right-handed, and this enabled him to use his right hand. He was adamant that he never used the walking stick in his right hand[10] and said that the stick helped him balance, gave confidence and helped with his feet. I asked the Claimant why he was limping? The Claimant replied that he was trying to balance the pain from one foot to the other. I observed that if he had bilateral problems he would be shuffling rather than putting more weight onto one foot. The Claimant said he did not know why he did so and maintained that he suffered pain in both feet.

43. The Claimant said that he uses walking sticks so often that they break due to the weight which he puts upon them, and he must keep buying new ones. He said that he physically needed to rely on a stick on a bad day because of his feet. On a good day the Claimant said he used the stick for confidence because he had several falls.

44. The Claimant was asked questions about his very large claim for care and assistance. He was taken to his first witness statement of 3rd March 2020 and in particular paragraph 49 where he set out that as a result of his injuries his wife had to do more and to paragraph 65 where he stated that he was "pleased to say that Racheal and me are still together". It was suggested that this was deliberately misleading as he had separated from his wife in 2018. His initial response was that it was fair for him to say what he had said because of the care she was giving him and the children and that she was always around the home. Eventually he acknowledged that the phrase "I am pleased we are still together" should not have been in the statement. He then attributed the problem to previous drafts of the statement.

45. The Claimant was taken to Mrs Kerby's report of January 2020 within which she records that the Claimant is assisted downstairs at 5:00am despite the fact that they had separated in 2018. The Claimant replied that if his wife "is around" then she would assist. He accepted that that was not recorded within the report. The Claimant was also taken to Mrs Ferrie's report of July 2020 and her note that she had been told that in December 2018 the Claimant and his wife moved to the property sourced through a bidding process. In fact Mrs Muyepa had never lived at the address as they had separated. He denied that he had misled Mrs Ferrie and said it was not important.

46. The Claimant said that his wife provided care for his youngest daughter as he was not able to do so but was then taken to a declaration to the DWP titled 'Caring for someone – Brian Muyepa'[11]. The Claimant confirmed that he had put down that his

[10] The Claimant was referred to Dr. Friedman's first report where he commented that the Claimant used a walking stick in his right hand. The Claimant said he thought that Dr. Friedman was not paying attention.
[11] The Claimant was also taken to a Wiltshire Council note outlining his youngest daughter's considerable care needs. He accepted that the note states that both parents were co-parenting. The Claimant was taken to a further note which suggested that he provided all the care for the youngest daughter. His response was that it was a mistake.

three children were living with him as opposed to his wife. The Claimant confirmed that he had entered on the form that he provided care for the youngest daughter who is disabled. He said that this was the advice he was given by the DWP (job centre) because the children were staying with him. He was adamant that that was what he was advised to do. The Claimant was then taken to the entry dated 3rd February 2022 where it was redeclared that the children do not live with him as of 18th January 2022. The Claimant said that his situation was a bit complex. He explained that his wife was homeless and had been since December. When she became homeless he offered her a place to live. The Claimant said that he told the Council who advised him that Racheal should take over all the benefits for the children in order to get a house. The children will move out once Racheal is given a house. In the meantime, the Claimant said that he told the Council that his wife was also living with him because this was what he had been advised to do. He confirmed that they were no longer a couple and that on 20th January 2022 the children were living with him despite the declaration saying to the contrary.

47. The Claimant was asked about the claim for the costs of future childcare despite the intention being that the children will move out to live with his wife as soon as she gets her own house. The Claimant said that he was still their father and wanted to still be there for them. It was put to the Claimant that if the children were only going to visit him then there would be no need for any care to assist with them. The Claimant did not have an answer.

48. The Claimant confirmed that he had known Marlon Lessey since 2015, but said he was not a friend and had not been invited around for drinks at any stage. He acknowledged that there was a photograph from a BBQ in August 2015 referred to as the 'white BBQ'. The Claimant said that Mr Lessey came uninvited and crashed the party.

49. The Claimant said there was no other BBQ with people other than family attending. It was put to the Claimant that it was at this other party (not the 'white BBQ') that the Claimant was overheard by Mr Lessey speaking to a former soldier. The Claimant said that there was no former soldier invited to a BBQ. He added that he did not have a friend from Portsmouth who is a former soldier, who had NFCI, and who used a walking stick. This was all made up by Marlon Lessey. It was suggested that the Claimant was fed up with the army in that it was not compatible with family life and he spoke with a former soldier about how to bring a claim due to NFCI. The Claimant said he was happy, coping financially, his wife was working, everyone was comfortable, and they were all happy. He said they were having BBQs every weekend and could afford food and drink. The Claimant said he could have had a good pension and questioned why he would leave all of that. The Claimant denied he had been planning to say he was injured in the cold on an exercise over the winter of 2016. The Claimant was asked about his final Medical Board and his presentation to them as being unable to walk or stand without a stick. It was also put to the Claimant that his presentation to Dr Edwards was following through on the guidance that he was given by the former soldier at the BBQ. The Claimant denied this and said he was not following any guidance. It was also put to the Claimant that he told Amanda Kerby that he sometimes used a urine bottle. Again, it was suggested, that the Claimant was following guidance from the former soldier. The Claimant said he used a urine bottle. This evidence was later largely contradicted by his wife.

50. The Claimant also denied that Mr Lessey could have seen him jumping off a stage at a BBQ in 2018. He said that Marlon Lessey was a liar. He also denied that he attended a petrol station and that he was seen walking normally without a stick. He said that there was no reason for him to change his style because he saw Marlon Lessey and that he did not need to put on an act for him.

51. He said that he had never met Marlon Lessey at the Lidl supermarket (although he did shop there) and he questioned why he would put on an act in Amesbury which is full of soldiers. The Claimant was asked about a conversation he and his wife Racheal had with Marlon Lessey regarding NFCI at this store. The Claimant said that it never happened. The Claimant said he never knew Marlon Lessey had NFCI.

52. The Claimant was asked about a trip to Tesco, Amesbury in spring 2020. The Claimant said he did not remember seeing Marlon Lessey. He said that the account provided by Marlon Lessey never happened; it was another lie.

53. The Claimant was asked about the BBQ at Christa Nanton-Browne's home in summer 2020. The Claimant agreed that this event took place. The Claimant said that he and his family arrived at the BBQ first. He said that Marlon Lessey would not have been able to see him walk anywhere. He said that he was not dressed in white as claimed by Marlon Lessey. He denied that he had danced in the backyard.

54. The Claimant confirmed that Martin Brown was a cousin of Racheal's. He described Martin Brown as like a brother-in-law. He was aware that he had suffered his own NFCI. The Claimant said that Martin liked to keep things to himself. He knew Martin had NFCI but not the extent. He did not ask what he was going through and the Institute of Naval Medicine ("INM") was "not something that you would just talk about". The Claimant said that he was aware that Edwin Mtumbula had also suffered NFCI. He said that he was aware of his NFCI but not his discharge in 2012.

55. The Claimant said it was incorrect to suggest that he was getting frustrated with Army life having fallen behind his colleagues in terms of promotion, and that his deployments were not compatible with family life. He denied that it had ever crossed his mind to try and get a payout for a NFCI. The Claimant was taken to an entry within his medical records on 13th November 2015 concerning stress related problems which required some time off[12]. It was put to the Claimant that this was the trigger to make him decide to go through with this fraudulent plan in Sennybridge. The Claimant denied that the entry related to a significant problem. He said he told the medical officer of his issues as they would then go to the hierarchy and the problem could be resolved quickly. I found this curious evidence.

[12] 13th November 2015 "Work related stress assoc with sense that punishment doesn't fit the crime, that his word is not believed and that he does not feel part of the team anymore. Related to putting in a leave application 2 weeks ago and then being accused of not having had it approved before going on leave. Found zopiclone partially beneficial - help him to get to sleep but waking up early still. Is an acute problem so SSRIs not appropriate now. PHQ-9 score is 23. Offered to phone BC or BSM but he decided to try and speak to BSM himself once more. Advised that sick leave to avoid work is not a solution. Family at home incl wife and 2 children aged 8 and 3. He is not keen to involve either padre or welfare. He has 220 more zopiclone tablets."

In any event I am satisfied that he sought to underplay his unhappiness as at the autumn of 2015.

56. I shall not set out the detail of the Claimant's evidence in relation to sums claimed in the schedule. As a very broad overview I found it unconvincing and containing exaggeration of the effects of his symptoms.

57. I shall now give an outline of the evidence given by the Claimant's witnesses. Given the length of this judgment and the limited assistance provided by many of them I shall deal with some of the evidence very shortly.

Claimant's witnesses

58. Mr Christoper Olivant was the platoon sergeant at the Sennybridge PNCO course in February/March 2016 where the Claimant allegedly suffered the onset of NFCI. Mr Olivant commented on the course and the briefing beforehand on NFCI. He confirmed that the Sennybridge PNCO course needed to be completed in order to progress to the next upward rank.

59. I asked Mr Olivant about the comment in his statement stated that he thought the Claimant suspected it would be cold on the course. He replied that Sennybridge was always cold; he had attended in May once and it snowed. Mr Olivant said everybody knew it would be cold in Sennybridge and that the testing conditions were a part of the course. Mr Olivant stated the Claimant was the only Commonwealth soldier on the course and that he had been trained that certain soldiers were more susceptible to NFCI. At briefings they were told to keep an eye out for those soldiers from Commonwealth backgrounds. He confirmed that during the exercise all clothing got wet.

60. Mr Olivant agreed that being in the army in general can put a strain on personal and family life and that it was fair to suggest that short notice deployments and moving from base to base can have an effect on soldiers particularly those with family at home. However, he considered the Claimant to have been happy and gave the example that the Claimant volunteered to go to Canada on deployment. He said that he had been alongside the Claimant on that deployment and if he had wanted to get NFCI he could have done so then when it was -16/17°C. He said knowing the Claimant he would not believe that he would have engineered or faked an NFCI. The Claimant would never whinge about the army; he was a professional soldier who excelled (this was contradicted to a degree by the lack of promotions).

61. Ms Clara Chibwana knows the Claimant through his wife (Mrs Muyepa's mother helped raise Ms Chibwana in Malawi). She moved to the UK in 2005 and visited the Claimant and Mrs Muyepa frequently (once every 3 months) and stayed for a day or two. Ms Chibwana has seen the Claimant limping, using a walking stick, struggling up and down stairs and struggling mentally. Ms Chibwana suffers from functional neurological disorder and chronic neuropathic pain as a result of a fractured spine suffered in a car accident 21 years ago in Africa. She says that she can relate to the Claimant. Ms Chibwana talks to the Claimant regularly because of his struggles. She says the Claimant can get carried away (dancing, wanting to have fun) but be in pain afterwards. Ms Chibwana last saw the Claimant in June 2019. She did not know that he had separated from his wife. She had called the Claimant

by telephone about three times over the course of the last year and he seemed distant and disassociated.

62. Ms Chibwana said the Claimant has a limp. I asked her to describe it to me. She said the Claimant was a bit wobbly and that he was trying to get his legs one step after each other but that he was trying too hard. She said that the majority of the time she spent with the Claimant was indoors and therefore she could not remember if he used the stick thoroughly.

63. Mr Alexander Chitenje was born in Malawi and is a Corporal in the army; he has been serving since April 2009. He is currently a clerk in personnel support. Mr Chitenje first met the Claimant in 2015 at a BBQ in a mutual friend's house. They became close friends; Mr Chitenje is godfather to the Claimant's daughter. Mr Chitenje and the Claimant lived close to each other in Larkhill and they were deployed together to Canada. The Claimant told Mr Chitenje about his NFCI in 2016/17. The Claimant had stopped socialising in 2017 and Mr Chitenje noticed the Claimant using a stick around 2017/18. Mr Chitenje has witnessed the Claimant use a stairlift and wearing lots of clothes to keep warm. Mr Chitenje has also helped the Claimant by shopping for him.

64. Mr Chitenje said that the Claimant was not the DJ in the video taken on 31st July 2016 (as his role had been described in a commentary) and that the Claimant was simply standing on stage. He confirmed that the Claimant was not using a stick and had no mobility problems that he knew of.

65. Mr Chitenje was at the Claimant's home during the BBQ on 23rd August 2019 and said that the Claimant had been drinking and was not moving much whilst dancing. He described the Claimant as moving like a penguin. Mr Chitenje said the Claimant was not using his stick all of the time.

66. Mr Makosah, the Claimant's cousin, was a journalist and is now a trainee solicitor. It was Mr and Mrs Makosah's renewal of wedding vows/reception on 1st June 2019 (200 guests were invited to the reception). Mr Makosah said that he invited the Claimant knowing of the NFCI and ensured that the Claimant would be comfortable at the church and then at the reception. He was taken to a photograph of himself and his wife flanked by the Claimant and Mrs Muyepa and confirmed the Claimant did not have a walking stick. Indeed, he did not see the Claimant use a walking stick at any stage that day.

67. From what Mr Makosah can remember the Claimant was not dancing at the reception. He says the Claimant was sat at his table and chatting to friends. Mr Makosah has known the Claimant since they were children. Mr Makosah noticed a change in the Claimant's mood since the NFCI.

68. Mrs Makosah also gave evidence. She was aware that the Claimant was in the army but she did not know of his NFCI. She stated that she did not see the Claimant dance at the reception (she somewhat reluctantly accepted she might have missed him doing so). She said it was normal that he was sitting down as he always is. Mrs Makosah described the Claimant and Mrs Muyepa as two very different people; the Claimant was reserved and Mrs Muyepa was an extrovert. In my judgment this is a broadly accurate assessment.

69. Mr Davie Chirwa was born in Malawi. He is an assistant caretaker at a school. He first met the Claimant at the reception on 1st June 2019. Mr Chirwa was sitting next to the Claimant's table. The Claimant was sitting by himself and was quiet. Mr Chirwa said he had his own personal issue with his wife and was also quiet. Mr Chirwa said that he got on well with the Claimant. Mr Chirwa described the Claimant as very sociable and that they spent a lot of the evening chatting. Mr Chirwa did not dance and did not recall the Claimant dancing.

70. Mr Chirwa said he did not remember seeing the Claimant with a stick and as far as he could remember the Claimant was walking normally. I view this as significant evidence which supports a finding that the clip was not out of line with the Claimant's behaviour throughout the reception. Mr Chirwa recalled walking to the toilet and then meeting the Claimant in the lounge where they sat on a sofa and spent most of their time. Mr Chirwa said it was possible that the Claimant had a dance, but he specifically recalled a dance for couples that neither he nor the Claimant went to dance with their respective wives. He sensed some tension between the Claimant and Mrs Muyepa at the end of the evening when Mrs Muyepa went missing. Mr Chirwa said that he and the Claimant sat at the sofas and waited together for their wives.

71. Mr Balewa Mwalwanda was also born in Malawi and works as a support worker in care homes and lives in Nottingham. Mr Mwalwanda met the Claimant through mutual friends in Nottingham several years ago. He is not close friends with the Claimant but they see each other at functions. Mr Mwalwanda is close to Peter Makosah. Mr Mwalwanda did not know the Claimant suffered NFCI or that he was discharged from the army until he read a newspaper article. Mr Mwalwanda was sitting at the same table as the Claimant throughout the reception in June 2019. Mr Mwalwanda said that the Claimant did not dance. He said they sometimes sat on the sofa by the bar but most of the time they were at the table. He confirmed that the Claimant was walking normally when he went to the bar and did not have a stick. Mr Mwalwanda accepted that the Claimant may have had a dance and he just did not see the Claimant dance. Mr Mwalwanda's evidence was consistent with that of Mr Chirwa; the Claimant was walking normally throughout the evening and they observed no obvious difficulties with standing up or sitting down.

72. Ms Patricia Morgan-Lynch is a healthcare assistant. She knew Christa Nanton-Browne and attended the BBQ in July 2020 at her house. Ms Morgan-Lynch did not know the Claimant or Mrs Muyepa very well. Miss Morgan-Lynch says the Claimant and his family were already at the BBQ when she arrived and she noticed the Claimant had a walking stick. Ms Morgan-Lynch says the Claimant spent most of the day in the lounge and that Marlon Lessey arrived later in the evening and did not stay for long.

73. Under cross examination, Miss Morgan-Lynch said it was not fair to suggest that her memory of the BBQ in July 2020 had faded as it was two years ago. She said there were 50 to 60 people at the BBQ and that there was a tent in the garden. It was put to Miss Morgan-Lynch that if there were 50 to 60 people then there was no

reason for her to keep an eye on the Claimant[13]. Miss Morgan-Lynch said that where she was, she could see the Claimant sitting in the lounge. She said it was not possible that the Claimant danced because he was sitting in the lounge. She was adamant that he did not dance; in my judgment overly so given how unlikely it is that she would have been paying him any attention (she confirmed this was the first occasion she had met him). Ms Morgan-Lynch accepted that when standing in the backyard one can see out onto the road (as Mr Lessey stated).

74. Mr Austin Chiwala first met the Claimant in 2015 in Nottingham at a friend's house. After that they then socialised approximately once a month. He had not seen the Claimant in two years. Sometimes Mr Chiwala would spend the night at the Claimant's house. He first noticed the Claimant using a walking stick in 2017 and has witnessed the Claimant using a stairlift. He had noticed a change in the Claimant's personality as a result of NFCI. Mr Chiwala took the video dated 23rd August 2019 of the Claimant dancing at a BBQ and said that he found the Claimant's dancing to be uncharacteristic.

75. Mr Chiwala said that the Claimant was not dancing at the reception on 1st June 2019. As he was dancing most of the time on the dancefloor (which he described as big with not many people dancing), he was sure he would have seen the Claimant dance but accepted under cross-examination that it was possible he had danced. Mr Chiwala said he did not see the Claimant with a stick that day.

76. I referred Mr Chiwala to paragraph 7 of his witness statement,

> "*A few years back I first saw Brian using a walking stick. This must have been around 2017. I asked him what happened to him and started teasing him about this, I thought maybe he had a fall or something. But he explained that he had suffered a problem with his leg in the Army. He did not explain what the injury was at first, but it seemed serious to me. He found it very difficult to move around. He was using the stick to lean on. He preferred to sit down all the time. He avoided walking or going out in the evenings. He was obviously struggling. Brian was not happy talking about it, but later told me that it was a cold injury. He has told me that he has problems with his feet and with the cold. I do not know anything more about his condition*."

I asked Mr Chiwala whether the Claimant usually had a limp or walked awkwardly. Mr Chiwala remembered the Claimant using his body with the stick as if it was helping him to move. Mr Chiwala said he would visit the Claimant at his house and that the Claimant would mostly be sitting down. He said that if the Claimant needed to move it was usually from the chair to the toilet and he had not seen the Claimant walk for a long distance with a stick. When the video from the reception on 1st June 2019 showing the Claimant walking (with no obvious difficulty) was played to Mr

[13] I noted that Miss Nanton-Browne stated in her witness statement that *"[t]here were probably around 30 adults and 10 children at the party"*. This would tally with Covid restrictions. Ms Morgan-Lynch said it was possible that her figure of 50 to 60 people was wrong

Chiwala he said that it surprised him because normally he does not walk like that (i.e. as well as that).

77. Mr Amos Khonje was born in Malawi and came to the UK in 2005. He lives and works in Nottingham and met the Claimant through Mrs Muyepa in 2012 and they became good friends. Mr Khonje said they spent Christmas together as families until 2016 when this tradition stopped because of the Claimant's NFCI. Mr Khonje speaks to the Claimant on the phone and has observed a change in the Claimant's mood. He thought he had become depressed.

78. Under cross examination, Mr Khonje confirmed that the last time he saw the Claimant was in 2018 and he has not seen the Claimant since Covid-19. Mr Khonje confirmed that every time he has seen the Claimant, he uses a walking stick, indeed he had never seen the Claimant without a stick and that it would surprise him to see the Claimant walk unaided across a room at normal pace (as he did at the reception in 2019) as that is not what he had seen when he had visited the Claimant (this is consistent with the similar surprise shown by Mr Chiwala).

79. Mr Yamikani Guba is a sergeant in the army having joined in 2007. Mr Guba has known the Claimant since they were children in Malawi. Mr Guba lost contact with the Claimant when he came to the UK but was reacquainted with the Claimant in 2016. Mr Guba assisted the Claimant who was suffering with the first onset of NFCI by undertaking the school drop offs, mowing the lawn and shopping. Mr Guba would also speak with the Claimant regularly and believed that he was suffering mentally due to the NFCI and the medication. Mr Guba assisted with the Claimant's daughter's christening as the Claimant was struggling physically and emotionally. Mr Guba also feels that the Claimant is depressed.

80. Mr Guba also confirmed that he saw the Claimant start to use a walking stick in 2017. He confirmed that he would help by dropping the kids off at school and do the gardening every other week. Mr Guba said he was not paid for this and did not receive any gifts as a thank you. He would also occasionally do some shopping for the Claimant but could not remember how often.

81. In re-examination Mr Guba said the last time he saw the Claimant was in February 2021. He said the Claimant "looked worse" and that he had to cook his own food when he stayed overnight. The Claimant was still using a stick and was sitting down watching boxing. Mr Guba said he saw the Claimant go to bed and that he massaged the Claimant's back and shoulders as he was not feeling well (Mr Guba said he does sports massage). Mr Guba said he went up to see the Claimant in the morning as he was still in bed when it was time for him to leave.

82. Mr Pesley Khonje was born in Malwai and is currently serving as a staff sergeant in the army. He met the Claimant in 2013 socially through mutual friends and has seen the Claimant once or twice a year since 2014. Mr Khonje heard about the Claimant's injury in 2016. He saw the Claimant in 2018 or 2019 limping and using a walking stick. He could not stand up and walk properly. Mr Khonje confirmed that he has not seen the Claimant walk without a stick. He said it would surprise him to see the Claimant walk without a stick as to him the Claimant "always used a stick". When the video dated 1st June 2019 of the Claimant walking at the reception was played to him Mr Khonje said the Claimant in this video was 'totally different' in comparison

to what he saw in 2018 or 2019. Mr Khonje said it would also surprise him to see the Claimant dancing without a stick.

83. Mr Peter Napolo was also born in Malawi and is serving in the army as a sergeant. Mr Napolo said that he met with the Claimant regularly from 2012. He commented on the Claimant's struggles since his NFCI and how his personality has changed. Mr Napolo last saw the Claimant in April 2021 and then prior to the lockdown. Mr Napolo confirmed that he has always seen the Claimant use a stick and has not seen him without one. Mr Napolo said he would be surprised to see the Claimant walk without a stick and that the video of the Claimant walking at the reception on 1st June 2019 would not be consistent with what he has seen on his visits.

84. Mr Wanga Nkalo is a further current member in the army who was born in Malawi. He has known the Claimant since October 2019. During their first meeting, the Claimant drove to a supermarket and parked in a disabled bay. Mr Nkalo says the Claimant used a walking stick and leant on a shopping trolley for support. Mr Nkalo has assisted the Claimant by collecting groceries and he has witnessed the Claimant's swollen feet in December 2019. Mr Nkalo has attended the Claimant's home and seen the Claimant use a stairlift. Mr Nkalo attended a BBQ in February 2020 where the Claimant, despite preparing the food, did not cook it.

85. Mr Nkalo was asked about the video dated 1st June 2019 of the Claimant walking without a stick at the reception and was asked how the mobility in the video compared to his recollection of when he met the Claimant. Mr Nkalo replied it was different. It was clear to me that what he saw in the video clip sat unhappily with him.

86. I asked Mr Nkalo about whether he could remember and describe the Claimant's swollen feet, but he could not remember.

87. Ms Christa Nanton-Browne met Mrs Muyepa in 2015 through work and they became friends as did their children. They would visit each other's homes and Ms Nanton-Browne got to know the Claimant. She said that she noticed a change in the Claimant's mood and personality. She has seen the Claimant use a walking stick. Ms Nanton-Browne has helped out regularly with the school runs even during lockdown. Mrs Muyepa left the Claimant in December 2018 to live in Ms Nanton-Browne's house whilst they were separating.

88. Ms Nanton-Browne provided a second statement which was in response to the witness statement of Marlon Lessey. She said that she first met Marlon Lessey through his ex-wife who used to work with Ms Nanton-Browne and her birthday BBQ is likely to be the one which Marlon Lessey discusses in his statement as having attended in summer 2020. Ms Nanton-Browne says the Claimant and his family arrived first and that the Claimant sat inside most of the time and did not dance. She says Marlon Lessey and his family arrived later and they left after an hour. Ms Nanton-Browne says that she sensed some animosity between Mrs Muyepa and Marlon Lessey's girlfriend.

89. Ms Nanton-Browne confirmed that she has seen the Claimant since she provided her first statement as she usually helps with the children by picking them up from school and looking after them. When Mrs Muyepa travelled to Malawi for two weeks the

children stayed with her and she would take the children to see the Claimant at the weekends.

90. Ms Nanton-Browne said that the Claimant started to use a stick around April 2017 and thereafter always used a stick. There were times Ms Nanton-Browne said that she turned up unexpected at the Claimant's house and he always answered the door with a stick. Ms Nanton-Browne said the Claimant comes down the stairs on the stairlift.

91. Ms Nanton-Browne was asked about the videos dated 1st June 2019 of the Claimant walking at the reception. Ms Nanton-Browne said she was quite shocked by the videos as it was a different Brian to what she had seen. She added that she did not know the extent of his injury but was nonetheless surprised by the video.

92. Ms Nanton-Browne was asked if a video of the Claimant dancing at a BBQ would also surprise her. She replied that she has held many social events which the Claimant attended but mostly he has sat in the chair. She added that on occasions the Claimant has moved around in the chair but he has never stood up and danced.

93. Ms Nanton-Browne said that after the separation Mrs Muyepa would stay with her on average five nights a week, with the remainder at the Claimant's house. She said that Mrs Muyepa would normally bring her daughter Malvina with her. Miss Nanton-Browne was taken to paragraph 11 of her first statement in which she stated:

> "*In or around December 2018 Racheal left Brian and came to stay with me at my old house at 60 Marchment Close, Salisburry, SP2 0BS. She told me that she and Brian were separating. I sympathised with her, she is a close friend and I was going through my own separation at the time. I was happy to let her stay and sort her head out. She ended up staying with me until August 2019. Throughout that time she spent most nights at my home, but she might have spent one or two nights a week at Fairfax Close, <u>where Brian and the kids live</u>*." (emphasis added)

However, she said that it was her clear recollection that Malvina came with Mrs Muyepa.

94. Ms Nanton-Browne confirmed she held a BBQ at her house on 25th July 2020 for her birthday. She said that Marlon Lessey was standing at the back of the house where the trampoline was and it was not possible to see clearly into the road from the garden without looking over the fence. Further the Claimant and Mrs Muyepa were also one of the first sets of people who arrived (and parked their car right in front of the house) and the Claimant never danced as he stayed in the lounge. Given that she was the hostess (and otherwise occupied) I was far from convinced by her evidence about the detail of what happened at the barbeque. It was implausible that she remembered such details.

95. Mrs Mada Brown is the wife of Mr Martin Brown (Mrs Muyepa's second cousin) and confirmed that her husband suffered an NFCI in 2014 and still has symptoms. Mrs Brown also confirmed how she met the Claimant and had noticed a change in his mood. She had never discussed NFCI with the Claimant.

96. Mrs Brown confirmed that after they moved to Salisbury she saw the Claimant out sometimes and he always had a stick. Mrs Brown said the video dated 1st June 2019 of the Claimant walking at the reception unaided surprised her.

97. Mrs Brown also took the Claimant to medical appointments on two occasions; the first at Salisbury Hospital and the second time was for a covid vaccine again at Salisbury Hospital. I informed Mrs Brown that I had seen the Claimant drive in surveillance footage, but she said that he she did not know why he did not drive himself on these occasions. She was just there to help and did not ask why. I also asked her how the Claimant coped getting in and out of the car but she could not really help on the issue.

98. Mr Garfield Taylor was in the army but left in 2017 to pursue a civilian career. Mr Taylor first met the Claimant in 2014 on a course and whilst Mr Taylor was living in Larkhill. He said they would regularly socialise and meet together as families. The Claimant told Mr Taylor he suffered NFCI in 2016 (he had not seen the Claimant since 2017 although they had spoken on the phone). Mr Taylor noticed a change in the Claimant's mood; he was less jovial. Mr Taylor worked alongside Marlon Lessey. He says he has never seen Marlon Lessey with the Claimant or Mrs Muyepa.

99. I referred Mr Taylor to paragraph 10 of his witness statement where he stated, *"I have seen his fingers swollen previously and he has showed these to me"* and asked if he could remember any further detail. Mr Taylor said he thinks it was the ring or middle finger of the left hand which was swollen i.e. only one finger

100. Mrs Princess Green-Taylor met the Claimant through her husband (Garfield Taylor) who was serving in the army at the time. They socialised regularly almost every weekend and she described the Claimant as very sociable, bubbly and "a funny guy". Mrs Green-Taylor said she also knew Marlon Lessey (they were Facebook friends). The Claimant told Mrs Green-Taylor in 2016 about NFCI. Her evidence was of little assistance.

101. Mr Edwin Mtumbula joined the army in 2007 and was medically discharged following an NFCI; having suffered it in 2011. He now works as a nurse in the private sector. Mr Mtumbula met the Claimant when he joined the army and told him when he suffered NFCI. The Claimant was supportive as a friend and never enquired about the NFCI but contacted Mr Mtumbula in 2016 to tell him about his own NFCI. Mr Mtumbula stated that the Claimant is not the same man as he was before the NFCI.

102. Mr Mtumbula confirmed he was currently working full time as a nurse. He said that he does not have any problems with his NFCI as he works indoors. Mr Mtumbula described his NFCI as affecting his fingers and the symptoms he suffers from are tingling, pins and needles, mostly in the winter. Mr Mtumbula said sometimes he can lose sensation in his hands when he is cold. Mr Mtumbula said he was cautious in the winter and wore thermals because he was careful. He said this meant he would be alright as his suffering was temperature related. Mr Mtumbula confirmed he had not seen the Claimant for some time as he lives in Worcester.

103. Mr Mtumbula confirmed he did not see the Claimant dancing at the reception on 1st June 2019. He said the videos of the Claimant walking normally were surprising although in his professional view as a nurse he would encourage the Claimant to try to walk normally.

104. Mr Mtumbula told me that he made a compensation claim against the Defendant and that liability was not an issue.

105. Ms Erness Chirambo is the partner of Mr Mwalwanda. She confirmed that at the reception on 1st June 2019, she sat on the same table as the Claimant and that the Claimant did not dance. However, under cross examination she said that it was possible the Claimant had a little dance when she did not see him. Her evidence was of little assistance.

106. Ms Mervis Muyepa gave evidence remotely. She is the Claimant's eldest daughter and is 14 years old (and aged 13 years at the time of her first statement). She has two siblings, Mervin (brother) 9 years at the time of the first statement and Malvina (sister) 4 years at the time of first statement. She confirmed that Malvina has learning difficulties and problems with her feet. She said that her mother does most of the school runs and her father only sometimes because he is sick. If her father was feeling okay, he would drive. She said that her Dad used walking sticks and an escalator machine and just sits on the sofa all day. If it is a good day, he will take the family out and play PlayStation. She said that his feet look bigger when swollen; they get lumpy and warm. Mervis said that she had seen her Dad's legs shake.

107. Mervis confirmed that since 2018, her mother had lived away and that she did not stay overnight that often. Mervis said Mum would come over to make dinner and clean up before going at night and coming back in the morning to take them to school. Mervis said that Malvina stayed at home with her and her Dad. Mervis confirmed that she shared a bedroom with Malvina after they moved to Fairfax Close. She was asked if Dad could manage to look after Malvina, and said that her mum would come home to give Malvina dinner and sort things out. She said that Dad would not have a lot of looking after to do during the night as if Malvina was crying or upset then she would go and look after her. Mervis said that Dad did do a bit of looking, checking and comforting. She said that when Mum was not there Malvina would be asleep. If she got up during the night then Dad would look after her. This evidence[14], which I broadly accept as accurate, was not consistent with that of Ms Nanton-Browne, Mrs Muyepa or the Claimant.

108. Mervis confirmed that her father used a walking stick a lot and it would surprise her to see her Dad walking without a stick. Mervis said that her mother would do the shopping whilst Dad stays in the car.

109. Mr Blessings Msowoya was born in Malawi and is studying to be a nurse. He met the Claimant through the community and they are just acquaintances. Mr Msowoya attended the reception on 1st June 2019. He said that there was a lot of dancing, but that he did not see the Claimant dance. Mr Msowoya did not know the Claimant was injured or that he had left the army. Under cross-examination he agreed there

[14] I bear in mind that that during re-examination said she could not really remember where Malvina was sleeping when Mum went to stay with Ms Nanton-Browne

were up to 200 guests at the reception and that it was possible the Claimant had a dance when he was not looking. His evidence was of no real assistance.

110. Mrs Cecilia Khan is the Claimant's mother-in-law and lives in Malawi. Mrs Khan attended remotely. Unfortunately it was a very poor link. She said that she learnt that the Claimant was very sick in 2017 and visited the UK to help out that year[15]. She said that she was surprised with how unhappy and quiet the Claimant was. Mrs Khan said that she saw the Claimant use a walking stick during the four months she was in the UK and also saw him struggling to go up the stairs, not driving, and having swollen feet. I asked Mrs Khan why the Claimant could not move to go upstairs and she replied it was because his legs were struggling and his feet were swollen.

111. Mr Martin Brown who was born in Malwai is Mrs Muyepa's cousin, once removed. He joined the army in 2008 and served for ten years before he was medically discharged after suffering an NFCI. He was diagnosed with a mild to moderate condition and still has symptoms.

112. Mr Brown was stationed in Cyprus until 2015 and became good friends with the Claimant. He could not recall when the Claimant suffered NFCI or was medically discharged. He described the change in the Claimant's mood and also how NFCI has affected him. Some of the photographs of the Claimant were taken at Mr Brown's birthday party on 12th February 2019. Mr Brown said that the Claimant was using a walking stick or chair/table for support when standing. He said he has never seen the Claimant without a stick. He denied the Claimant was quite active at this party. Mr Brown said the Claimant used a chair to help himself up sometimes. Mr Brown said the Claimant always used a stick to walk. Mr Brown said the Claimant also walks with a limp all of the time.

113. Mr Brown said he did not speak to the Claimant about his NFCI as he prefers to keep it to himself rather than share. Given that both he and the Claimant had NFCI's and were close friends, I had significant doubts about the accuracy of this evidence.

114. Mr Noel Chikoleka is based in Malawi. He is a banker by trade but also a professional musician and singer. He met the Claimant whilst performing at an engagement in the UK. Peter Makosah is Mr Chikoleka's brother-in-law. Mr Chikoleka travelled to and performed at the reception on 1st June 2019. Mr Chikoleka says the Claimant did not dance at the reception. It was put to Mr Chikoleka that he had no particular reason to keep an eye on the Claimant as opposed to anyone else. Mr Chikoleka said that he did, and he was in the centre of the hall and he had a good view. I found his evidence wholly unconvincing as he did not know the Claimant at all well, there were up to 200 guests and he was overly certain in what he recollected about the event.

115. Mrs Muyepa gave evidence. She said that she was currently living at Fairfax Close with the Claimant and their children. She is bidding for a property of her own

[15] Mrs Khan's passport has a stamp from Heathrow dated 3rd November 2017. She then left the UK on 25th January 2018 for a month sadly because of a death in the family and then returned to the UK. Mrs Khan left for Malawi on 12th April 2018. Mrs Khan confirmed she has not seen Mrs Muyepa nor the Claimant since April 2018.

through the local authority and will be moving out of Fairfax Close together with the children when she gets one.

116. In cross examination, Mrs Muyepa was taken to her first witness statement, and challenged about creating a misleading impression that she was living at the matrimonial home at the time it was signed. She said that she was providing a large amount of care to the Claimant and the children whilst she was present at the matrimonial home ('Fairfax Close') but agreed that she was not living there. I asked Mrs Muyepa why under the description of home life did she not say in her statement that she was not living at the matrimonial home? Mrs Muyepa replied that she was only asked how the Claimant is and what he was doing and she was not asked about herself. She felt that this matter (where she was living) was her private life and she did not want to speak about her private problems. Mrs Muyepa was challenged as to how she could have helped the Claimant down the stairs at 3:00am when she was not staying over at the matrimonial home 4-5 nights a week. Mrs Muyepa repeated that she stayed over 2-3 nights per week and that she had witnessed these issues before; although she conceded this was not in her witness statement. I found this evidence very unsatisfactory.

117. Mrs Muyepa was then asked about Amanda Kerby's visit on 30th December 2019. She remembered the visit and agreed that she had provided much of the detail and spoke a lot about the Claimant's care needs. She further agreed that as she was doing the talking, the words in Ms. Kerby's report under the heading 'typical day' were hers and not the Claimant's. I asked what Mrs Muyepa had to say about the fact that Ms. Kerby, her husband's expert on care issues, did not know that she was not living at Fairfax Close. Mrs Muyepa again replied that the information she gave was about the days that she was there and knew what the Claimant was going through. She said that she was also talking about what the Claimant would need in the future. Mrs Muyepa eventually conceded that she had misled Ms Kerby (because she was not there to help the Claimant as described on 4-5 days a week).

118. Mrs Muyepa was taken to the reference in Ms. Kerby's report to the Claimant regularly using a urine bottle, although there is a toilet both upstairs and downstairs at Fairfax Close. Mrs Muyepa said that she would leave a urine bottle for the Claimant in case he needs one because he is not feeling fine. Mrs Muyepa added that the Claimant does not use it all the time and only if he is in really bad shape. Eventually, when pressed on the issue, she told me that the Claimant had only ever used a urine bottle once. This was also very troubling evidence of exaggeration of the effect of the NFCI.

119. Mrs Muyepa also recalled the video call with Mrs Ferrie on 8th May 2020. Again she accepted that she misled Mrs Ferrie by saying that she had moved into Fairfax Close with the Claimant. Mrs Muyepa was taken again to the use of the urine bottle and the impression given that the Claimant needed help from Mrs Muyepa for 3.5 hours with the urine bottle and fetching of drinks when she was not staying at Fairfax Close for 4-5 nights in the week.

120. She was also challenged on her statement that the Claimant could not help himself out of the shower when she was not there. She denied that this was both misleading and made in order to ramp up the Claimant's claim.

121. Mrs Muyepa said that she had provided care for Malvina ever since she was born. If she was not able to do so then her friends would assist. Mrs Muyepa was taken to the DWP declaration completed by the Claimant for the Claimant dated 20th May 2019 and accepted that it declared that the Claimant, and not her, was caring for the youngest daughter for 35 hours or more per week. However she denied that this was true.

122. Mrs Muyepa was also taken to the entry on 3rd February 2022 in which the Claimant re-declared that the children no longer lived with him as of 18th January 2022 and had gone to live with Mrs Muyepa although presently they are all living together at Fairfax Close. Mrs Muyepa said that they had followed the advice they had been given in order to be able to bid for a house.

123. Mrs Muyepa was shown the local authority care plan on behalf of the youngest daughter which was sent out in December 2021. It recorded that Malvina lived in Amesbury with her father and siblings and that her mother lived in Frome with Mr and Mrs Thompson. Mrs Muyepa said that it was recorded as such because the Claimant has a home for himself and the children. As a result, "all the benefits and everything" was under his name at that house. I sought clarity on this matter because a care plan has nothing to do with benefits, so one would have expected professionals to have accurately recorded the situation as regards childcare. Mrs Muyepa described the situation as "complicated" and conceded that social services did visit Fairfax Close to assess where her youngest daughter was sleeping. However she said that social services had also attended at Ms. Nanton-Browne's home to assess its suitability as well as the home of Mr and Mrs Thompson.

124. Mrs Muyepa was also referred to the Educational Psychology Advice for EHC Needs Assessment on behalf of the Special Educational Needs & Disability (SEND) Service for Malvina. The visit took place on 22nd November 2021 and Mrs Muyepa accepted that the assessment states that Malvina lives with her dad and siblings at Fairfax Close. Mrs Muyepa explained that since 2021 Malvina would stay overnight. I asked, given that both she and the Claimant said that he needed extensive care, if Mrs Muyepa was happy to leave her disabled daughter with him overnight? Mrs Muyepa replied that she was not happy which is why she was getting a house so that they could move out.

125. It was put to Mrs Muyepa under cross examination that her eldest daughter gave evidence that she shared a bedroom with the youngest daughter ever since they moved to Fairfax Close. Mrs Muyepa said that this was not true and that her eldest daughter may have made a mistake with the dates.

126. Overall Mrs Muyepa's evidence on the issue of where her disabled daughter lived after 2018 was at clear variance with the accounts given to third parties and also the evidence of her older daughter during cross-examination.

127. Mrs Muyepa was also asked a series of questions about her work. She confirmed that in 2018 she was employed as a carer and contracted for 39 hours per week[16] and

[16] Mrs Muyepa explained that the 39 hours per week were split across a fortnight; three nights in week one and four nights in week two; alternating on a fortnightly basis.

that she was also working for an agency during the day[17]. Mrs Muyepa confirmed that on top of these jobs she claimed she was also providing a minimum of 35 hours per week of care to her youngest daughter. She also acknowledged that when she was living with Mr and Mrs Thompson there was a 45 minute commute each way to Fairfax Close as opposed to a 5 minute commute each way when she was living with Ms Nanton-Browne. She was then taken to the schedule of loss dated 4th May 2022 where it was stated that between June 2017 and November 2018 in addition to all these hours she provided in excess of 70 hours of care per week to the Claimant. When it was pointed out that there are only 168 hours in a week Mrs Muyepa's sole response was that she was a workaholic and, rather bizarrely, that she has worked 200 hours a week (she sought to justify this by saying she was sometimes paid to care for a client but would leave early if they did not need her). She conceded she was also very active on social media and was pursuing her music career. Although her claims were clearly and obviously incorrect, she denied that this was a patently untruthful, dishonest claim and inflated claim for past care.

128. Mrs Muyepa admitted she was aware that the Claimant was claiming future childcare costs even though the children have been living with her since January 2022 at Fairfax Close and would be moving out once she secures her own property. She denied that this was a dishonest claim as they were just following the advice of the professionals.

129. Mrs Muyepa was shown the videos from the reception on 1st June 2019. She accepted that the Claimant was shown walking without a stick and at normal pace. She denied that that is how the Claimant walks when he is not presenting a dishonest claim. Mrs Muyepa said that as a carer she has encouraged him to walk without a stick as he is reliant upon one. It was the Claimant who feels that he needs a stick whereas most of the time she tells the Claimant to see how he goes without the stick. Mrs Muyepa said that she did not know if it is in the Claimant's head that he needs a stick but that she does not judge him for it. She would encourage him to walk to see how far he can go. Mrs Muyepa explained that the Claimant has had some falls and there are days when he does not want to get up or do anything. Mrs Muyepa says that she has to prompt him and that it is hard to deal with the Claimant.

130. Mrs Muyepa was shown the video of the BBQ on 23rd August 2019, taken some four months before the interview with Amanda Kerby and it was suggested that she was wrong to say that the Claimant always needed a stick. Mrs Muyepa replied that the Claimant relies upon the stick and it was close by. She said that the video of him dancing was only a short clip.

131. Mrs Muyepa was asked about the claim for universal credit made by the Claimant on 2nd August 2019. She confirmed that she filled out the questionnaire and provided the information and also acknowledged that the form stated that the Claimant has no pain free days, was unable to walk without assistance and had to use a stick. It was put to Mrs Muyepa that this assessment was two months after the reception on 1st June 2019 where the Claimant was walking without a stick and three weeks before the BBQ where he was dancing. She had no satisfactory answer for the obvious

[17] Mrs Muyepa was taken to a series of records of her agency work which recorded the hours of work she did within a specific week. One such example was w/c 12th April 2020 where she recorded 61 hours of agency work.

conflict. It was suggested that every time Mrs Muyepa accompanied the Claimant to an appointment she would exaggerate his symptoms as part of a plot to maximise his claim, but she denied that this was the case.

132. Mrs Muyepa said that she knew Marlon Lessey through his ex-wife and that they were friends on Facebook. She said that she did not know him very well. She denied that there was a BBQ in the summer of 2018 and that Mr Lessey saw the Claimant dancing, enjoying himself and jumping off the stage. Mrs Muyepa said that everything she does is posted onto social media and this BBQ would be something that she posted. Mrs Muyepa said that it never happened and that Mr Lessey was being untruthful.

133. Mrs Muyepa denied ever meeting Mr Lessey at a supermarket in Amesbury. She said that this was another lie.

134. Mrs Muyepa confirmed that the BBQ in summer 2020 was at Ms Nanton-Browne's house. She denied that she came out of the house looking panicked and getting frustrated when Mr Lessey arrived. Again she said Mr Lessey was lying.

135. Mrs Muyepa said she was too busy in her own life, working and looking after the children, to be concerned about others or being aware of soldiers leaving the army because of NFCI and receiving big pay outs. Mrs Muyepa said she did not know Mr Lessey had suffered his own NFCI and she denied the suggestion that she and the Claimant had invited Mr Lessey and his ex-wife over for drinks sometime after July 2015 because Mr Lessey was being discharged from the army. Mrs Muyepa said this was not true.

136. Mrs Muyepa denied being tired of the Claimant's low earnings, failure to gain promotion, and deployments on short notice, and that they decided to claim NFCI in order to receive a big payout. Mrs Muyepa reiterated they were comfortable, not short of money and she enjoyed being in the army.

137. Mrs Muyepa said that when the Claimant first suffered his NFCI in March 2016 he could still undertake Army duties. She said that around 2017 he started to become bad. Mrs Muyepa could not refer to anything specific within the period when he was working in hangers during the winter of 2016/17 however she said that the Claimant's feet were swollen. Mrs Muyepa replied that he was given a walking stick for the first time following a fall the Claimant had on the stairs. She described the Claimant as not accepting what he was going through and hence he was forcing himself down the stairs. Mrs Muyepa said the Claimant's legs started twitching and he fell down the stairs. When he came out of hospital the Claimant was given a stick.

138. Mrs Muyepa could not recall when the limp started. She said that the Claimant always limps when using a stick. Mrs Muyepa said that there were times he could walk without a stick or a limp but that he would walk slowly.

139. I asked Mrs Muyepa about the twitching in the Claimant's legs and she stated that if the Claimant sits down for a long time you can see his leg starting to twitch. She described it as uncontrollable and the reason why he falls when standing up. Mrs

Muyepa confirmed that it is his legs which cause him to fall and not his feet. As I shall set out in due course this is not supported by the medical evidence.

140. I asked whether it was a stick or a crutch that the Claimant was sent home with? Mrs Muyepa replied it was what they usually give you. She confirmed that this was the first time he was given a stick and he was given one because he had a fall. This is evidence is not supported by the medical records, as there had been no fall prior to March 2017.

141. Mrs Muyepa acknowledged that after their youngest daughter was born in 2017 it was not easy for them. Mrs Muyepa said things did get worse and she went to welfare within the army to complain as she could not cope. It was a hard situation for her.

Defendant's case

142. The Defendant advanced a claim that the Claimant was fundamentally dishonest which relied on lay and expert witness evidence. The provenance lay within the expert evidence compiled without any reference to the Defendant's lay witness evidence. However the lay witness evidence subsequently obtained is, if truthful and accurate, damning.

Marlon Lessey

143. Save for being incorrect about one date by a few months, which he explained in his evidence in chief, Mr Lessey gave consistent and assured evidence. He explained his experiences with the Claimant and his wife (he had known the Claimant since 2013/14 as his wife knew Mrs Muyepa) and also how when he saw the newspaper article, he came forward having been the victim of fraud himself in the past. He stated that he had spoken out at other times in his life in other circumstances when he knew that there had been dishonesty. Worryingly for the Defendant he also stated that in the past he had been offered money by soldiers to give false statements. He stated that others knew the Claimant was being dishonest, but some people had asked not to be named as they still knew Mr and Mrs Muyepa.

144. Mr Lessey has suffered an NFCI and had been discharged from the Army which led to the Claimant approaching him. His own credibility had been challenged by experts. His claim was settled for £273,000. The bulk of his claim was for loss of his army career and pension. He was able to work as an HGV driver and had made no claim in respect of care.

145. It was put to him that his motivation (the only motive that could realistically be put to him) for why he had come to court to blatantly lie on oath was jealousy at the size of the sum which the Claimant was seeking (reported in the newspapers as £3.7million). Mr Lessey dismissed this suggestion and did so with conviction. Once this suggestion was laid to rest there was little that could be said to challenge large elements of his testimony. He described incidents when he saw the Claimant clearly feign disability (when he met Mr Lessey by chance), with an unshakeable certainty. I have little doubt that had such incidents been recorded on camera the progress of this case would have been very radically different. Indeed, other applications may have been made by the Defendant.

146. What Mr Lessey described he saw on occasions (before the Claimant was aware of his presence) would be consistent with the Claimant's presentation on 1st June 2019 at the wedding and also at the barbeque on 23rd August 2019. Put simply the Claimant can walk without a stick or limp, can dance (even jump off a two-foot stage) but can also switch into a full disabled mode when necessary.

147. The most important aspects of Mr Lessey's evidence were as follows;

(a) After Mr Lessey had been told that he was going to be discharged in April 2015 the Claimant came directly up to him and asked about his discharge. That evening there was an invitation round to the Claimant's house for drinks. Mrs Muyepa (and it is in my view significant that it was Mrs Muyepa and not the Claimant) started asking questions about Mr Lessey's NFCI and discharge. Then the Claimant asked a lot of detailed questions including about symptoms, how the matter was reported to the doctor, testing at Gosport, medication and compensation. He stated that it was as though the Claimant's wife wanted to know everything and this made him feel a bit uncomfortable as it was very personal.

(b) Mr Lessey bumped into Mrs Muyepa the following week outside the gym in the town centre near to the Stonehenge primary school (and not the gym inside the Army facility). Again, she asked him questions about his NFCI.

(c) At a barbecue in the summer of 2015, just before Mr Lessey was discharged from the army he witnessed a conversation between the Claimant and another former soldier with whom the claimant had worked at Portsmouth. Mr Lessey could overhear the conversation which carried on for about 30 minutes. They discussed NFCI. Mr Lessey recollected:

> "Brian told the guy that he was fed up of the army and was ready to leave but he didn't want to leave the army empty-handed. He said that he wanted to make a claim for NFCI so he could get some money but he was worried to make the claim as he thought he might fail the test at Gosport. The former soldier told him that he needn't worry as he could tell him what you need to do to pass the NFCI test."

Mr Lessey recollected that the former soldier told Brian that he needed to soak his socks and place them in the freezer the night before the test and should arrive with a holdall with a bag of ice in it. He should put his feet in the bag of ice and then put on the socks that had been in the freezer and he would pass the test. Mr Lessey said that he could not believe what he was hearing but Brian said that he had been waiting to go on exercise during winter so that he could report that he got injured by the cold whilst he was on the exercise. Brian and the former soldier also talked about money. Mr Lessey's recollection was:

> "The former soldier told Brian that he shouldn't play stupid when he went to the medical centre. He needed to tell them that he couldn't walk for more than hundred metres and that he needed to use a walking stick, as this would give him a

> higher payment. He also told him about some of the disability payments that he was getting such as a carer's allowance and that he should say that Racheal took care of him and that she would receive a payment also.
>
> The former soldier also told Brian when he is given an appointment to see a specialist that you need to say that he couldn't travel and struggled to walk so that they needed to come and visit him. Then when they arrived Brian needed to be downstairs and should leave his duvet and pillow lying around and make sure the house wasn't clean but left in a dirty state. It should also have a bowl of food on the floor and to use a water bottle to urinate into. He should then leave these things lying around the house and say that he couldn't take them out or get rid of them as he had to wait for Racheal to do it."

Mr Lessey also recollected that there was discussion about the Claimant working and the former soldier told him that he was not allowed to work at all and that if he did he would not get any benefits it would affect the pay out on any claim. Mr Lessey also recollected Mrs Muyepya joining the conversation and asking questions along the same lines as she had previously asked him about NFCI. After Mr Lessey was discharged, he moved to Amesbury, and would only see the claimant and his wife from time to time. They continued to ask about Mr Lessey's claim for damages arising from NFCI. It was Mr Ward's submission that the Claimant was to follow a significant amount of the former soldier's advice, particularly as regards his claim as to how far he could walk, the use of a stick, the care provided by Racheal, the urine bottle and not working.

(d) Mr Lessey saw the Claimant at a barbecue in the summer of 2018. Mr Lessey arrived late and did not stay long. There was a 2 foot high stage in the backyard as there had been some small performances for a birthday party. Mr Lessey recalled that the Claimant was

> "Enjoying himself drinking, dancing and jumping on and off the 2 foot high stage. I remember talking to a friend that I met up there and he talked about Brian jumping on and off stage and saying it was strange as he had only seen Brian the day before using a walking stick to walk about but tonight it was perfectly fine and it didn't seem like there was anything wrong with him."

(e) In the spring of 2019 Mr Lessey encountered the claimant at a petrol station in Amesbury. The Claimant did not recognise Mr Lessey's car and he watched the Claimant walk normally and without any problems or a walking stick over to pay. He could see the Claimant had no issues walking, but when he came out of the shop and noticed Mr Lessey he suddenly started to walk with a limp such that it looked like he could hardly move.

(f) Also in the spring of 2019 Mr Lessey encountered the Claimant in the Lidl supermarket in Amesbury. He noticed the Claimant and his wife walking normally and that the Claimant was not using a walking stick. He was paying particular attention to the Claimant given what had happened when he encountered him at the petrol station. He then recollected:

> "I was almost at the middle of the first aisle when I saw that Racheal had noticed me. She then appeared to lean into Brian and said something, though I couldn't hear her. Brian then looked over towards me and then went back down the second aisle in the direction that he had come from. He went past the third aisle to the fourth aisle and was walking very fast. He was almost bent down, like he was putting himself out of view, behind the shelves and then went straight out of the supermarket. I could see him out of the store window and saw he went over to his car. Brian then put on a cap, and sunglasses, and walked back into the supermarket with a walking stick in his hand. He was walking very slowly, like he had a disability and was in a lot of pain…. I am 100% certain that it was Brian who had walked out of the supermarket and came back in. It was at this point that I knew Brian was faking an injury."

(g) In spring of 2020, this time in the Tesco supermarket in Amesbury, Mr Lessey again bumped into the Claimant. He was standing there holding his daughter in his right hand and arm and pushing the trolley with his left hand. He was not using a walking stick and was walking normally. Mr Lessey carried on shopping. He noticed Brian picking up items from shelves and out of fridges and was still carrying his daughter. Eventually he saw Mr Lessey and immediately put his daughter into the seat on the shopping trolley, and then put his weight on the trolley. Mr Lessey stated:

> "I thought this was quite dramatic, like he was unable to walk or bear any weight by standing without the trolley. He then started to move as he had done on other occasions when he knew I had seen him. He looked as though he was badly injured and struggling to move."

(h) The next occasion that Mr Lessey encountered the Claimant was at a barbecue in the summer of 2020. When he arrived he recollected that Mrs Muyepa was in the living room and he went into the backyard to chat with some friends standing near the barbecue. He could see the road next to the house and saw Racheal come out of the house and use her phone to call someone. She looked panicked and was getting frustrated. He then saw the Claimant walking down the road dressed in all white, walking normally without any issues and not using a walking stick. Racheal then stopped him. When Mr Lessey next saw

> the Claimant he was walking back along the road towards the house walking very slowly with a stick and was quite laboured as though he was disabled; which was very different to how he was walking only 5 to 10 minutes earlier. Mr Lessey then left the barbecue but later returned and saw the Claimant and his wife dancing in the backyard. The Claimant was standing and moving normally, he was not in any pain and did not need to use a walking stick.

148. Even if Mr Lessey was mistaken about dates of meetings or barbecues his evidence was nevertheless consistent as to witnessing the Claimant feigning injury and walking normally or even dancing when caught off guard. If correct it was devastating testimony in relation to the claim as Mr Lessey had witnessed behaviour which was very clearly underpinning a fraudulent claim. Given the number of incidents there can be no issue as to whether there was a mistake or misunderstanding in some form. Either Mr Lessey has provided a thoroughly dishonest witness statement and lied on oath or the Claimant has been dishonestly trying to feign injury to some people over an extended period.

149. Ms Collignon suggested that the account was fanciful as there were many other soldiers in Amesbury who could have witnessed the Claimant walking normally. Further, friends and relatives would have seen him walking normally and it was the evidence of numerous witnesses, who were not challenged as being untruthful, that they only saw a significantly disabled and depressed man. I have carefully weighed these factors into the consideration of Mr Lessey's evidence.

150. As for the improbability of the Claimant being worried about Mr Lessey seeing him, but not other soldiers, one potential explanation is that, as Mr Lessey stated, that he had been offered money by other soldiers to give evidence and refused to do so. It is possible that he had a reputation as a man who might disclose the existence of a fraud. In fact that is exactly what he says he has done. So if the claimant were indeed trying to conceal his true mobility, then he would have been wise to conceal it from Mr Lessey. Given the close-knit military community, and even closer-knit Afro-Caribbean military community Mr Lessey has taken a brave step to speak out. He did not need to do so and has no doubt gained nothing but enemies for doing so.

151. As for the evidence of friends (including some soldiers) and extended family I have no doubt that the Claimant also had an incentive to put on an act for them. I am sure that most of them would have taken a very dim view of a blatant fraud and that the Claimant and Mrs Muyepa, apart from the obvious risks of third party action, would have lost face (for Mrs Muyepa with her burgeoning social media presence and entertainment career this would have been disastrous).

152. I also bear in mind that seven[18] witnesses expressed considerable surprise that the Claimant was able to walk freely and without a stick as was shown on the video of June 2019. It is troubling that nobody recalled seeing this given that he can be seen to be walking straight across the room in plain sight (this is also significant when considering that nobody except Ms Mgemezulu saw him dancing). I remind myself of the dangers of speculation and go no further than weighing the point made by Ms

[18] Mr Chiwala, Mr Khonje, Mr Napolo, Mr Nkalo, Ms Nanton-Brown, Mr Bown and Mr Mtumbula.

Collignon as to the consistent evidence given by the Claimant's witnesses into the assessment of credibility.

Alice Mgemezulu

153. The main element of Ms Mgemezulu's evidence was in relation to the wedding on 1st June 2019. She stated that she saw the Claimant and his wife at the afternoon/evening event. She said that the Claimant was wearing a suit and formal shoes and was walking normally. He was not using a walking stick and did not walk with a limp. She recalled the Claimant was standing at the bar for large parts of the day drinking and chatting with other men and appeared to be having a good time.

154. Pausing at this stage the evidence of Ms Mgemezulu is broadly consistent with the video that shows the Claimant walking without a stick in a normal fashion back and forth across the room. As I have stated it also appears as though he is carrying a drink.

155. As I have also indicated the fact that the Claimant was walking without a stick in this fashion surprised a number of his own witnesses as it was inconsistent with his presentation to them on all other occasions.

156. Ms Mgemzulu also came forward having read the article in the Daily Mail setting out the detail of the Claimant's case. She stated:

> "It didn't make any sense to me. It also took me back to the wedding when I saw Brian in June 2019. The article said that Brian "could only walk around 100m with a walking stick" and "could only stand for 10 minutes" but this wasn't the Brian that I saw. At the wedding I saw that Brian was walking normally, didn't use a walking stick or have a limp. I also saw him standing for long periods of time by the bar drinking and then dancing around. There was nothing in the way that he acted that made me think that he had any physical problems or that he was physically disabled in any way."

157. Ms Mgemezulu also added:

> "After the meal and the speeches had finished, there was a DJ playing music plus other Malawian artists and people dancing. I recall seeing Brian dancing and having fun. It looked like he was having a really good time and at no point can I remember thinking this was a person who was in a lot of pain or was struggling. There was nothing to make me think that."

158. When the video of the Claimant walking easily at the function is taken along with the video approximately three months later when he is seen to dance, this evidence does not appear to be wholly out of kilter with what one could expect the Claimant could do. A significant number of witnesses were called to say that they did not see Brian dancing at the wedding. However, seven of them professed surprise that he

could walk as he did. Further this was a large wedding and there was no doubt a lot of dancing taking place and the Claimant was not the main focus of the event.

159. Ms Mgemezulu also made comments on social media about the Claimant's case. During her online discussions/presentations, Ms Mgemezulu might have 300/400 of her 30,000-40,000 followers listening. She made comments which accused the Claimant of stealing in her first live session on 12th May 2021.[19] Mrs Muyepa challenged her about the first set of public allegations but Ms Mgemezulu refused to take down the relevant video. It is of some significance that there is no evidence before me of any other person taking direct issue with the accuracy of what Ms Mgemezulu said despite the fact that her comments must have been known to a great number of members of the Malawian community. In her second video posted on 25th September 2021 she stated that the Claimant was walking and dancing[20].

Analysis of the lay witness evidence

160. The diagnosis of NFCI is very largely based on the history given by the patient; here the Claimant. There is usually limited objective and independent evidence to provide a bedrock, or base of facts. However in this case the evidence of the various forms of recording of the Claimant's movement provides objective evidence against which the Claimant's account of his symptoms can be tested.

161. When considering the Claimant's evidence, and that of his witnesses called on his behalf, I take the following matters as not capable of realistic dispute;

(a) that the course in February/March 2016 exposed the claimant to conditions which could lead to the development of a NFCI;

(b) the Defendant's medical officers believed the claimant had a NFCI;

(c) the claimant has had some tests which provided some support for a diagnosis of NFCI and also has had swelling in his feet and one finger which has been seen by a number of people;

(d) the claimant has persistently presented to friends and extended family as very significantly disabled;

but also;

(e) the Claimant can walk without a stick or a limp (and can dance and assist with cooking);

(f) the Claimant can drive and undertake shopping.

[19] Bundle B2 page 8
[20] Bundle B2 page 54

(g) The Claimant and Mrs Muyepa deliberately misrepresented their living arrangements to the care experts.[21]

It is also my view, as I shall set out in more detail in due course, that

(h) the Claimant's evidence has not been consistent on important issues, such as whether or not his symptoms are better in warmer temperatures;

(i) when the Claimant was examined by medical legal experts there were a number of inappropriate signs including consciously exaggerated complaints of disability (such as during his presentation to Dr Carey) and pain[22] and the symptoms of depression. He also feigned a fall.

(j) There is no evidence the Claimant ever received advice to use a stick in March 2017 and the reliance on a stick cannot be explained through organic symptoms attributable to a peripheral neuropathy.

(k) The Claimant's limp cannot be explained on an organic/functional basis (given that his symptoms are bilateral);

(l) The claims of shooting pains from the feet upwards and of disabling pain in his legs, hips and back have no organic explanation;

(m) There are plain, incontrovertible and very significant inconsistencies between what the Claimant described in his statements and at the interviews and what could be seen on the social media clips and surveillance videos.[23]

162. After consideration of all the evidence I have reached the conclusion that major parts of the testimony of both the Claimant and Mrs Muyepa cannot be accepted as truthful or accurate. Before being confronted with the evidence on the recordings the Claimant's evidence was that he could only walk with a stick, and even then for a limited distance and duration. He had balance problems and could not drive or go shopping. He was very seriously disabled and needed constant care, provided principally by his wife. Given such severe functional limitations, and the loss of an army career, a very significant claim, which was (largely) supported by the Claimant's experts to whom he had presented as severely disabled, was advanced. The reality was very, very different. I agree with Mr Ward's submission that the clip at the wedding in June 2019 showing the Claimant walking normally in a casual

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[21] He also told Dr Sidery in January 2020 that he was still living with his wife. This was a lie.

[22] As an example, Dr Sidery noted in his first report (after examination on 8th January 2020) that; "He experiences a constant stabbing and burning pain in the soles of the feet. Stabbing and burning pains score 9/10….Mr Muyepa explained that he experiences unpleasant cramping pains in the feet, and these combined with stabbing pains score 10/10)."

[23] "We agreed that these inconsistencies cannot be explained purely on the basis of neurology or NFCI, and neither of us can find readily available explanation for the marked divergence between the clinical picture exhibited at the medical interview and what is seen in the video recordings." (Dr Carey/Mumford joint statement of 21st October 2021)".

fashion across and back a room with a drink in his hand was devastating for the Claimant's credibility as the Defendant's experts found it to be; particularly when taken in the chronological context of his medical examinations. Whilst the change was not quite as dramatic as the miracle at Capernaum; it was as Dr Mumford described "astonishing". Equally the dancing at the barbeque was easy movement. The Claimant could be seen driving and shopping (and cooking or assisting at the barbeque). Given the medical evidence (which I shall address in detail) I have no doubt that he uses his stick as a prop and that he does not need it. The limp is put on.

163. The Claimant sought to support his case through calling a large number of lay witnesses (some of whom gave little or no assistance and/or dealt only with the issue of whether or not he danced at the renewal of vows reception in June 2019). Lay witness evidence as set out in the statements provided a universal and clear picture that the Claimant was incapable of walking normally and needed a stick at all times. It was proved to be wrong. Some witnesses expressed very considerable surprise when they were shown the clips, or were told of what they showed. Nobody seemed to consider that the Claimant was capable of the sort of mobility shown on camera "on a good day". They all recounted a consistently negative picture. So on any objective analysis the conclusion has to be that the Claimant's lay witness evidence taken as a whole, largely consistent though it is, does not set out an accurate picture.

164. The interim hearing in this case was the subject of a press report in the Daily Mail in May 2021. That publicity led to Marlon Lessey coming forward. As a generality, care must be taken as an honest witness can be mistaken. However, there was little scope for mistake with his evidence. Either he was lying about all of the startling events he recounted; or they broadly occurred as he recollected. He was unshakeable and convincing. I also found Mr Lessey's evidence to be internally consistent and consistent with such objective evidence as is available and also with the evidence of the Defendant's experts. To a degree it is the Defendant's case that his evidence does no more than provide yet further, albeit egregious, examples of what had already been unearthed as exaggeration by the experts. It was presented in an honest and forthright fashion. Having carefully considered it I accept it as accurate. He knew of a clear fraud and he felt compelled to come forward.

165. It is also of some significance that there could be no allegation of collusion between Mr Lessey and Ms Mgemezulu. Put simply they were two people who came forward independently when the claimant's claim became public knowledge. They provide mutual support. I also accept the evidence of Ms Mgemezulu as truthful and broadly accurate.

166. In her closing submissions Ms Collignon focused on Mr Lessey's evidence which she submitted was untruthful. However even without it I would have reached the conclusion of dishonest embellishment as opposed to psychological magnification of organic symptoms.

Expert evidence

Overview of the medical expert evidence

167. As a generality doctors in most disciplines, and in most circumstances, start with the assumption that a patient is telling them the truth when giving a history. In some disciplines/with some conditions the patient's history is vital when trying to arrive at a diagnosis.

168. As Dr Carey stated in NFCI cases 80% of the diagnosis is based on the history[24] as there is no reliable objective diagnostic test (the INM having stopped using thermos-imaging due to concerns over its reliability as no baseline testing is available[25]).

169. Psychiatry also relies very heavily of what the patient says; for obvious reasons.

170. As for pain management as Dr Edwards stated it would be hugely counter-productive to challenge the history given by a patient and it is necessary to work with what has been said i.e. to accept it (or to appear to accept it). So in a clinical context a patient's history of symptoms is infrequently directly challenged. In my experience this approach tends to carry over into the compilation of medico legal expert reports.

171. As a result the experts were, at least initially very heavily reliant upon the accuracy of what the Claimant (and his wife) told them about the nature and extent of his symptoms.

172. I am quite satisfied all the experts asked for the Claimant's history with an open mind and in particular the experts instructed by the Defendant started off from a properly independent standpoint. Indeed, Dr Mumford and Dr Edwards initially prepared reports which were favourable to the Claimant. There was no hint of bias against the Claimant arising from the source of their instructions. Although Ms Collignon robustly challenged Dr Mumford when he gave oral evidence, within her closing submissions she relied on the content of his first report when, despite stated misgivings (including by reason of the feigned fall) he gave the Claimant the benefit of the doubt and concluded that he was not consciously malingering.

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[24] He explained that diagnosis in NFCI is 80% history, 10% examination and 10% investigation.

[25] Dr. Carey said that diagnostic tools for NFCI was a very vexed area as there is no clear one diagnostic test for NFCI. He was aware that until recently soldiers complaining of NFCI were referred to the INM in Gosport. Dr. Carey said that Infrared Thermography ("IRT"), which was used to look at thermal patterns across an area of skin, was not diagnostic in itself such as an x-ray or radiograph would be to show broken bones. Dr. Carey said IRT was one of a range of tests done where the cumulative effect would lead to a diagnosis of NFCI. Dr. Carey added he was aware that the military stopped IRT and agreed it was because of the reliability of it. He said there was concern in some quarters that there was no baseline to compare results with because soldiers are not thermally tested at the outset of service. Dr. Carey was agreed that Thermal Sensory Thresholds ("TST") were not a proper clinician diagnostic test as they were a subjective test; any diagnostic test requiring an answer from a patient is difficult to assess as being accurate. As for the use of skin biopsies these are taken from the base of the tibia; so not the area of skin affected. As a result there is considerable doubt as to whether they provide any reliable objective assistance.

173. Against a broad background of support for the Claimant's case the initial opinion of Dr Friedman was notable. He set out the firm view that the Claimant was exaggerating after his first interview and before any surveillance or social media evidence. He gave very clear and compelling evidence that the Claimant intentionally presented to him as he (the Claimant) thought a severely depressed person would present. Subsequent evidence merely confirmed his view that it was not a true presentation; rather dishonest exaggeration.

174. Dr Mumford and Dr Edwards were both taken aback by what they were subsequently presented with by way of social media and surveillance evidence. Ms Collignon criticised both experts for failing to adequately weigh into the balance against it the Claimant's lay witness evidence when they considered whether the Claimant was consciously exaggerating his symptoms and if so to what degree. However, there is an obvious problem with this line of attack: a clip of a man walking perfectly normally, and on a seperate occasion, dancing, without a stick is indisputable, non-subjective evidence. As I have already set out, at first blush the Claimant's lay witness evidence as set out in the statements provided a universal and clear picture that the Claimant was incapable of what was shown; but in this regard that picture was clearly wrong. Seven of the witnesses could not reconcile what had been caught on camera with what they had described in their statements.

175. Dr Mumford found the social media/surveillance evidence "astonishing" given how the Claimant had presented to him at examination. Dr Edwards was even less impressed. He stayed throughout the trial and is clearly a clinician who is devoted to alleviating the functional limitations caused by chronic pain. I accept that he was, as he stated, anxious to be fair to the Claimant. In the end his evidence was scathing. He was adamant that this was conscious exaggeration for secondary gain.

176. Together the evidence of Dr Mumford, Dr Friedman and Dr Edwards painted a coherent and consistent picture of conscious, deliberate, prolonged and significant exaggeration which I much prefer to the overly benign and, I regret to say, at times partisan, analysis of Dr Carey, Dr Baggarley and Dr Sidery.

177. Having given this summary I shall now deal with the oral evidence given by the experts and then set out an analysis of each discipline in greater detail.

NFCI Experts

178. The experts in NFCI were Dr Carey and Dr Mumford.

Dr. Carey

179. Dr. Carey confirmed that his experience was in occupational and thermal medicine in the military and not the civilian world. Although not a vascular or neuropathic expert but as most NFCI cases occur in the military he has had considerable experience of the condition. He had seen 500-1000 cases of NFCI in a clinical context. He had worked at the environmental unit at the Institute of Naval Medicine and had sat on the Defendant's medical boards both as a president and as a consultant in occupational medicine.

180. Dr. Carey began his evidence by providing a helpful synopsis and outline of NFCI. He agreed that NFCI is rarely seen in civilian medicine and there are very few studies to show how the condition is formed (or progresses). He also said it was the orthodox view that a NFCI is caused by damage to the nerve fibres caused by prolonged exposure to a cold and wet environment without an opportunity for rewarming[26]. The damage to the nerve occurs at the time of the cold exposure, the initial exposure, and any further cold exposures did not cause a deterioration of the injury. However, further cold exposures could exacerbate the NFCI caused by the initial exposure.

181. Dr. Carey explained that the symptoms of NFCI had to be divided between symptoms on exposure and symptoms on rewarming. In terms of symptoms on exposure he generally regarded them as classic symptoms, i.e. numbness to the hands and feet with pain, which he said was an anomaly of NFCI, together with swelling and little to no manual dexterity. On rewarming, Dr. Carey described the symptoms as including tingling, stabbing hot and burning pain which lasts two to three hours and which generally resolves but a person may be left with susceptibility to further exposures of cold; a degree of vulnerability.

182. Dr. Carey said it was fair to suggest that in mild and moderate NFCI it was not uncommon for those sorts of injuries to recover over time and it was possible for a full recovery to take place.

183. In the Claimant's case, Dr. Carey said the initial exposure in March 2016 caused cold sensitisation which meant the Claimant did not need the same level of exposure in order to make him vulnerable. Dr. Carey was shown a video of the Claimant dancing in a red blazer and which was posted onto Mrs Mueypa's Facebook account on 23rd June 2016. This was taken a few months after the initial exposure. It was suggested to Dr. Carey that the Claimant's movements as displayed on this video and which were after the initial exposure, and before the subsequent complaints of deterioration, should not have worsened to the extent the Claimant says following what was arguably an innocuous exposure whilst working in a hanger. Dr. Carey's view was that the video was not inconsistent with the degree of injury the Claimant had reported following the initial exposure. He added that it was taken in the summer and he was continuing in the military. I found this view sensible and convincing; however it threw the focus sharply on the claim of a very significant, subsequent deterioration after working in a hangar which to the lay person would seem somewhat strange. However, Dr. Carey said in winter months hangers can be very cold and he did not see it as unusual or inconsistent that working in that environment would exacerbate the original NFCI.

184. Dr. Carey agreed with his description of the Claimant's presentation to him on 21st May 2018:

> "§5.02 Mr Muyepa required assistance from his wife and myself from the point of arrival in their car. Mr Muyepa's wife assisted Mr Muyepa from the car, and then in walking into the building.

[26] He also said it was fair to suggest that over time the condition affected both hands and feet and it was not a prerequisite that they be immersed in water in order to sustain the condition; hence the move from trench foot to NFCI.

> Mr Muyepa also used a walking aid. Mr Muyepa's gait was slow and considered. He had difficulty ascending just a few steps and had to stop regularly (every minute) to rest. Mr Muyepa chose to sit on a wooden (dining) chair rather than in a soft leather one, because he felt it easier to lower and rise from it. Throughout the consultation, which lasted for 2 hours, Mr Muyepa expressed pain, both orally and through his facial expressions, and would touch or rub his legs. During the consultation, the room temperature of around 20°C, and the outside temperature was between 18°-22°C."

185. Dr. Carey said this presentation was as bad as it gets, severe, and was a very rare presentation. As for the examination on 17th August 2020 (Dr. Carey said that the Claimant informed him that his presentation was essentially the same as when he has previously seen him in May 2018);

> "§5.06 I noted Mr Muyepa's gait as he exited his vehicle from the passenger side, it was unsteady and he required both his walking stick and to a lesser extent his wife to help him. He used his stick to assist him sitting and raising himself from a sitting position. I asked him to stand without his stick and he did so. I then asked him if he could stand on one leg without his stick, which he did for around 2-3 seconds before he became unsteady."

186. Dr. Carey was asked about the Claimant's presentation in the videos of 1st June 2019 (walking at the reception) and 23rd August 2019 (dancing at the BBQ). Dr. Carey would not agree that the Claimant's presentation in the videos was irreconcilable with his presentation to him on 21st May 2018 and August 2020 but would accept they were inconsistent. He said the videos 'raised eyebrows' and he acknowledged that patients do exaggerate /malinger. Later Dr Carey was happy to adopt the term 'irreconcilable' when comparing the presentation of the Claimant to him in May 2018 and August 2020 with the surveillance footage of 3rd September 2020 showing the Claimant getting into a car unaided.

187. Dr Carey said that he was with the Claimant for two hours during his assessment and the shots on the video from 1st June 2019 were for a matter of seconds and he could not analyse someone in only seconds although he added that he believed there is likely to be a lot of psychological overlay. Many patients catastrophise their injuries. He said he would concede that there may be an element of exaggeration in this case however whether it was subconscious or a conscious attempt is difficult to tease out. He also said that he was a doctor and not a Spanish Inquisitor.

188. Both videos were taken in summer and Dr. Carey also said it did not make sense to him that the summer does not have an effect on the Claimant's NFCI (as the Claimant had stated). He said factors such as warmer conditions and alcohol, taken cumulatively, may provide some form of explanation for improved mobility shown on the videos. Mr Ward suggested to Dr. Carey that the only person who would know if his symptoms improved in the summer is the Claimant and he said there was no difference (and no witness had referred to any improvement in summer). Dr Carey conceded that the Claimant had never given him the impression that there

were good days. He was reminded of the caution he expressed regarding the "good day/bad day" explanation in the third joint statement signed 14th October 2021 and it was put to Dr Carey that he was now "leaning over to protect the Claimant" and justify his behaviour in breach of his duty to the Court. Dr Carey acknowledged that he perhaps could have written that he was surprised the Claimant said there was no difference in the summer and on reflection he should have flagged this up as an exaggeration on the part of the Claimant.

189. I asked Dr. Carey why the Claimant used a stick and why he limped. The only explanation Dr. Carey could offer for the use of the stick is that many people who use one do not actually require it all of the time, rather they largely use it for reassurance. With respect to the limp, Dr. Carey said the only way he could "square it" is that when one can actually not need a stick, but use it nonetheless because of fear; having fallen in the past, and this could give rise to a limp. Dr. Carey explained that if a stick is a badge of honour and not a badge of shame, that would give rise to a gait that looks like a limp. I did not find this a convincing explanation. Dr. Carey said that in his experience, people with NFCI can fall if they have numbness in their feet which results in them not being sure footed. However this was not the Claimant's explanation of why he had fallen. Dr. Carey was asked about the Claimant's evidence that the pain in his feet comes first and then his legs. Dr. Carey said he had not seen/heard of this before, but that he had previously seen some people with problems with their gait. Given the totality of the evidence in this case I do not believe it proper to place significant reliance on unusual or idiosyncratic presentations by individual soldiers without much more information.

190. The allegation that the Claimant engineered the NFCI was put to Dr. Carey. Dr. Carey said it was highly unlikely the Claimant would be able to present a history to persuade him that he had NFCI especially since the Claimant's medical records form part of the history. His view remained that the history of onset in the Claimant's case was strong; the symptoms and their severity came later. I pressed Dr. Carey on whether he could provide me with an irreducible minimum of symptoms, i.e. if he could be certain that a presentation would have resulted in minor or moderate injury? Dr. Carey could not be certain; he said that mild, moderate and severe were all up for question and he did not like those terms as they mean different things to different people. Dr. Carey said he was completely secure in the diagnosis; he could not see how any evidence save for an extreme example of the Claimant running in the Olympics would take him away from that diagnosis. Dr. Carey reiterated that he had considered the videos for many hours and it did make him reconsider the severity of the injury and conclude that it was not as severe as he once thought.

191. Dr. Carey agreed that the Claimant might well have been retained by the army if he had suffered a mild NFCI. Dr. Carey said the medical board would have been concerned with function which varies between individuals. Dr. Carey said there are soldiers with NFCI who carry on with their service, however this is dependent on their rank and role, e.g. whether they are a marine or work in logistics; the latter could be retained the former would not be. Dr. Carey said if the Claimant had a mild NFCI but exaggerated the extent of his symptoms then he could have been retained but there was no guarantee.

192. Dr. Carey said if the NFCI was genuine and mild then he would have expected a good recovery in a few years so long as there was no further exposure. If there was

a mild organic NFCI, then five years on from the exacerbation, Dr. Carey would have expected the Claimant to be improving.

Dr. Mumford

193. Dr. Mumford confirmed that he was an adult neurologist who deals with all aspects of neurological disease; with a particular interest in the areas of multiple sclerosis and general neurology. He described himself as a generalist in peripheral neuropathy.

194. Dr. Mumford accepted that the preponderance of NFCI is in the military although he was aware of papers published concerning NFCI in fishermen and mountaineers. Dr Mumford said he was aware of NFCI but in general practice there would only be a handful of patients. Dr. Mumford said he had now seen 134 NFCI cases for medicolegal purposes. He conceded that Dr. Carey was vastly more experienced in terms of seeing cases of NFCI, however as regards peripheral neuropathy generally, he would be the more experienced clinician.

195. Dr. Mumford agreed that the conditions at Sennybridge in March 2016, in particular the appalling weather, and the time spent in those conditions, were precisely the type of scenario where one would get NFCI. Dr. Mumford also acknowledged that black Afro-Caribbean ethnicities were more likely to get NFCI.

196. Dr. Mumford was taken to the military medical records of the Claimant. The entry on 11th March 2016 by Corporal Claire Bailey recorded that the fingers on both hands of the Claimant were cold to touch. Dr. Mumford accepted that was her finding on examination however he qualified that by saying Corporal Claire Bailey would not have been a doctor. He accepted that this finding was not dependent on what the Claimant had told her. Dr. Mumford was taken to another entry on 11th March 2016 by Colonel Andrew Baker who recorded that both hands and feet were very cold; and 14th March 2016 by Captain Kate Wright who recorded tender, cool mildly swollen fingers. He agreed these entries were not dependent on what the Claimant had said. Dr. Mumford also accepted that swelling had been reported but the inference he would draw was that it was 'noticeably swollen'. He added it was difficult what to make from that however he agreed with Dr. Carey who suggested that swelling is hugely variable.

197. Dr. Mumford was then taken to the IRT test results from the INM and he confirmed that these were consistent with the diagnosis of NFCI.

198. Dr. Mumford described working in a remote hangar as a very different exposure to that at Sennybridge. Dr. Mumford said he was puzzled by the Claimant's symptoms whilst working in only a relatively cold environment with a trivial change in temperature. Dr. Mumford added that it was a matter of common sense that the harsh exposure at Sennybridge could not be replicated in a hangar. Dr. Mumford agreed that damaged nerves can be prone to pain, however he was still puzzled as to why the overall trajectory of the Claimant's injury deteriorated. He could not understand why modest exposure in a hangar would cause the overall trajectory to get so poor and worse so that it is dominating his life.

199. Dr. Mumford did not consider swelling to be a common symptom of NFCI but acknowledged that it does occur. He was taken to the witness statement of Garfield Taylor and Cecila Khan, who had observed that the Claimant had swollen fingers and feet respectively. Dr. Mumford agreed that swollen fingers and feet are an objective sign of NFCI and is not dependent on the Claimant's account of his symptoms however he placed greater stock in reports of swelling shortly after the insult/exposure and not years after. This, in Dr. Mumford's mind, raises some other pathological reason for the swelling. He explained that when nerves have been damaged with NFCI they should regrow. The process is slow but they will still regrow in four to five years. Dr. Mumford's expressed puzzlement was as to why the Claimant has got worse. He said swelling is a feature of NFCI but he would expect that as a feature early on hence why he finds it odd when it is attributed to by friends years after the exposure. The view that I eventually reached was that neither Dr Carey or Dr Mumford could explain the complaints/witnessing of swelling years after the exposure and without further exposure.

200. Dr. Mumford said it was uncontroversial that the Claimant's symptoms should be better in a warmer climate such as the Ascension Islands and he would expect the symptoms to be generally less troublesome in the summer when he is not being exposed to a cold environment. However, Dr. Mumford added that he would still not expect to see major variations in function on a day to day basis. Dr. Mumford said the Claimant's complaints of variation in intensity of pain in the Claimant's feet, and "haphazard" symptoms during the day with no particular pattern, were not things that he had seen in NFCI and were curious.

201. Dr. Mumford reiterated that he saw no reason why the Claimant used a stick. In his first report he stated that the Claimant walked with a stick but he thought he did not need it as he was not putting much weight through it. Dr. Mumford emphasised that from a physical point of view the Claimant did not need a stick and he was perfectly normal.

202. Dr. Mumford explained that his initial reaction to the Claimant falling during his first examination was 'Crikey, what's that?!' He had said in his first report that the fall appeared in his view to be 'affected'; and did not believe there was a wide difference between affected and feigned. Dr. Mumford said there was nothing in the nerves that would explain neurologically why the Claimant fell.

203. Dr. Mumford accepted that the video clips of the Claimant walking at the reception on 1st June 2019 and dancing at the BBQ on 23rd August 2019 were short and did not show the Claimant moving around for a considerable time. However he said they were still astonishing. Dr. Mumford said he spent two hours with the Claimant who had said to him that 80% of the time he could not do anything.

204. Dr. Mumford accepted that he initially opined there to be a mild NFCI with other psychological factors. Also that the symptoms that others have observed support NFCI. However he stated that other symptoms such as back pain and pain that makes him fall over are ones for which there are no explanation other than they are bizarre. Further, speaking from a neurological basis he said that the inconsistencies were so

marked that they had thrown into question the diagnosis of NFCI; it was now "insecure".

205. On the assumption that there is a secure diagnosis of NFCI, Dr. Mumford opined that on balance it was a mild NFCI. However, several years down the line Dr. Mumford said the Claimant was presenting as someone with a range of symptoms and therefore it was difficult for him to say how many of those relate to the true organic baseline. He could not explain why he has pain up his legs, back pain and why he falls.

Analysis

206. The two experts had markedly different experience. Whilst Dr Carey had greater experience of the presentation of NFCI amongst soldiers Dr Mumford had a greater experience in relation to neurological symptoms generally and upon issues such as the alleged pain shooting up from the feet through the legs to the hip and back and the loss of balance.

207. The Claimant presented to Dr Carey as at the "extreme end of the spectrum" as regards symptoms and "as bad as it gets" with a "dramatic" presentation. Dr Carey has seen a lot of NFCI cases, so these descriptions reveal how bad the Claimant was claiming his symptoms were. He said that he was in continuous pain. This is the picture he has presented to many people since the spring of 2017 as set in the Claimant's lay witness evidence.

208. Initially the experts had been happy to agree in a joint statement of 2020 that the Claimant had suffered an NFCI and the most likely cause for it was a cold exposure during the course in February/March 2017. They also agreed that if the Claimant was further exposed to cold it could have further exacerbated his NFCI. However even in the first joint statement concerns both had formed were set out, specifically that:

> "We agree that the Claimant now has symptoms consistent with cold sensitisation, which, if reflective of underlying small fibre neuropathy, would be the result of his NFCI. However, we both agree that there is a significant psychological element in the Claimant's presentation, and this causes us both to question the security of the diagnosis. This is because although many elements of the Claimant's past symptoms were consistent with NFCI , he currently complains of other symptoms that are less typical and inconsistent, and there were findings on examination, especially those signs identified by Dr Mumford during his examination in March 2020, relating to the Claimant's balance, gait and perception of vibration which raised the possibility of non-organic issues. In other words we agree that in this case there is a realistic possibility of exaggeration of symptoms and questions of credibility arise."

and

> "Dr Carey was of the opinion that the Claimant's NFCI is severe because he does not apportion as much emphasis to the psychological component of his condition. In contrast, Dr Mumford is of the opinion that the Claimant's NFCI is mild, with the majority of his current symptoms taking origin on a psychological rather than a physical basis, moreover Dr Mumford is concerned that there may be ongoing exaggeration or embellishment of the symptoms in this case, but accepts that determination of veracity is an issue for the court."

209. They subsequently agreed that the Claimant's presentation to them and as shown on the video surveillance evidence is inconsistent with the presentation before them at examination and that they can give no organic explanation. However, as set out above, they differed as to the extent to which this evidence undermined the Claimant's history and explanation of his symptoms.

210. In my judgment when evaluating the NFCI expert evidence the following matters are of significance:

(a) The Claimant's NFCI has not followed the usual pattern. NCFI is generally not a deteriorating condition absent further cold exposure. In mild to moderate conditions it is not uncommon for there to be recovery over time and full recovery is possible. Indeed, Dr Carey stated that if the history was of a mild NFCI he would expect to see some recovery by now i.e. he should have improved/be improving. The Claimant's reported symptoms significantly deteriorated in the Spring of 2017, some considerable time after any cold exposure and have never improved since. As for the extent of the increase in symptoms since 2016/17 it was noted in the joint statement of February 2022:

> "Dr Mumford recognised that the 2016 video was taken some four years before he assessed the Claimant, but noted considerable surprise that an individual who carried a diagnosis of small fibre peripheral neuropathy (i.e. NFCI) in 2016, yet was fully mobile, could seemingly have accumulated such apparent severe disability over just four years i.e. in the period between the 2016 video and his assessment in 2020. This in his view would be an exceptionally unusual timeframe the progression of symptoms due to a peripheral neuropathy, which in general progresses only slowly, over many years."

(b) The Claimant has unusual or "bizarre" symptoms. Dr Carey could give no adequate explanation for the limp or for the use of the stick by the Claimant other than it was used for reassurance (which is not what the Claimant said he used it for). Dr Mumford described the pain in the legs and back as bizarre symptoms and he could not explain them (nor the "curious" falling problem). He did not understand why the Claimant needed a stick. On 21st May 2018 the Claimant told Dr Carey that his symptoms were no better in summer and that the pain in his hands and feet was generally constant, although some days were

better/worse than others. This was contrary to what would be expected of symptoms. Dr Carey also recorded that the account given by the Claimant about his symptoms was that they were "haphazard during the day" with no particular pattern. His wife informed Dr Carey that his feet felt cold when it was warm and warm when it was cold. There is no organic explanation for such haphazard symptoms. Dr Mumford stated that he would not expect to see fluctuations on a daily basis in the absence of an (environmental) temperature change. Dr Mumford stated swelling can accompany NFCI but is uncommon and very variable. However the underlying condition should improve with time and he could not explain the swelling witnessed by some of the Claimant's witnesses and he considered it "very odd".

(c) There were inappropriate signs on examination. There were four aspects which caused Dr Mumford concern.

(i) "His gait seemed odd. It was not completely normal. He walked with a stick in his left hand which he appeared not to need.

(ii) "He was able to walk using little steps, each time touching the heel of the moving foot with a toe of the other foot; a test called "Tandem walking" the fact that he could do this suggested normal, or very near normal, balance, coordination and proprioception"

(iii) After standing still apparently putting little pressure on the stick (which appeared unnecessary) Dr Mumford asked the Claimant to continue standing with his eyes open but to do so without using the stick. As soon as he lifted the stick just an inch or so he fell backwards. In his first report Dr Mumford stated "the fall was somewhat dramatic and did not look to me like a natural fall" as he subsequently clarified reality was that he thought the fall was feigned. He simply appeared to throw himself backwards somewhat conveniently landing in the relatively narrow gap between the wall and a table. Dr Mumford said he thought "Crikey, what was that?" And that the fall was "put on". Dr Mumford gave clear and compelling evidence about the fall before him. I accept it without any real hesitation. The Claimant's explanation that he had shaky legs following neurophysiological testing was untenable given the time lapse after those tests.

(iv) The responses to test the vibration sense were not normal and with a pattern that was not organic. In both legs he confirmed that he could feel a vibrating tuning fork over the distal part of the shin very easily. However he claimed that he could not feel the tuning fork on another part of the same bone.

To this list can be added a fifth; the exaggerated description and exhibition of current pain/discomfort/loss of function before Dr Carey

(d) Dr Carey and Dr Mumford agreed (in the joint report of 13 October 2021) that there were significant inconsistencies in the Claimant's presentation. They stated that:

> "at interview with both experts the Claimant described neurological impairments giving rise to physical disability, and a resulting handicap in terms of his ability to function on a day-to-day basis. Such impairments were not seen in the video recordings, which appeared to show the Claimant without any noticeable neurological impairments, and who appeared to walk (albeit with a stick, although the extent to which this was relied upon is uncertain) and able to drive. We agreed that these inconsistencies cannot be explained purely on the basis of neurology or NFCI, and neither of us can find readily available explanation for the marked divergence between the clinical picture exhibited at the medical interview and what is seen in the video recordings."

and

> "Both experts note that significant changes in disabled individuals' physical capacity over a short period of time are not seen in their respective medical practices. Accordingly, both experts agree one needs to be cautious regarding a "good day", "bad day" explanation, especially for chronic long-term conditions."

211. Dr Carey accepted that the inconsistencies (which included getting into a car unaided which he agreed was irreconcilable with what he saw at interview) would have caused him to "raise an eyebrow" had he been provided it alongside what he saw and heard at interview. In my judgment this very significantly underplayed the differences. Under questioning Dr Carey conceded that in his reports he should have said secondary gain for money was a possibility before he agreed in the joint statement of October 2021 that "we also agree that this degree of inconsistency must raise the possibility of either exaggeration of symptoms, or even malingering.."

212. As regards the June 2019 wedding clip it was set out in the joint statement of February 2022 that:

> "Dr Mumford was of the opinion that the video evidence showed the Claimant walking normally at a wedding in 2019, with no signs of any neurological deficit. Dr Mumford was also of the opinion that such a gait was inconsistent with the presentation of the Claimant when he saw him just nine months later in March 2020. Dr Carey agreed with Dr Mumford that the Claimant's gait appeared normal, and that it was in stark contrast to the presentation of the Claimant when he saw him nearly 2 years earlier in October 2018, and one year later in August 2020."

213. I found Dr Carey's view that the wedding was a happy social occasion in a warm, summer environment and that since there was a significant psychological element in the Claimant's condition and presentation this could have accounted for the stark inconsistency in mobility, to be unconvincing and unrealistic. He suggested that video clips for a matter of seconds could not be representative of the Claimant's activities throughout the entire day or evening. However the Claimant admitted he did not use a stick throughout the day (and the wedding photographs show him without a stick).

214. I much prefer Dr Mumford's analysis that it is "implausible" and that "the startling change in neurological function" was far too great to be explained by these features. Not only was there too great a swing in the pendulum, it took place over too short a time. As Dr Mumford stated the changes were inconsistent with the natural history of the range and breadth of general neurological diseases that he dealt with on a day-to-day basis. He pointed out that he raised concerns in his first report regarding unusual findings on neurological examination, which appeared not to take origin from a physical basis. Those early observations regarding non-organic features found on examination then took on greater significance when taken with the further inconsistencies revealed by the video recordings. He opined in his report of 6 September 2021 that:

> "The video recordings are astonishing. They show Mr Muyapa moving around normally, without any evidence of gait difficulty not of poor balance……He clearly does not need to use a stick for walking assistance, despite his report (and illustration) of such a requirement at interview…..It now seems very likely that he was exaggerating and or substantially embellishing his problems when he and I met."

I accept his view that the profound deficit described and exhibited at the time of the interview "would not miraculously disappear on a good day".

215. I much prefer Dr Mumford's assessment of the inconsistencies in presentation. They are very marked and inexplicable on any organic basis. Also the inconsistencies have to be taken together with the fact that the Claimant's NFCI has not followed the usual pattern and also the presence of bizarre and inexplicable symptoms. I accept his opinion that it is very likely that the Claimant exaggerated and/or substantially embellished his problems during his interviews. I find as a fact that he did.

216. During his evidence Dr Carey was quite firm and unshakeable in his view that it was highly unlikely that the Claimant had "faked the whole lot" (of the NFCI symptoms) and he felt certain about a mild injury diagnosis even if the rest was stripped away. Significantly he explained that if the symptoms had been mild then the Claimant may not have been discharged from the army and may have been retained.

217. I accept the analysis of Dr Carey that hangars can be cold places and working there could cause an exacerbation of an NFCI. Also that second or subsequent exposures need not be as marked or severe to cause an aggravation or exacerbation. However I prefer and accept the opinion of Dr Mumford that any exposure in a hangar could not explain the overall trajectory of the Claimant's symptoms. I accept that the Claimant was exposed to cold temperatures whilst working in the hangars and that

there was some worsening of his symptoms. However the worsening was nowhere near as severe as the Claimant has claimed. He has hugely exaggerated his symptoms.

Psychiatric

218. The psychiatric experts were Dr Baggaley and Dr Friedman.

Dr Baggaley

219. At the outset of his oral evidence, I expressed my concern that Dr. Baggaley's first report was dated 2nd April 2020, some 18 months after his examination on 11th September 2018. Although the report postdates the Claimant's witness statement of 3rd March 2020, Dr. Baggaley had not seen it. I pointed out that this was very unsatisfactory and could lead to a misleading impression and/or confusion. A report dated 3rd July 2020 following a second examination on 21st May 2020 was provided in the morning of Dr. Baggaley's evidence. This had not been included within the trial bundle.

220. Dr. Baggaley was asked about the examination via Skype on 11th September 2018, in particular how the Claimant presented in terms of mobility. Dr. Baggaley replied that he did not have a clear view of his mobility and explained that this is one of the limitations of remote assessment as very often people are seated and he cannot see them move. In terms of the Claimant's mental state and utilising his notes and the best of his memory, Dr. Baggaley said the Claimant was objectively depressed, pessimistic and concerned with his situation. Dr. Baggaley confirmed that his second examination on 21st May 2020 was also a remote video assessment because of Covid.

221. Dr. Baggaley was taken to his first addendum report dated 8th September 2021 where he stated as follows:

> "*12. Reliability*
>
> *a. Surveillance or social media evidence can reveal discrepancies between a claimant's account of his activities to experts with the objective reality.*
>
> *b. I could see nothing in the DVD or social media footage which suggested any such discrepancy.*
>
> *c. This is consistent with my impression at interview where I found no suggestion of exaggeration or abnormal illness behaviour.*
>
> *d. This is also consistent with the contemporaneous medical records in which I could find no suggestion that the treating clinicians detected signs of exaggeration or malingering*."

222. Dr. Baggaley was then shown the video dated 23rd August 2019 of the Claimant dancing at a BBQ. It was put to Dr. Baggaley that this video was at odds with the Claimant's presentation to Dr. Friedman on 8th March 2020 and that there was a marked discrepancy. Dr. Baggaley said that by marked discrepancy he would expect someone who never leaves the house to be seen outside or someone who says that they cannot walk more than 50 metres to be running. He said he had been given lots of material and he did not come across any significant discrepancy with the Claimant's accounts of his disability. Dr. Baggaley did not accept that he was being partisan and non-compliant with his CPR 35 duty. He said for him to take the view that the videos were discrepant he would expect to see the Claimant walking for a substantial amount of time without his stick. When taken to the reception videos of 1st June 2019, he said he did not consider this video to be inconsistent because his view was that the stick was used for support to give him assistance if he would start to fall rather than being necessary for walking. Eventually he conceded that what could be seen in the various clips was inconsistent with the Claimant's statement that there was no variability in those symptoms (as the Claimant had stated to Dr Carey).

223. It was Dr Baggaley's opinion that the Claimant was not forcibly pretending to be depressed. Dr. Baggaley said that people can give dishonest accounts but that does not mean that they are not depressed. He added that he would not expect a man of African origin to fake being depressed as in his experience of treating those from an African background, it is unlikely that they would fabricate depression because showing signs of depression would be frowned upon. He also said that mental health issues were not as well known in Africa.

224. Dr. Baggaley explained that his opinion in respect of the Claimant was partly influenced by his experience of having seen a substantial number of cases involving people in the military with NFCI and psychiatric issues. In summary it was his view that the Claimant sustained a moderate psychiatric episode caused by and perpetuated by the organic NFCI and that loss of career was a relevant factor. Dr. Baggaley stood by his prognosis as set out at paragraph 9a in the first joint statement;

> "*Dr. Baggaley is pessimistic about the outcome given the chronicity of symptoms and lack of response to date. Dr. Baggaley understands that the pain and disability arising from his NFCI is likely to run a chronic course and there is likely to act as a chronic perpetuating factor for his depressive disorder."*

225. Dr. Baggaley was asked about his view if exaggeration had been established. He said that if there was a mild NFCI then he would be cautious regarding his diagnosis.

226. Dr. Baggaley agreed that the Claimant did not need any care from a psychiatric perspective.

Dr. Friedman

227. In cross-examination Dr. Friedman was referred to his first medical report dated 11th March 2020 and in particular his opinion that he considered that the Claimant *"…was a poor historian and it was difficult to get a clear account as to his psychological problems over time."* He said that as a general proposition it may be true that patients may be poor historians because of their depression, but he did not think the Claimant had been, or was, depressed. In the first joint statement dated 5th November 2020 it was his view that

> "Dr. Friedman considers that his adjustment disorder had resolved by the time that he was discharged from the army. Dr. Friedman considers that he remains distressed by ongoing pain and disability but below the level of a psychiatric disorder, and defers to expert opinion as to the severity of his physical problems. The claimant did not seek any psychological treatment in the period of time after his discharge from the forces. He remained on Duloxetine, which while an antidepressant, is licensed and prescribed for the treatment of pain."

However Dr. Friedman explained that when he first saw the Claimant he had concerns over the Claimant's veracity and the existence of a NFCI was a major factor in his diagnosis of an adjustment disorder. When Dr. Friedman first saw him, his presentation was of someone who was severely disabled and depressed. He could not answer a question and could not do a single thing. Dr. Friedman recalled not knowing how the Claimant would be able to leave the room as he could not do anything.

228. During cross-examination he was taken to the medical and other records with entries referring to depression including the entry of 30th June 2019 concerning Universal Credit and the recording that the Claimant suffered from mixed anxiety and depression, had been referred for CBT and was on Duloxetine. Dr. Friedman denied this record was consistent with ongoing depression and anxiety. He said this entry was a process of form filling and the authors were not gatekeepers. Dr. Friedman reiterated his view that the Claimant was being prescribed Duloxetine for pain and not depression.

229. Dr. Friedman agreed that he had heard from a large number of witnesses on behalf of the Claimant and confirmed that he had read their witness statements. It was suggested that he should have reached the same conclusion on those witness statements as Dr. Baggaley did in his first addendum report:

> "*The evidence covers a considerable period and comes from a wide range of informants. It also gives a consistent impression of a man who has become socially withdrawn and depressed and whose personality and character has markedly changed since his injury*."

Dr. Friedman did not accept this proposition as these were lay people who were not qualified to give psychological evaluations. Dr. Friedman added that by and large the witness statements described the Claimant as miserable but the statements do not

support depressive illness. He also explained that medication is not a reason for there to be good days and bad days and you would not expect symptoms to fluctuate if one is chronically depressed.

230. Dr. Friedman said he found Dr. Baggaley's comment that those of an African background were unlikely to fabricate depression, extraordinary.

231. I asked Dr Friedman directly whether, as he had made a number of comments about the Claimant's presentation at his examination, he thought the Claimant had not been truthful at his examination Dr. Friedman said that the way the Claimant stood up and the way he walked was very odd; and clearly not in keeping with depression. Dr. Friedman felt the Claimant was being cagey and was careful not to answer questions so that he was not caught out. When he was trying to get an account from the Claimant he would not provide one. He thought the Claimant was putting it on. He said he had been reluctant to put into his report (in plain terms) that the Claimant was acting like somebody who is pretending to be severely depressed.

Analysis

232. Dr Baggaley and Dr Friedman agreed in their first joint statement that the Claimant had developed a psychiatric disorder following the development of NFCI symptoms in March 2016. They preferred slightly different diagnostic terms with a significant degree of overlap. Dr Baggaley preferred the category of a moderate depressive disorder whilst Dr Friedman was of the view that it was an adjustment disorder. It was their view that the difference was within the range of reasonable clinical opinion. They also agreed there was some pre-existing vulnerability in terms of pre-existing psychological problems and relationship issues. They agreed that the development of the NFCI and the secondary effects on his physical abilities, military career in the setting of a strained marital relationship were significant factors in the development of his psychiatric disorder.

233. The significant area of disagreement between the experts was that Dr Baggaley considered that the NFCI led to the loss of military career which caused continuing pain and disability which was of the greatest significance in the development of a psychiatric disorder. Further that the Claimant remained significantly depressed. Dr Baggaley was pessimistic about the outcome given the chronicity of the symptoms and the lack of response to date. Pain and disability arising from the NFCI was likely to act as a chronic perpetuating factor for the depressive disorder.

234. Dr Friedman considered that an adjustment disorder had resolved by the time that the Claimant was discharged from the army. He considered the Claimant remained distressed by ongoing pain and disability but below the level of a psychiatric disorder. He supported this view by reference to the fact that the Claimant had not been referred to his GP when he been discharged from the army (there having been some improvement in mood by 24th January 2018) and also had been mentally fit and well enough to organise a four-month stay in Malawi.

235. The experts also considered Dr Friedman's significant concerns that the Claimant was a poor historian and that he might be exaggerating his level of disability.

236. Dr Baggaley stated that he did not find any evidence of exaggeration. Dr Friedman stated that he had concerns in relation to the Claimant's straightforwardness and comprehensiveness of his account. Not surprisingly given the nature of psychiatric and psychological analysis the experts agreed that the assessment of the Claimant's current symptoms and level of functioning mainly depended on the account provided by the Claimant and that matters of his veracity and reliability were for the court.

237. It was Dr Friedman's view that the Claimant was a poor historian when he was interviewed and the reason was not because he was depressed. The Claimant's presentation in the witness box over one and a half days was unrecognisable from the shuffling and uncommunicative, severely disabled man who had presented before him. He described the Claimant presenting before him in a terrible state and that if it were an accurate representation of how he was day to day no responsible member of the family would have left him like that as he could not answer a question; it would have been inhuman not to take him to see a GP (which he did not do for a year). He repeatedly stressed how the Claimant was presenting as seriously ill and was very firmly of the view that the Claimant's presentation to him was not consistent with the social media and surveillance evidence. Clinical depression produced a pervasive mood disturbance without "good days". He had worked in pain clinics for 30 years and recognised that there were cases where pain was amplified by depression. However this was not the case here. Dr Friedman stated that psychological factors were not a significant driver for the alleged pain and disability. He believed the Claimant was not truthful and was putting on an act by pretending and acting as he thought a seriously depressed person would act.

238. Dr Friedman had set out his initial view without the benefit of any third party evidence. His view was "reinforced", confirmed and hardened by the video surveillance and material taken from various social media sites.

239. Dr Baggaley stated that he did not consider that either the video surveillance or social media evidence demonstrated "any discrepancy between (with) the Claimant's account *to him*". In my judgment the final two words are important and the view taken both narrow and unsustainable. I recognise that Dr Baggaley conducted his interview remotely via skype so did not have a clear view of the Claimant's physical disability e.g. how he walked, got up from and sat down on a chair etc. However, he failed to comment upon the inconsistency with the presentation to other medical experts, including Dr Friedman. Dr Baggaley only reluctantly conceded during extensive cross-examination that there were any inconsistencies and was accused by Mr Ward of a partisan view. In my opinion there was some force in the criticism; not least of the reasons for which is that Dr Carey and Dr Mumford agreed that there were inconsistencies. My view is that such inconsistencies were plain to see and Dr Baggaley should have readily conceded that this was the case.

240. Dr Baggaley remained of the view that the Claimant had suffered, and continued to suffer, with depression. He stated that depression was a common comorbid symptom with an NFCI. He supported his view that the Claimant had not pretended to be depressed with an assertion (made for the first time in cross-examination) that people with an African background are ashamed of mental illness. Dr Friedman took great issue with this opinion which he said was wholly unsupported by any evidence. Dr

Friedman had been involved with Rwandan and African psychiatry services and has an adopted son who is African. He believed that Dr Baggaley's view was offensive and that a significant number of African soldiers had presented with mental health problems including, most significantly, the Claimant himself in November 2015 (when he was noted to be self reporting as PH9; consistent with a severe depression). I accept Dr Friedman's view that this was a point without any validity and a rather unfortunate attempt to shore up an untenable opinion.

241. As for the comorbidity of depression with NFCI if the Claimant was trying to exaggerate his symptoms for financial gain, having discussed the condition with other soldiers (which I find as fact that he did), it is likely that he would have been aware that others had suffered with depression. The major mistake the Claimant made is that he very significantly overacted (appearing as he thought a severely depressed person would appear) before a very experienced clinician who saw through him from the start.

242. In my judgment Dr Friedman was much the more impressive and persuasive expert in relation to the analysis of the Claimant's presentation of symptoms. I am sure that the Claimant consciously and very significantly exaggerated his presentation to him. I also prefer the view of Dr Friedman that at its highest the Claimant suffered a time-limited adjustment reaction disorder to the development of NFCI. In my judgment it was quickly overtaken by conscious exaggeration of physical and psychiatric symptoms to obtain discharge from the army. I have weighed in the balance the Claimant's lay witness evidence concerning his low mood and (to the lay eye what looked like) depression. In my view it is likely that he presented an exaggerated low mood for much (but not all) of the time so as to be consistent, given the claim that he was mounting.

243. It is my view that if the Claimant had not exaggerated his physical symptoms, whilst he would have faced limitations on his army career, such limitations would not have caused psychiatric injury. I accept Dr Friedman's view that the Claimant would, at most, have had periods of distress which fell short of a recognised psychiatric disorder. It is also my view that had the Claimant not suffered a NFCI at all the birth of the child with a disability and the death of a brother in the context of a failing relationship would in any event have caused considerable distress for the Claimant who, as the November 2015 entry showed, had some psychiatric vulnerability.

244. If the Claimant had been honest about the nature and extent of his physical symptoms I do not believe it is likely that any psychiatric symptoms would have led to his discharge. The true extent of any psychiatric symptoms was limited and as Dr Baggaley conceded moderately depressed people can work; they can function sufficiently to carry out normal duties.

Pain experts

245. The pain experts were Dr Sidery and Dr Edwards

Dr Sidery

246. At the outset of the oral evidence of Dr Sidery, I aired my concerns about the limits of the written evidence of the pain experts. I referred to the third joint statement of Dr. Sidery and Dr. Edwards dated 4th March 2022 where they set out that

> "We agreed that whatever diagnosis is accepted by the Court the Claimant's reported level of pain and disability is disproportionate."

And

> "We agreed that any reported physical symptoms which cannot be reasonably explained by the underlying pathology has 2 possible explanations:
>
> 1. That symptoms are being significantly magnified by psychological distress.
>
> 2. That the Claimant has exaggerated his symptoms for the purpose of secondary gain[27]."

247. It concerned me that neither expert had adequately set out an opinion, analysis, guidance or research that would assist the Court in deciding this central issue. Ordinarily that is the function of a pain expert in cases such as this. Although issues were identified, such as his limited mobility, neither of these experts had, by way of example, watched/ observed the Claimant walking across the room and set out the conclusions they reached as a result. Neither set out a view as to why it is that the Claimant limps and why he uses a stick although in their second joint statement dated 7th October 2021 they said at §30:

> "Mr Muyepa has bilateral injuries. He uses a stick not a crutch. A stick cannot be used to transfer any meaningful weight through the upper limb (unlike an elbow crutch) and in this context would be used as additional support or 'psychological support' in the context of an account of having sustained falls. Use need not, from a chronic pain perspective, involve observable transfer of weight through the stick in this context."

I explained that my understanding of having bilateral foot issues is that one would shuffle and not limp i.e. not favour one leg. I also did not understand why the Claimant consistently used a stick and whether it was consistent with any organic pathology or not. I had hoped to be enlightened on this issue by the experts. Dr. Sidery replied it was a reasonable criticism but that it was a matter for the Court to assess the evidence and therefore the Claimant's veracity. Credibility was crucial. He accepted that if the Claimant's presentation was dishonest it would put into doubt his findings.

[27] Clarified as financial gain

248. Dr. Sidery was taken to paragraph 63 of his report where he recorded that the Claimant "…explained that 90% of his problems are centred upon his feet" and that the constant stabbing and burning pain he experiences in the soles of his feet score 9/10 and that when he in addition experiences unpleasant cramping pains this elevates the score to 10/10. Dr. Sidery said it was fair to say that the Claimant was complaining to him of the highest level of pain possible.

249. Despite the complaint of spasms in the feet and difficulties in standing and walking, Dr. Sidery said he did not get the Claimant to stand up and walk as the facility where the examination took place had small rooms and could not accommodate the space needed to examine the Claimant's gait. Dr. Sidery added that in peripheral neuropathic pain the issue is how long and the distance the person can walk before they struggle; it gets worse over time when one weight bears on the feet.

250. Dr. Sidery acknowledged that the Claimant had told him that he used a stick for more than comfort i.e. the Claimant placed actual reliance on a stick. Dr Sidery also agreed that it was fair to suggest that the Claimant gave him the impression that he always needed a stick. Dr. Sidery said the Claimant did not refer to any foot being worse than the other and that the Claimant's gait was short and odd for a young male. Dr. Sidery saw the stick as "a reassuring aid" although how he utilised it was "up for debate". I did not find this particularly helpful evidence.

251. I asked Dr Sidery whether the Claimant mentioned anything about his legs (pain and/or shaking in his legs) because the nerve conduction tests performed by Dr. Moran showed no abnormality in the nerves in his legs yet the Claimant has said he falls over because of issues with his legs; he explained that pain went up his legs and that caused him to become unsteady (Dr. Mumford said there was no reason to explain the shaking/pain in the legs or hips; in fact he said it was inexplicable). Neither Dr Sidery nor Dr Edwards had addressed this issue in their reports. Dr Sidery said the Claimant had described shaking in his feet and that peripheral neuropathy was linked to the soles of the feet. He said that his interpretation of the medical records is that the Claimant is distressed and has difficulties with chronic pain. In his opinion it was feasible for someone who is dealing day in and day out with neuropathic pain, to experience pain that goes well beyond the pain that the original insult inflicted. The Claimant's reported symptoms in this case were disproportionate and contained a number of discrepancies.

252. Mr Ward suggested to Dr Sidery that an explanation for his reported but inexplicable leg pain/shaking was that the Claimant was lying and that he was consciously exaggerating for financial gain. Dr. Sidery said it was his view that the Claimant had suffered an NFCI to his feet and the psychosocial distress and combination of both can produce a disproportionate response. Dr. Sidery explained that the medical records for him were reassuring as they appeared to be consistent. He highlighted no clinician has stated that the Claimant had presented in a strange way (although this ignored his presentation at interviews with Dr Friedman and Dr Mumford).

253. Dr. Sidery accepted that in consideration of whether there is an organic NFCI he would defer to the NFCI experts. He maintained his view that from a pain perspective, the small nerve fibre neuropathy in the Claimant's feet is the cause of his pain however it is affected by psychological and psychosocial factors.

254. Dr. Sidery confirmed he was aware of how the Claimant presented to Dr. Carey and he had watched the video of 23rd August 2019 of the Claimant dancing at a BBQ. He accepted that there were certainly large discrepancies between the two. He was asked why he had referred to them as inconsequential in his first addendum report dated 20th August 2021. Dr Sidery replied that although they raised a number of issues with the Claimant's credibility the Claimant retained the capacity to do all those things in the videos; he added by way of example the neuropathic injury would not stop the Claimant from running from a burning building.

255. Dr. Sidery was shown the videos of 1st June 2019 of the Claimant walking at the reception and agreed it was evidence of the Claimant walking without a stick or a limp. It was put to him that the Claimant was putting on his limp as in an unguarded moment there was no limp. Dr. Sidery replied that in the context of walking indoors and in a warm environment it might represent him on a "good day". Dr. Sidery said he was not astounded when he saw the videos and added that, in his view, they do not undermine the Claimant's veracity as a whole (although Dr. Sidery accepted that the videos of 1st June 2019 was not reconcilable with the statement to the benefits agency that he could not walk unaided)[28]. Dr. Sidery accepted that if the Claimant is found to have misled others by saying he always uses a stick and needs assistance, that cannot be explained on a psychological basis; you cannot use a psychological issue to justify dishonesty.

256. Dr. Sidery was taken to the NFCI experts' view that the condition would not have such an extreme "*swing of the pendulum"* with regards to signs and symptoms. However, Dr. Sidery commented that it is likely on balance there were "other factors" active and pertinent. He did not know why the Claimant improves on a good day and therefore he agreed there is a discrepancy.

257. Dr. Sidery confirmed he had read the witness statement of Marlon Lessey and accepted that if the Court were to accept the content as accurate "it would be fairly cataclysmic" and that one explanation would be that the Claimant constructed a factual narrative in order to get money. Dr. Sidery added there would be no psychological element to explain what he claimed to have seen/heard.

258. Dr. Sidery agreed that he would have expected some degree of improvement in the Claimant's condition from a moderate NFCI to a mild NFCI. In his view this was a difficult case and he "gets the feeling" the Claimant is vulnerable and that there are specific issues in this process that are having an impact on him.

Dr Edwards

259. Dr. Edwards explained that he has been involved in medico-legal work for over twenty years and has undertaken extensive research experience in pain and anaesthesia. He explained that in terms of pain management his is a holistic

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[28] Dr. Sidery was shown the surveillance footage from 3rd September 2020 and he agreed that there was not a lot of evidence of weight bearing on the stick. He said the Claimant was presenting an unusual gait and that there was "a bit of a limp".

approach working with psychiatrists and he has developed pain management in the community[29].

260. Under cross-examination, Dr. Edwards agreed that he had no experience of NFCI and was reliant upon the NFCI experts. He agreed with Dr. Sidery's opinion that people with neuropathic pain in their feet will experience more pain the longer they walk. He was not sure whether standing for long periods would cause more pain but he did not disagree with the proposition. Dr. Edwards also agreed that a psychiatric condition can amplify pain from an injury.

261. Dr. Edwards also confirmed that as he had recorded in his first report that the Claimant described his mood as low, with no positive feelings and that he gets anxious and restless. Dr. Edwards added that he took a video of the Claimant's presentation which showed that he was feeling low. He agreed on the evidence of the clinical records that the Claimant was suffering from low mood psychologically.

262. Dr. Edwards explained in relation to paragraph 5.12 of his first report:

> "On 2 March 2017, it is reported that 'since he was last seen in July 2016, he has been doing his job and feels he has improved'. However, by 27 April 2017 he is noted to have a recent deterioration in his symptoms, and is walking with antalgic gait and a stick."

That an antalgic gait would imply a limp. So as at April 2017 it appears that he was limping and using a stick. Dr. Edwards was then taken to the Claimant's military medical records and he agreed that the entry on 8th May 2017 by Dr. Sally Acton was the first entry with reference to anxiety and depression following the NFCI.

263. Dr Edwards did not agree with the analysis of Dr. Sidery that there was not a lot of secondary gain in the case of the Claimant. Dr. Edwards said he always tries to look for why an individual presents and it is always important to consider secondary gain. He also stated that when treating patients he is not interested in pain; he is interested in function; function is what is key.

264. Dr. Edwards was of the view that the Claimant's leg pain was likely to be non-physical in nature. He concurred with Dr. Carey and Dr Sidery's views that swelling is highly variable and whilst swelling can occur with NFCIs it was his understanding that it was unusual to see it longer term. Dr. Edwards added that medication such as Gebapentin and Pregabalin can cause swelling and in his view it was inevitable that on travels or sitting down for too long can also cause swelling.

265. He was referred to his first addendum report dated 31st August 2021, which he provided following the disclosure of the social media videos and surveillance footage and confirmed that he has seen a lot of people use sticks because of the need for reassurance/support. He considered the videos of the Claimant at the reception and dancing at the BBQ on 23rd August 2019 to be very significant pieces of evidence. What was shown was discrepant with what the Claimant had told him.

[29] Dr Edwards retired from clinical practice in 2020

266. Dr. Edwards was also shown the surveillance footage of 3rd September 2020, in particular the section showing the Claimant shopping. Dr. Edwards said the Claimant's gait whilst shopping was normal. He conceded that the Claimant was not carrying shopping weighing more than 10kg, that he was using a basket, was walking slowly with a short stride and with a stick and was putting his items of shopping out onto the till with one hand. However, he observed that the Claimant was putting his heels down first when walking. He said that this was an indication of perfectly normal gait (this was the type of analysis which I had expected to see in the written reports). Indeed, Dr Edwards questioned what was possibly abnormal about it. He was then shown part of the footage where the Claimant was shopping with a trolley. Dr. Edwards described the Claimant as not pushing the trolley but leaning on it and looking like he had back pain. He strongly disagreed with Dr Sidery's analysis of this footage that the Claimant's gait was not normal, that there was genuine use of the walking stick and that the Claimant was reliant on the shopping trolley.

267. Footage of the Claimant walking back to the car was also played to Dr Edwards who commented that whilst there appeared to be a slight limp the Claimant had his walking stick in the wrong hand. He observed that the Claimant appeared to have a slight limp in his left leg and was using his stick in the left hand. This, according to Dr. Edwards, was creating the limp. Otherwise the Claimant was walking with otherwise a relatively normal heel to toe gait. It was put to Dr. Edwards that the Claimant was acting in accordance with the advice given to him by a therapist some six months before the surveillance footage that he should get out more. Dr. Edwards said that when he interviewed the Claimant, the Claimant originally told him that he goes as an escort to shopping and at times he would sit in a wheelchair.

268. It was put to Dr Edwards that lots of factual witnesses had given evidence of the Claimant's use of the walking stick (apart from Mr Lessey) and Dr Edwards had not given those witness statements sufficient weight before coming to his conclusions. Dr. Edwards replied that it is difficult for lay witnesses to comment on medical issues and how the Claimant had appeared in front of some others was not as important as the surveillance footage which in his view was key. He accepted the point that all the evidence had to be considered and that he had to be very careful to be fair and objective given that there was an allegation of fundamental dishonesty. Dr Edwards explained that he had taken the case very seriously indeed and had been in attendance throughout the trial and heard all of the evidence. He said that he has considered and weighed in the balance fairly what the witnesses had said and that he stood by everything he had said in his reports.

269. Dr. Edwards said it was absolutely clear that the Claimant's gait was normal, that he did not need a stick and whilst there was no footage of the Claimant walking on stairs, it was ridiculous and preposterous to say that the Claimant needed a stairlift. He said that he had carefully considered the video/ social media/surveillance footage evidence; the walking, dancing, shopping, driving etc and the Claimant was clearly less disabled than he had suggested. He agreed that the surveillance footage did not show the Claimant get out of his car only into it however as regards the feet Dr. Edwards said there was no difference and the ability of the Claimant to get into his car easily was not compatible with him saying he needed help getting off the toilet.

He assessed the Claimant's level of function compared to the Claimant's reported level of function and the discrepancy could not be explained away by good and bad days and he stood by paragraph 2.08 of his first addendum report in which he said:

> "I note that the Claimant seeks to explain the discrepancies between the surveillance and what he has told experts in terms of him having good days and bad days. I accept that in individual's with NCFI [sic] symptoms there will be fluctuations and symptoms will be worse in cold weather. However, I am unconvinced by that argument."

270. Dr. Edwards maintained that he had been very fair in his analysis. He took great offence at the suggestion that he had not been objective and was being partisan.

Analysis

271. As set out in the joint statement dated 4 March 2022, the pain experts agreed that whatever diagnosis is accepted by the court the Claimant's reported level of pain and disability is disproportionate to any underlying condition. They also agreed that any reported physical symptoms that cannot be reasonably explained by the underlying pathology have two possible explanations; magnification by psychological distress or exaggeration for financial gain.

272. Dr Edwards is a clinician of very considerable experience who clearly has great empathy with those disabled by chronic pain. As recorded in his first report following the examination on 30 March 2020 the Claimant had stated to Dr Edwards that he was significantly limited in how far he could walk and that he

> "Always uses a walking stick which he has been using since mid-2017. On a really good day he could walk up to 100 m, then he would have to stop for a few minutes. He could then go again but not as far, maybe 50 m. Are the days when the pain is worse, he can walk less distances."

He said that after maximum of 10 minutes standing he would have to sit down. After a while sitting in the same position he had problems with his back. He was restricted as regards how much he could lift and carry because of the need for a walking stick and his other symptoms. As regards shopping

> "He told me he goes more as an escort than getting involved in shopping itself. If it is a big shop, he might sit in a wheelchair inside or might sit in the car."

So the Claimant presented as very significantly disabled. Dr Edward stated

> "…it is known that there is a significant incidence of malingering in patients reporting chronic pain with financial incentives. In my opinion secondary gains may be a factor here, and I cannot rule out the possibility that there may be an element of conscious exaggeration. However in the absence of evidence

> it will be my view the Claimant's presentation can be adequately explained in terms of physical problems being significantly magnified by psychological/psychiatric factors."

273. The first report of Dr Edwards was favourable to, and supportive of, the Claimant's case. Indeed Ms Collignon suggested that it was a balanced and fair analysis. However, as he set out in the second joint statement, after sight of the social media and surveillance evidence, Dr Edwards' view changed very markedly. He considered that as opposed to suffering significant functional limitations, the Claimant requires no further treatment, had a good prognosis, was able to work full-time in some capacity and had no need for care. He had changed his mind and it was his firm, "clear" view that the Claimant had consciously exaggerated his symptoms. His analysis in relation to the supermarket surveillance (the Claimant attended two shops; Lidl and Home bargains over an extended period of time but had told Dr Edwards that he could not go shopping) was that the Claimant could be seen with an entirely normal gait, a basket in one hand and a stick in the other which he was not using. It was persuasive evidence. He explained that the Claimant could be seen leaning on the trolley as he pushed forward with no evidence of a limp. Also that a limp favours one leg to protect another and that when the Claimant is seen to limp in the car park (so when he knew he was in full public view) if it was his left foot that caused greater difficulties, he was using the stick in the wrong hand. He strongly disagreed with Dr Sidery's analysis of the Claimant's movement and was of the view that the Claimant was clearly "creating a limp".

274. Dr Sidery acknowledged in the second joint statement that there were certain aspects of the surveillance that did not support the Claimant's claim regarding his level of disability as reported to him and to others. However it was his view that the evidence showed an individual who did not appear to walk normally (although he recognised that this was an opinion that was not uniformly held) and that his gait was slow, with a short stride length and that the Claimant is seen walking with a stick "on each occasion" (this being incorrect as the clip at the wedding and the barbeque show the Claimant is not always reliant on a stick). He stated that the Claimant

> "Has the capacity to function relatively normally in a thermoneutral environment. He considers that the drivers for Mr Muyepa's low levels of function were psychological (a function of active psychological issues and vulnerability)."

275. Notwithstanding the social media and surveillance evidence Dr Sidery held a view that the Claimant presented as an archetypal chronic pain patient, with evidence of disproportionate symptoms not easily explained from a biomedical or psychological perspective. It was his view that the nature of the injuries and their implications had led to the descent into a negative spiral of psychological distress and chronic pain. Somewhat remarkably, and in my view unrealistically, he stated:

> "The new evidence only strengthens my previously held opinions in this case."

276. As regards the use of a stick Dr Sidery stated in oral evidence that he was "not hugely hung up on the stick". He set out in the joint statement that

> "Mr Muyepa has bilateral injuries. He uses a stick and not a crutch. A stick cannot be used to transfer any meaningful weight through the upper limb (unlike an elbow crutch) and in this context would be used as an additional support or "psychological support" in the context of an account of having sustained falls. Use need not, from a chronic pain perspective, involve observable transfer of weight through the stick in this context."

However there were four problems with this opinion;

(a) The Claimant has regularly said he needs the stick for mobility and support (he stated that he wears the sticks out) as opposed to psychological support; so he expressly disavows this reason for its use

(b) It does not explain the limp; which is obviously interlinked with the use of the stick;

(c) The Claimant started using the stick before any complaints of falls. The Claimant told Dr Sidery that he would be standing and experience a very sharp stabbing sensation in the toes or in the feet which would lead to immediate loss of balance. It was as a consequence of these symptoms that he was advised to start using a walking stick, which he found very difficult to come to terms with. Mrs Muyepa stated that her husband was advised to use the stick at the hospital after a fall. However, the Claimant started to use a stick and complaining of very limited mobility in April 2017 before there was any fall or visit to a hospital. Ms Collignon could point to no potential source of the alleged advice.

(d) It can clearly be seen from the social media and surveillance evidence that the Claimant can walk perfectly well, and even dance (albeit not exuberantly) without relying on a stick. During cross examination Dr Sidery accepted that the Claimant walking normally at the wedding in June 2019 was a discrepancy which he could not dispute and he agreed it was an omission not to mention it in his report. That he did not do undermines his analysis and provided some support for the submission made by Mr Ward that, as with Dr Carey and Dr Baggaley, he had not been truly objective in his reports.

277. In my judgement Dr Sidery significantly underplayed the existence of the limp (which he could not explain) and the use of the stick. Whilst I understand very well, both from the evidence of both experts, and also from my experience in other chronic pain cases, that organic symptoms may be significantly magnified by psychological overlay, it is difficult to see how, given the totality of the evidence (i.e. the other expert evidence and the social media and surveillance evidence) that here they were not clearly aspects of conscious exaggeration for secondary gain. This being before any consideration of the devastating impact of the evidence of Marlon Lessey.

278. I much preferred the evidence of Dr Edwards to that of Dr Sidery who in my judgment, as is sadly too often the case, tended to stray from objectivity and into the role of an advocate for the Claimant.

Non-medical expert evidence

279. I heard from two care experts, Ms Amanda Kerby and Mrs Jill Ferrie and two employment experts Mr Craggs and Mr Cameron.

280. I doubt either Ms Kerby or Mr Craggs would be anxious to relive their experience of giving evidence. However I have limited sympathy for either in this regard. They acted at times as advocate for the Claimant and both at times presented partisan views to the court and, in my view, in so doing neglected their duties as independent experts.

281. The very significant edifice of damages constructed within the schedule was built with significant reliance upon the evidence of Ms Kerby and crumbled significantly as the case progressed even on the assumption that the Claimant's evidence was largely reliable.

282. At times Mr Craggs adopted the twin roles of expert and Judge of the facts (his findings being favourable to the Claimant).

Care evidence

283. Given the issues that arose in respect of the expert evidence in relation to care in this claim it is necessary to consider the principles which govern such evidence.

284. Experts should constantly remind themselves through the litigation process that they are not part of the Claimant's or Defendant's "team" with their role being the securing and maximising, or avoiding or minimising, a claim for damages. Although experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code, as CPR 35.3 expressly states they have, at all times, an overriding duty to help the Court on matters within their expertise. That they have a particular expertise and the court and parties do not (save in some professional negligence claims) means that significant reliance may be placed on their analysis which must be objective and non-partisan if a just outcome is to be achieved in the litigation.

285. The duty that a care (and/or occupational therapy) expert owes to the court is no different to that of any other expert discipline. The well known principles set down by Mr Justice Cresswell in **National Justice Compania Naviera SA Prudential Assurance Co Ltd** ("the Ikarian Reefer") [1993] 2 Lloyd's Rep 68 are applicable and must be borne in mind at all times. They were described as follows;

> "(i) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation[30].

[30] See *Whitehouse v Jordan* [1981] 1 WLR 246, HL, at 256, per Lord Wilberforce.

> (ii) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate[31].
>
> (iii) An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider the material facts which could detract from his concluded opinion.
>
> (iv) An expert witness should make it clear when a particular question or issue falls outside his expertise.
>
> (v) If an expert's opinion is not properly researched because he considers insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
>
> (vi) If after exchanging reports an expert witness changes his view on a material matter having read the other side's expert report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court."

The Court of Appeal in the same case endorsed these points without hesitation.

286. CPR 35.3 sets out the primary duty of an expert as follows;

> (1) It is the duty of experts to help the court on matters within their expertise.
>
> (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

CPR 35.10 states that an expert's report must comply with the requirements set out in Practice Direction 35 which sets out a distillation of the principles outlined by Cresswell J at paragraph 2

> "2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
> 2.2 Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.
> 2.3 Experts should consider all material facts, including those which might detract from their opinions.
> 2.4 Experts should make it clear –
> (a) when a question or issue falls outside their expertise; and

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[31] see *Pollivitte Ltd v Commercial Union Assurance Company plc* (1987) 1 Lloyd's Rep 379 at 386, per Garland J, and *Re J* (1990) FCR 193, per Cazalet J.

> (b) when they are not able to reach a definite opinion, for example because they have insufficient information.
> 2.5 If, after producing a report, an expert's view changes on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court."

287. Some care experts have a (full time) private practice solely preparing reports for either Claimants or Defendants. Given that the compilation of a care report often requires a significant amount of subjective judgment, there is an obvious risk of contravention of Cresswell J's first principle and CPR 35.3. (2) through a lack of true independence arising from the need to maintain a source of instructions and the pressure to prepare a report which is favourable to the instructing party.

288. There is also often, if not usually, a very marked aversion shown by those conducting higher value personal injury or clinical negligence claims to the use of single joint care experts, despite the fact that there is often no principled reason against such an instruction. In my view the common working assumption within these fields of litigation that it is axiomatically the case that each party will have a care expert is misplaced, helps perpetuate polarised expert opinions and often greatly increases the cost of litigation.

289. An expert must provide an objective unbiased opinion in relation to the relevant matters upon which they are assisting the Court. CPR 35 PD 3.3 provides that an expert must verify his/her report by a statement of truth in the following form:

> "I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.
> I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."

290. The words "and complete" are there for a purpose. As set out above CPR 35 PD 2.3 provides that experts should consider all material facts, including those which might detract from their opinions and CPR 35 PD 3.6(6) refers to the need to deal with any range of opinions on the matters covered within the report. The court should receive a comprehensive, objective analysis; including whether an alternative view to that held by the author is tenable. An expert must not solely pick out pieces of evidence or entries in documents which provide support for the conclusion he/she has reached whilst not addressing material that points, or may point, the other way. Where there is a contrary interpretation, analysis or view it should be set out in the report and it is a breach of the duties owed to the Court by an expert to leave such issues to be raised by an expert instructed by the other party.

291. The sixth of the Ikarian Reefer principles and CPR 35 PD 2.5 cover the position where an expert has changed his or her view arising as a result of matters that have occurred after they have prepared a written report (or joint report). Importantly this

includes a change of opinion during a trial. By way of example if as a result of lay witness evidence an expert's view has changed he/she should communicate this (through the legal representatives who have instructed him/her) to the other side without delay and when appropriate to the court. An expert should not step into a witness box having changed his /her view without having made this plain beforehand. If the change of opinion is properly communicated it may alter the need for or extent of evidence to be given.

292. Although they are well settled it is also necessary to briefly set out the relevant legal principles which entitle an injured Claimant to damages in respect of care or the purchase of a particular aid/appliance.

293. The purpose of an award of damages is, in so far as a sum of money can do so, to put a Claimant, as nearly as possible, in the same position as he/she was in before the relevant injury was sustained (see generally **Wells-v-Wells** [1999] 1 AC 345). As a result a Claimant is entitled to damages to meet his or her "reasonable requirements" or "reasonable needs" arising from his negligently caused disability (see e.g **Sowden v Lodge** [2004] EWCA Civ 1370, [2005] 1 All ER 581, [2005] 1 WLR 2129).

294. So the question to be addressed is whether care, and/or aids or equipment are reasonably required? In **Whiten v St George's** [2011] EWHC 2066 (QB), Swift J said that the approach she adopted was as follows:

> "The Claimant is entitled to damages to meet his reasonable needs arising from his injuries. In considering what is 'reasonable', I have had regard to all the relevant circumstances, including the requirement for proportionality as between the cost to the Defendant of any individual item and the extent of the benefit which would be derived by the Claimant from that item."
>
> And
>
> "It is unlikely that the Claimant will ever have the requisite level of cognitive ability to make it necessary or appropriate for him to be able to control lights and curtains. The cost of a system that would permit him to do this would be disproportionate to the benefit he would derive from it. He will have carers to attend to his needs and comfort."

295. The evaluation of damages for care and equipment is not just a question of a requirement simpliciter, including on a theoretical and/or very limited or occasional basis, rather of a reasonable requirement. Damages will not be recoverable if the cost is disproportionate to the benefit. The requirement of reasonableness is used to qualify and filter suggested requirements and there is no entitlement to have funding for a wish list of all care and expenditure which could conceivably provide any benefits.

296. When assessing reasonableness consideration must be given to all relevant factors. By way of example it may be necessary to consider the interaction of care and equipment/aids. If an aid/piece of equipment enables a Claimant to do tasks for

himself/herself it may remove or reduce the reasonable necessity for care to assist with that task.

297. Also, when care/aids or equipment are used to confer therapeutic or pleasurable benefits, consideration should be given as to whether any "loss" which is sought to be addressed should be addressed as part of a Claimant's general damages for loss of amenity. In **Cassell v Riverside** [1992] PIQR Q168 the trial judge allowed the cost (£32,000) of building a swimming pool. This decision was overturned by the Court of Appeal, Purchas L.J. observing that

> "the provision of a swimming pool is more properly considered as an element in the damages for loss of amenity, etc."

By way of a more prosaic example I am sometimes doubtful that there has been adequate analysis of what assistance is required with gardening so as to identify what is reasonably necessary solely for maintenance purposes as opposed to catering for the pleasurable element. In the present case Ms Kerby gave as part of the justification for an element of privately funded care/assistance that the Claimant had lost the ability to play football with his children. However children do not have a need to play football with their father and to the extent that the Claimant had suffered a loss in this regard it was clearly a matter to be compensated through the loss of amenity element of general damages.

298. If a reasonable requirement is identified it is then necessary to consider two further questions. Firstly, whether it is likely that the uninjured Claimant would have paid for or had access to what is being recommended in any event. Sometimes what is claimed for is to be found in most households. In **P v North Devon Healthcare NHS Trust** [2002] Lloyds' Rep. Med. 100. Mr Justice Gage stated:

> "In my view, a lawnmower is now an everyday item of expenditure for anyone with a garden."

> And

> "The microwave: Mrs P said that she only purchased one because S P's dinners need constantly to be left warm. Nevertheless, this is nowadays a normal piece of household equipment, and I disallow the cost of it. A dishwasher: For the same reasons as with the microwave, I disallow this item. TV and video: For the same reasons as above, I disallow this item."

In **Leon Seng Tan v Bunnage** July 23, 1986 (unreported); see Kemp paragraph 18-006 Mr Justice Gatehouse refused to award the cost of a computer on the grounds that the Claimant would have bought one anyway. In **Smith v East and North Hertfordshire Hospitals NHS Trust** [2008] EWHC 2234 (QB) Mr Justice Penry-Davey: stated in respect of a digital camera:

> "Mr Smith said that this was bought on the advice of the speech therapist to aid communication with the Claimant. Although he said that he preferred film camera to a digital camera and would

> apart from the Claimant's disability not have purchased a digital camera, he acknowledged that most parents enjoyed taking photographs of their children and many nowadays had digital cameras. In my judgement it is likely that the family would in any event have purchased a digital camera, and accordingly I do not allow this aspect of the claim."

299. In the present case there were a number of items, such as kitchen equipment, which were recommended by Ms Kerby apparently without any thought as to whether they were ordinary household items or not. In a similar vein Ms Kerby also recommended the cost of breakdown roadside assistance but could not say if she had asked the Claimant (who stated that he loved driving) whether he had it pre-NFCI, or would have been likely to purchase it once he left the army, in any event.

300. The second question is whether, as a matter of fact the Claimant will actually use/receive what would be recommended as a reasonable necessity. As Russell LJ, in **Woodrup-v-Nicol** [1993] PIQR Q104, at Q114, as follows:

> "..if, on the balance of probabilities, a plaintiff is going to use private medicine in the future as a matter of choice, the defendant cannot contend that the claim should be disallowed because National Health Service facilities are available. On the other hand, if, on the balance of probabilities, private facilities are not going to be used, for whatever reason, the plaintiff is not entitled to claim for an expense which he is not going to incur."

301. There is a danger that because comparatively few personal injury/clinical negligence cases reach a hearing where the issues of care/aids and equipment are contested, and as a result few reminders are given by the Courts of the correct approach to be adopted, that some reports will fail to approach the analysis of what should be claimed/funded with sufficient rigour.

302. Ms Kerby's experience when giving evidence should stand as a warning. The following issues arose in respect of her evidence;

(a) In respect of a number of recommendations Ms Kerby set out no adequate assessment of why care/an item was reasonably required by the Claimant. By way of example, she advised the purchase of a "riser recliner chair" at £1,100 (with insurance and maintenance and replaced on a five-year cycle) so that the Claimant could "stretch his back out". However, the Claimant's case is that he has a peripheral neuropathy affecting his hands and feet and no medical expert had suggested any back pain was linked to his condition a fortiori any need to "stretch it out". An induction hob was said to be required "to give more control with cooking and reduce the risk of the Claimant scalding himself, although why he may do was something Ms Kerby could not really explain[32]. There was also no adequate justification for advising the need for a carousel pull out corner cabinet and pull down shelving, a

[32] A hot tap was recommended at a cost of £1500 (and replaced every 10 years). This was also to avoid some remote theoretical risk he might scald himself.

> slide and hide oven at a cost of £1250, and a soup maker, a food processor, cooking baskets (each ordinary and commonplace kitchen equipment), a butcher's trolley (£800), a wash dry toilet (£4,165, a whirlpool bath £10,000, a body drier £1,250[33] and a double bed (£3,799). None of these items was justifiable given the correct test of reasonable necessity. No expert should be in the position of having to concede during oral evidence that a recommendation in their report was "ridiculous" as Ms Kerby conceded in relation to the cost of a cabin assessment before flying on holiday.

(b) Ms Kerby also neglected to consider whether what she was recommending was something the Claimant would have had/used in any event had he not been injured (e.g. vehicle breakdown assistance at £139 per annum).

(c) She did not set out a range of views and specifically whether another view was tenable in respect of what she was recommending.

(d) Ms Kerby entered the witness box not having advised the Court of her revised view after the Claimant and Mrs Muyepa had given evidence. Ms Kerby realised that the figures she had set out in her reports were unsustainable in light of the evidence given by the Claimant and his wife but she did provide set out any recalculation. By way of example when Ms Kerby was alerted to the hours that Mrs Muyepa worked (and also that she had moved to stay in a house a 45 minute drive away) she formed the view that the hours of care she had estimated for past and future care were unrealistic. As she said during cross-examination "I realise the care level is affected big time" yet she had provided no recalculations When I explained how unsatisfactory this was there was an "on the hoof" recalculation during re-examination which was difficult to follow at times and obviously unsatisfactory. A court will, if time is available, give an opportunity for an expert to provide a revised report/recalculation. Here the evidence of the Claimant was given 10 days (and that of his wife 5 days) before Ms Kerby gave her evidence and there was ample time to provide a revision to the opinion previously provided.

(e) The social media and surveillance evidence clearly changed the matters addressed in her report or at the very least potentially changed them, but Ms Kerby effectively dismissed it (although she said that she had not) stating:

> "This evidence does not lead me to need to alter my opinion within my report or subsequent joint statement."

This was unrealistic bearing in mind the increased function shown. The Claimant could clearly do more than he had led either care experts to believe. Ms Kerby did not provide any tenable alternative view or set out the likely effect on her analysis if the court were of the view that the Claimant was consciously exaggerating.

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[33] When asked why the Claimant could not dry himself with a towel Mr Kerby suggested he may not be able to reach his feet. When the obvious solution of sitting down was suggested she resorted to suggesting it may heat the room up

303. Ms Collignon wisely tried to limit potential damage to Ms Kerby's credibility by striking several items out from the schedule which were based on her recommendations before she gave evidence (taken together they amounted to a very sizeable concession). However much of what was claimed should simply never have been recommended within Ms Kerby's reports.

304. After I asked (her report contained no breakdown[34]) Ms Kerby revealed that she has been preparing reports solely on behalf of Claimants for nine years. She recognised the understandable concern a Court will have as to the risks that arise when an expert's workload (and income) is solely for one side to litigation. In my view the risk came to fruition and the reports she prepared contained some partisan views designed to maximise damages for the Claimant rather than recommendations made, as they should have been, after balanced and objective application of the relevant principles.

305. Turning to other respects of Ms Kerby's evidence, it is necessary to highlight the fact that the Claimant complained to Ms Kerby (in January 2020) of constant pain. He told her of a typical day including:

> "At 3 am he wakes up. Mrs Muyepa will sort the children out, take them to school, come back and attend to his breakfast routine. In the holidays, he will get up at 5am and is assisted downstairs to watch TV. His breakfast is provided. If Mrs Muyepa is going out she will administer his medication then put the fluids and snacks near him. When there is time, he has a shower with assistance from Mrs Muyepa on waking. Mrs Muyepa prepares breakfast. Dependent on his pain levels and impact on his mobility, he either uses a urine bottle or go to the toilet, with assistance to urinate. Use a stick with assistance from his wife to mobilise. In the middle of the day, he sits in the chair for most the time and his wife will encourage him to mobilise. Mrs Muyepa were very occasionally work a shift for 2 to 3 hours within the school day, and will leave his lunch, medication and fluids reachable from his chair. After Mrs Muyepa has picked up the children from school, they have tea together, which has been prepared by Mrs Muyepa. He is assisted to have a shower before is assisted to go to bed."

306. Mrs Kerby then set out a diary of care and estimated that between 17th January 2018 and 31st May 2018 the Claimant was receiving 77 hours of care per week, between 1st June 2018 and the 30th November 2018 73.5 hours a week, and from 1st December 2018 to 30th December 2019 (the date of the visit) 57.75 hours of care per week. Eventually during cross-examination Mrs Muyepa admitted that she and the Claimant had deceived the experts as to where she was living. The reality was that she had never lived at the property having separated from her husband in December 2018. As I have set out the effect of this deception was that the Claimant's Schedule was drastically reduced (in a rather clumsy and basic approach past care was reduced

[34] Such a breakdown should be set out in any report by any expert whose income is largely if not solely derived from giving expert evidence

by a quarter of the hours previously claimed) Ms Kerby stated that if she had known the true position her first report would have been markedly different. Ms Ferrie stated within the second joint report:

> "Jill Ferrie highlighted in her supplemental report that the detail in the witness statements…describe a different scenario to that advice to both care experts and to (sic) which assessments were based. Importantly Jill Ferrie highlighted that Mrs Muyepa advised she had not moved to the current property with Mr Muyepa in December 2018 and therefore she does not feel that the past assessments of care can be accurate. She also considers that with the above, the ongoing and future care assessments would need to be reassessed."

307. In my judgement the attempt to deceive was due to dishonesty on the part of the Claimant and his wife with the sole and naked aim of increasing the care claim.

308. Ms Ferrie was also an experienced care expert (with a balance of instructions roughly two thirds defendant and one third Claimant).

309. She stated that the surveillance evidence gave her "an awful lot more" than she gained from her initial assessment and showed a completely different level of function to what had been explained to her. She pointed out that the Claimant was captured getting into his car which did not reflect his reported difficulties in rising from the toilet and the need to rely on a rail. She stated that she would not have anticipated that the Claimant (who said he was only able to stand for 10 minutes) would have left the home unaccompanied and managed both school trips and visits to stores on one morning. She stated that her revised opinion was the Claimant was clearly able to contribute to childcare and some shopping and there was no reason why his level of functioning as observed in the surveillance would not allow him to assist in domestic tasks at the home or preparing a meal. She strongly disagreed with the proposition that was put to her by Ms Collignon that the surveillance evidence should not have caused her to alter her views. On the basis of the Claimant having significant ongoing symptoms she would accept that some assistance with DIY and decorating would be reasonable given the dangers of climbing a ladder. She would also allow recommend assistance and associated costs in relation to functional restoration programme if one was justified by the other experts.

310. Ms Ferrie was a balanced and helpful expert and I have no hesitation in preferring her analysis of the degree of function revealed on the surveillance and social media clips.

Employment

311. In his report of 23 September 2021 Mr Craggs, an employment expert, provided a critique and his conclusions in relation to the surveillance and social media evidence and the statement of Marlon Lessey and Ms Mgemezulu. Quite why he thought this was within his remit (and why it was not pointed out to him that it was inappropriate for him to stray into matters of fact) I found difficult to understand. Examples of his comments are (in relation to the wedding in June 2019)

> "I acknowledge the video does show Mr Muyepa walking without a stick, but for a very limited time and in my opinion it cannot be inferred from this that he walked without a stick regularly for any significant distance."

and

> "….In the absence of any images or video corroborating Ms Mgemezulu's statement that Mr Muyepa was standing for long periods of time by the bar drinking and then dancing around leads me to conclude that I cannot place any significant weight on her statement with regard to Mr Muyepa's claim about his functional ability or his capacity for work, then, now or in the future."

Mr Craggs should have recognised that issues of fact were matters for the court. As it is, I broadly accepted Ms Mgemezulu's evidence.

312. Mr Craggs also gave some partisan views. In relation to the footage on 23 August 2019 showing the barbecue he stated:

> "I note that Mr Muyepa was wearing thick soled training shoes and sports socks, compared with the others in the clip who were wearing sandals or flip-flops without socks. It could be inferred from this that Mr Muyepa's need to keep his feet warm and cushioned was far greater than others in the clip."

Nobody else had ever suggested this was why the Claimant was dressed as he was and in my judgment it was a clear example of Mr Craggs straining to find an explanation that could assist the Claimant. He also opined that there was nothing in the new evidence that indicated the Claimant's functional capacity was inconsistent with what he indicated in his first witness statement, and at both interviews, "therefore on this aspect in isolation, there is nothing that requires me to change any of my opinions" However on any reasonable analysis the new evidence was inconsistent with what the Claimant had said in his first witness statement. He also stated:

> "In my experience unless the discrepancy is blatant or obvious…care must be taken in inferring an individual's functional ability for work from video footage. In my experience in order to provide reliable opinions employment experts must therefore look for repeated instances of performing the same functional activity over a protracted period of time or prolonged performance of the functional activity over a limited number of occasions"

313. The problem with this analysis is that it would place an impossible burden on the defendant. The clips showed that the Claimant was capable of walking unaided and even dancing and this was obviously inconsistent with the very limited functionality he had described to two other experts and also in his witness statement. It was Mr Craggs' duty to provide an opinion for the court based on the range of alternative

scenarios in terms of residual function apparent from the evidence. He failed to do so.

314. Mr Craggs also only provided scenarios for the court based on what would happen if the Claimant completed 20 years in service. He failed to provide the court with information as to what would happen if the Claimant left before 20 years which, based on the objective statistics, is what 46% of soldiers do. His scenarios were based upon what he decided on balance was likely, as a matter of fact, to have occurred. He expressed the view that a number of factors affected time in service including a range of personal, family, financial and career issues and that:

> "In Mr Cragg's experience and opinion the analysis of these factors does not suggest the chances of Mr Muyepa completing 22 years were less than that indicated by the general statistics and are likely to have been greater than indicated by the general data."

315. Even ignoring the evidence of Marlon Lessey, given that the Claimant was very substantially behind his peers in terms of promotion, had complained of stress in November 2015, had not taken the opportunity for all available operational tours and had three children (one of whom was disabled) it is difficult to see how Mr Craggs arrived at this analysis. In any event given that general statistical likelihood of leaving was approaching 50% he should have provided any illustrations that would have assisted me if I found, which in fact on balance I have, that the Claimant would not have completed twenty years. This was a significant failure to provide full and complete evidence to the court.

316. Mr Craggs gave the opinion that the Claimant could have been retained as a driver within the army despite an NFCI but that as he would have to be out in all weathers and service the vehicle this may have been impractical. He also accepted there were many soldiers with a logistics role deployed in the field, but he did not see that it was likely that the Claimant would have been retained in such a role. However, the difficulty with expressing partisan views (and making factual assumptions/findings favourable to an instructing party) when giving an expert opinion is that it calls into question the reliability of views expressed elsewhere. Put simply if the aim is to assist the Claimant to advance his case any answer has to be viewed with caution.

317. Mr Cameron pointed out that once he had been promoted to lance bombardier the Claimant had to prove himself at that level before achieving further promotion. Further he was on the brink of changing from a mechanical trade to work with drones so had to prove himself in a new role. He was relatively speaking a late promotion so it may have been a bigger struggle. If he were promoted to bombardier, the expectation would be that he would challenge himself with a new role.

318. As regards the Claimant staying in post Mr Cameron pointed out that whilst the Claimant had been to Canada (for four months) and also the Ascension Islands more recently he had previously not taken the opportunity for two deployments (he would be able to decline with reasons).

319. It was agreed between the employment experts that:

(a) The Claimant enlisted on an open engagement of 22 years. He had failed the aptitude test for a watchkeeper pilot and therefore is highly unlikely to have become a qualified gunnery instructor and so eligible to extend service 24 years. Therefore, in the absence of injury his end of engagement date would have been 2 September 2029.

(b) Based on statistics (i.e. without consideration of any personal factors) the Claimant had a greater than 50% chance of completing 22 years' service.

(c) The Claimant was an average soldier.

(d) The Claimant had passed the course during which he claimed he sustained the NFCI so would have been promoted to lance bombardier between September 2016 and January 2017.

(e) If he remained in the army the Claimant is likely to have been promoted to bombardier between November 2020 in January 2021 and then to Sergeant between October 2025 and January 2026.

(f) The Claimant would have been away from his home station on operations, exercises, training and detachments. He was likely to have spent 5 to 6 weeks per year on routine exercises and training earning around £416-499 gross.

(g) The Claimant would have been entitled to routine health, fitness, medical, dental and education benefits. The expert agreed these benefits to have a value of £840 per annum.

(h) The Claimant was entitled to subsidised service accommodation. According to the army benefits calculator most accommodation is provided at around 57-66% of the market rate.

(i) The Claimant was entitled to enhanced learning credits comprising three annual awards £2000 each to be taken during service or within five years of discharge. He can still use these up to 15 January 2023.

(j) The Claimant could have chosen to leave the army at any time by submitting 12 months notice.

(k) That some soldiers with NFCI were retained. It would have been down to the Claimant's commanding officer to consider his restrictions (given his symptoms) and see if it was feasible for him to continue in rank.

(l) As for an uninjured civilian career, the Claimant suggests that he would have looked into a management role, possibly in the construction industry, he also could have worked in general supervisory management or security management. He held a category C and E driving licence and therefore had potential employment as a professional driver. At interview with Mr Cameron, the Claimant indicated that he would have been keen to pursue a career related to his military employment with undermanned aerial vehicle/drone operations.

320. Having considered the totality of the evidence (including the evidence of Marlon Lessey which I accept) I find that the Claimant would not have completed 20 years. He was keen to leave despite what he said to a number of his friends. The entry in November 2015 shows a degree of unhappiness with his role (and specifically with his superior officers); sufficient that he was signed off duties for a week. I have little doubt that very sadly Malvina's disability would also have produced significant challenges to the Claimant's domestic circumstances. Given that he had three children any substantial time away from Larkhill would have produced an enormous strain on Mrs Muyepa. According to the 2020 UK regular armed forces continuous attitudes survey the main reason (60%) personnel leave the services is due to the impact of service life on the family and personal life. Mr Muyepa does have ambitions (as can be seen from his hope of retraining as a social worker); and he would have known that others had left the army and gained roles in civilian life which within a reasonably short period were equally remunerative.

321. As for what would have happened had the Claimant disclosed the true extent of his mild NFCI it is an extremely difficult issue upon which to make findings. In my opinion the following entry made in July 2016 is significant:

> "NFCI to feet and hands or other body part Email from BC 10 Bty RA (Maj Harvey) If Gnr Muyepa is diagnosed with a NFCI and the decision by ROHT is to down grade him I would like them to know that l am very keen to retain this soldier. He is likely to score well on the upcoming Gnr-LBdr grading board in September and has completed a PNCO leadership course (where he sustained his injury). I would hope to be able to deploy him to Ascension for immersion training - an environment which is warm. When we move into ES2 with WATCHKEEPER my aim would be to employ him as L&R operator. I can employ him now within the Bty with his current limitations. These courses won't take place until next May/June time, Gnr Muyepa has a great attitude to improvement and recovering from his injury and I want to support his efforts Fit for Full Duties within current MES."

322. It appears that the Claimant's commanding officer would have been broadly supportive and tried to keep him if he could. The problem with the Claimant advancing a dishonest claim that he had severe, as opposed to mild, symptoms is that no consideration was given to the issue at the time. As a result I must approach the issue with considerable caution.

Findings of fact

323. I have already set out some factual findings with the analysis set out above. I will now set out a chronology drawn from the documentation and other evidence before me together with further findings.

Chronology

2016

29th February 2016- 13th March 2016	The Claimant attended a PNCO course at Sennybridge, Wales. Between 8th -11th March 2016, whilst the outdoor exercises were ongoing, temperatures ranged from around -2°C to 8°C. On or around 8th March during an outdoor exercise the Claimant was wearing wet boots. On or around 9th March 2016, the Claimant was submerged up to his chest in water under a bridge. He spent the following 5-6 hours in cold and wet kit (his boots were wet throughout the day). His leather gloves were waterlogged and remained wet. On an overnight patrol on 9th-10th March 2016 the Claimant wore dry socks but his boots and gloves were still wet from the day. It was raining and then snowing (six inches of snow on the ground by the end of patrol). The Claimant's fingers were in a clubbed position and he was unable to straighten them. His feet were extremely painful. On the morning of 10th March the Claimant went to see his chain of command, Bombardier D Clarke as his hands and feet were painful. He was shivering and unable to warm up. He was told to sit in a Landrover and warm up for an hour before continuing with outdoor exercise. He was not provided with any additional kit and not seen by a medic. The Claimant was sent out on patrol for the rest of the day. The weather was still very cold and windy with snow on the ground. The Claimant's boots and gloves were still wet. Later that day the Claimant's hands were pale and fingers swollen. His feet were in similar condition but worse than his hands. As he began to warm up his fingers and toes on both hands began to feel tingly and painful.The Claimant went to see Chain of Command Bombardier D Clarke, who called for a medic. The Claimant was assessed as probably having suffered a NFCI to both hands and feet. The post exercise report (dated 13th March 2016) set out that "Non Freezing Cold Injuries (NFCIs): Despite the best efforts of DS at the point of injury, three suspected NFCIs were suffered on the night of 8 Mar 16. During BCCS training earlier that day, while taking the tactically proven route as they advanced to an enemy position, students passed through a culvert containing shin-deep water. As they passed through the culvert all students clothing and equipment got wet to varying degrees. Following this, DS gave students ample time to administer their clothing and equipment, prepare and ingest hot drinks, etc. Unfortunately three suspected NFCIs were suffered.

At the point of injury LBdr Williams and Gnr Higby reported to DS that they were feeling extremely cold. Both students were immediately removed from the woodblock in which their patrol harbour was located and taken to Farm 2, SENTA. As both were displaying and complaining of signs of core body coldness and not NFCIs, DS treated them accordingly. Both were stripped of wet clothing, received hot drinks and were placed in their sleeping systems beside kerosene heaters located in a Farm building (hard standing, covered roof, internal room). Throughout the night they were monitored by DS and assessed by the MATT 3 Level 3 instructor (Bdr Middleton). It was not until the morning of 9 Mar 16 that both reported symptoms of NFCI. Given this new information they were taken to Dering Lines Medical Centre for the 0800 sick parade. At that point they were diagnosed with suspected NFCIs and RTU on 10 Mar 16. It must be noted that since returning to Larkhill, Gnr Higby has been assessed as not having an NFCI. Details on LBdr Williams' NFCI are pending.

Gnr Muyepa also suffered a suspected NFCI at the same point of injury on 8 Mar 16. He, however, did not report cold symptoms to DS. Instead DS noticed he was cold and was wearing wet gloves. Gnr Muyepa was then given dry inner and outer gloves by a member of DS and placed in a Land Rover to warm up. He then returned to the exercise without complaint. It was not until he was assessed by the CMT on 11 Mar 16 that a suspected NFCI was noticed and subsequently confirmed by the Medical Centre at Dering Lines. Gnr Muyepa was RTU at that point. An update on his NFCI is pending.

11th March 2016 — The medical record entry of Corporal Clare Bailey at Brecon 08:40hrs was as follows;

"History – spent several days on the field and then yesterday morning started to feel very cold and was shivering. Found as he warmed up his fingers and toes on both hands and feet began to feel tingly and painful. Patient said his fingers were swollen yesterday but that this has now gone.

Examination – difficulty undressing due to needing to use his fingers to grip zip and shoelaces. Fingers on both hands are cold to touch. Patient experiences pain on palpation of all fingers. Fingers look slightly swollen. Toes on both cold to touch. Altered sensation in the big toe on each foot. Pain on palpation of toes 2-5 on each foot.

Admitted to ward".

11th March 2016 — Entry by Colonel Andrew Baker in the medical records at Brecon 09:19hrs

"History – Feet and hands very cold but only became painful on 8.3.16. Two others with suspected cold injury already made known. Fingers and toes sweating a lot last night.

Examination – all fingers hypersensitive at DIP joint with swelling and hyperaemia. All toes affected. On big and second toe of both feet single area on each of brown discolouration measuring approx. 3mm not previously noted by patient. Full extension of fingers on both hands painful.

Discharged to unit at 15:28hrs as unit had transport going to Larkhill".

14th March 2016 Record entry of Captain Kate Wright at Larkhill at 08:28hrs

"Notes from Brecon reviewed.
Examination – tender, cool mildly swollen fingers. No need for active rewarming".

14th March 2016 The Claimant was seen at Medical Centre at Larkhill by Captain Wright and a diagnosis of NCFI was made and he was referred to Institute of Naval Medicine. The Claimant was downgraded to MND Temp (Medically Non Deployable, Temporary) and it was noted on his Appendix 9 (form for notifying medical/functional restrictions to unit) that he was to be employed in an appropriate thermal environment and that appropriate cold weather kit must be issued and worn. Appendix 9 restrictions were to remain in place until review.

Note dated 14.3.16

"sustained ongoing damage to his fingers and toes. Weather was cold, wet and snowy in Sennybridge for 3-4 days during cadre. Needed active rewarming of his hands and feet. Fingers and toes remain hyperalgesic and are mildly swollen."

24th March 2016 The entry in the record made by Dr Fiona Graham Munro at Larkhill at 08:34hrs was as follows ;

"Difficulty sleeping last 2 weeks. Gets off to sleep ok then wakes up with pain in feet and fingers. Wears socks but not gloves to bed. Presented wearing winter gloves".

25th March 2016 Record of Major Jennifer Johnston at Larkhill at 11:06hrs

"Symptoms in hands and feet have improved since initial injury but still problematic. Awaiting INM appointment (15.7.16). Reports feet painful when wearing boots. Wearing trainers to work.

25th April 2016 The Claimant was reviewed by Major Johnstone. She noted that he still had problematic symptoms in his hands and feet. He was further

	downgraded to P7 MND Temp (medically fit for duty with major employment limitations).
19th May 2016	The Claimant was assessed by Regional Occupational Health Team at Tidworth. It was noted that he was taking Amitriptyline but not finding it effective. He was suffering from pain, swelling, pins and needles and excessive sweating in hands and feet.
28th June 2016	Record of Lieutenant Colonel Andrew Tredget at Larkhill that the Claimant was requesting further medication.
29th June 2016	Facebook/Instagram post. The is shown Claimant dancing with wife and others. He appears to have largely unrestricted movements. These videos were not addressed within the oral evidence.
15th June 2016	Assessment at Institute of Naval Medicine and a diagnosis of NFCI confirmed. Infra-red thermography showed moderate cold sensitisation in feet and mild sensitisation in hands. Claimant was to be given cold weather kit and protected from the cold, and only to work outside when it was warm and dry. Claimant was to be excused all parades and external Guard duties, and to be excused outdoor PT on cold days.
29th July 2016	Record entry of Captain Kate Wright at Larkhill "Keen to retain Claimant if he is diagnosed with NFCI and downgraded. Fit for full duties within current MES"
31st July 2016	Facebook Post – Claimant seen at a music event at a Sports Hall. Standing with the DJ
5th September 2016	Claimant assessed by Major Harvey. It noted that Claimant had a "very strong reporting period" and he was recommended for promotion having recently passed a Potential Non-Commissioned Officers Course for leadership (this being the course where the Claimant sustained his NFCI). The Claimant was praised for his hard work on the course. Promotion to Lance Bombardier was expected within the next 12 months.
14th September 2016	Record entry of Captain Kate Wright at Larkhill requesting further medication before the Claimant's deployment to Ascension Islands.
18th September 2016	Claimant on deployment to Ascension Island (isolated volcanic island in the South Atlantic Ocean).
28th October 2016	Record entry of Dr Rowena French at ROHT Tidworth "History – hand sx settled by 2 months. Ongoing sx in feet – intermittent pain and swelling. In Ascension his feet were a lot better

and since return a week ago they are better than before he went. Due to return to Ascension in 4 weeks.

[D61] History – describes his hand symptoms settling by 6-8 weeks and whilst his feet symptoms improved, they remained intermittently troublesome, such that he is unable to wear his boots, requires medication 3-4 times a week and avoids impact activities. He has had no previous problems with cold exposure, having been exposed during his initial training, and twice in Sennybridge and twice at Otterburn, and BATUS from March. He has returned from 3 weeks in Ascension, where he found his feet symptoms improved and since returning a week ago they have been less troublesome than previously.

Current symptoms – He continues to have one sensitive area to the medial aspect of his left ring finger and his feet intermittently swell and become painful, such that his functional ability is reduced. This is unpredictable occurring in both summer and winter but less so in warmer weather. He keeps himself warm at all times and always wears gloves. His heating at home is up high and he wears socks at night. The temperature on his shower at home is locked and he avoids bathing his children.

Ongoing rehab – He uses his foot spa 4 times a week and since doing so he no longer limps.

[62] He maintains his fitness in the gym using the spin bike and rowing machine, together with sit ups and press ups. He avoids impact – running and jumping".

22nd November 2016 Record entry of Lieutenant Corporal Andrew Worth at Larkhill

"Reported sick due to pain getting worse in his feet and not so much in his hand. Recently returned from Ascension and had not issues with NFCI out there and has gotten worse since returning to the UK".

Record entry of Dr Susanna Soar at Larkhill

"Duty doctor appointment. Returned from Ascension 4 weeks ago. Going again tomorrow for a month. Increasing symptoms in hands and feet associated with the colder weather. Increasing dosage of medication. Once in Ascension reduce back".

Winter 2016/17 The Claimant working in hangers carrying out vehicle maintenance and also undertook driving duties. He was exposed to cold as hanger doors left open.

2017

26th January 2017 The Claimant had a telephone consultation with Major Sarah Dunnill, who recorded

"Ongoing symptoms. Since back from Ascension it has got worse. Increased dosage when returned from Ascension. Dosage increased further. INM appointment for March".

17th February 2017 Major Sarah Dunnill recorded

"Review – requesting custom boots and allowing him to go to work at 11:00hrs due to effects of medication".

2nd March 2017 The Claimant had an assessment at Institute of Naval Medicine Infra-red thermography appeared to show that the condition had worsened

3rd March 2017 Dr Sally Acton at Larkhill noted that the Claimant was

"Requesting repeat prescription of previous medication and current medication and dosage is making him sleepy. Still requesting custom boots. Says he gets swollen feet and may need 2 sizes".

8th March 2017 Malvina born. Although it took time to diagnose she suffers from Potokci-Lupski syndrome a genetic disorder associated with significant disability and delayed development.

13th March 2017 Notes in record of Dr. Sally Acton at Larkhill

"Current medication working and seeking increased dosage".

13th March 2017 A photograph was taken of the Claimant walking with a pram (and no stick)

15th March 2017 Occupational Report completed by Major Trevis. It was inaccurately recorded that Claimant was not working outdoors or in hangers. He was described as a valuable asset to the troop. The Claimant was due to have a medical grading reviewed in around April 2017 but a decision was taken to proceed to a Full Medical Board for consideration of whether Claimant should be medically discharged from the Army in light of worsening symptoms of NFCI.

24th March 2017 Dr. Sally Acton noted

"Review – current medicine not effective as pain relief at current dose. Dosage increased. Vasectomy requested. Decided to reconsider as irreversible".

10th April 2017 Dr Panagiotis Degaitas (also at Larkhill) noted in the records;

"Review – life gets worse as family is affected by his symptoms and side effects of medications – Wife feels and looks depressed as she has to carry the burden of his symptoms and medications. Made clear to

Claimant that medications are not a treatment; only to cope with his symptoms. He also has to think life ahead. Advised to see Dr. Acton"

18th April 2017 — The Claimant had a telephone consultation with Dr. Sally Acton who recorded

"Call to welfare office to see if there is anything that welfare can do to support family at home. Explained that 3 young children at home and Mrs Muyepa is struggling to cope with husband's symptoms and manage with children with little social support."

April — The Claimant's brother dies

19th April 2017 — It was noted that the Claimant was unable to attend an appointment on 21st April due to having to fly back home urgently. I was informed during submissions that the Claimant did not fly back. However he was clearly contemplating doing so.

20th April 2017 — Dr. Sally Acton recoded that the Claimant was

"Getting swollen legs and also very sleepy. Increased medication. Very sleepy. Wife describes him as a zombie and says he is very forgetful. She is looking after him as well as small children. Brother died 3 days ago and they are all going to Nottingham and aiming to be back in Larkhill next week. He is also having issues with swollen ankles later in the day and has pain radiating up through feet into lower legs. This is impacting on gait. Couple are happy to be referred to welfare support. Review in ten days".

As I have already set out there has never been any satisfactory explanation why pain from a peripheral neuropathy would radiate up the legs. Dr Mumford, the only neurologist to give evidence stated that there could be no explanation (major nerve conduction studies were normal). The Claimant has continued to describe this phenomenon with pain radiating back up his legs to his hips and even his back.

20th April 2017 — Claimant ceased duties

21st April 2017 — Dr. Rowena French at ROHT Tidworth recorded

"Case review – unable to attend appointment due to compassionate reasons. Unable to wear boots for prolonged periods. Sees MO regularly for pain and swelling of his feet requiring neuropathic pain medication. His INM review indicates deterioration in cold sensitisation with inability to gauge temperatures".

27th April 2017 — Dr. Sally Acton's entry in the records was as follows;

"Consideration of medical discharge. Attended with wife and both visibly upset. He has 3 small children and his wife feels she cannot go back to work as she is looking after him.

Examination – walking with antalgic gait and stick today. Discussed recent deterioration in symptoms. Currently unfit for work. Review again on 2.5.17."

In my judgment this is a very important record. The Claimant presented as far more disabled than on previous occasions after "a recent deterioration" in his symptoms. For the first time he is recorded as limping and using a stick. The following matters are to be noted

(a) the marked deterioration occurred in late April i.e. not in winter and there was no complaint of any recent cold exposure

(b) he was limping. There has never been a satisfactory explanation for why he limps and favours one side when he has a bilateral foot condition.

(c) there was no complaint of any fall/s

(d) there has never been a consistent and plausible explanation for the use of the stick. The Claimant says that he was advised to use a stick however there is no reference to any such advice given by anyone. Mrs Muyepa stated that the advice to use a stick came after a fall had led to attendance at hospital. However this was in October 2017. There had been no attendance at hospital or before a Doctor at the time of this entry.

(e) Mrs Muyepa attended at this appointment and referred to the difficulties with child care. At this stage Malvina was proving a "difficult" baby. In support of her submission that the Claimant loved the Army and did not want to leave Ms Collignon referred in her closing submissions to the fact that the Claimant and Mrs Muyepa had coped with him being away from home for extended periods. This may well have been the case in the past but Malvina created a very significant additional caring duties.

(f) There was no attempt to "play down" symptoms (which would be consistent with trying to stay in the Army); quite the reverse. This presentation if continued before a medical board would, I am sure that the Claimant very well appreciated, inevitably lead to his discharge.

I am entirely satisfied so that I am sure that by this stage the Claimant had a settled intention to obtain discharge. I am also satisfied, having carefully considered the totality of the evidence, that the use of a stick and the limp were both conscious exaggerations designed to ensure he achieved his aim. In my judgment the Claimant was concerned that if he disclosed the true extent of his disability he would not be discharged.

28th April 2017 — Dr. Panagiotis Degaitas noted

"Walks with antalgic gait with the help of a stick as is too painful to bear full weight on left foot. Foot: skin feels cold, digits no evidence of ischaemia."

This the only reference to why the Claimant limps on one side. As I have stated the condition is bilateral and no explanation could be given by any medical expert as to why he limped, and has continued to limp on one side. A limp and consequential need a stick to weight should be due to an orthopaedic and /or neurological cause. I repeat that none has ever been identified. As for the suggestion that the use of the stick was in part a psychological aid given that he has fallen in the past, it important to note that this was not what the Claimant was stating to the Doctors. He was not complaining of having fallen and he stated that the stick was to bear weight. In my judgment the expert evidence, social media clips, surveillance videos and evidence of Marlon Lessey establish that the Claimant does not need a stick as he has repeatedly claimed he does.

8th May 2017 — Dr. Sally Acton recorded

"Increased medication is helping sleep better but still having significant pain in his feet which is affecting how he walks.

Examination – antalgic gait and walking slowly with stick. Remains unfit for work. Difficulty kneeling due to pain and sitting on stool in bath as this is the only way he can get in and out due to pain".

I am satisfied that this was an exaggerated presentation.

9th May 2017 — The Claimant referred to Department of Community Mental Health complaining of worsening low mood.

11th May 2017 — It is noted in the records;

"symptoms worsened over winter. Considering discharge. Mood worsened. diagnosed with NFCI in March 2016. Some initial improvement especially in hands but has always had intermittent pain and swelling in his feet."

19th May 2017 — Dr. Sally Acton recorded;

"Review – feels a little better from medication. Getting support from welfare and unit. Attended with his wife who alluded to his impotence.

Examination – still walking with a stick and has had some easing of pain. Trying to come to terms with where he is. Remains unfit for work".

2nd June 2017 Dr. Sally Acton recorded;

"Review – pain radiating from feet up his legs. Described as pins and needles. Intermittent in legs and pain in feet present 90% of the time. Pain in legs last night accompanied by shaking of legs. Feels as though he has lost control of his legs.

Examination – walking slowly with stick. Looks as though he is in pain still however good interaction and appears to have better mood".

The pain radiating up the legs and "shaking" of the legs are inexplicable neurologically and I find that these complaints were, and are, an exaggeration.

23rd June 2017 Medical Board Record:

The records states

"[66] History – Since the last board and on return from Ascension Islands, Claimant's leg symptoms have deteriorated. Review at the CIC on 2.3.17 documented that he now had very cold sensitisation to his feet (moderate to hands). His mood was deteriorating secondary to his physical problem and concern about the future, with hopelessness and suicidal thoughts.

[67] Current symptoms – constant burning pain in his feet with pain and swelling radiating up his legs to his hips, and latterly shaking of his legs.

Relevant examination findings – Claimant attended walking with a marked limp, using a walking stick. He had difficulty rising from sitting and his gait was careful and slow".

It is of relevance that the limp was now marked and the Claimant was complaining of pain "radiating up his legs to his hips". Again there is no organic explanation for such pain and I reject the suggestion that it was psychological augmentation. The difficulty from rising from sitting (which had by this stage developed) and the careful and slow gait were conscious exaggerations.

The medical board graded Claimant as MND Perm (Medically Non Deployable Permanent).

24th August 2017 The Claimant was seen at the Pain Clinic at Salisbury Hospital. Dr. Broadbridge (a Consultant Anaesthetist and Chronic Pain Specialist) reviewed medication but noted that NFCI is notoriously difficult to treat and very little else that they could do for Claimant.

2nd October 2017 The Claimant attended at Salisbury Hospital after a 999 call at 5.02 am. He stated that he had fallen down seven stairs having lost his balance and was complaining of neck and back pain. It is recorded

"Pt uses a stick to assist walking as he has nerve damage to his feet caused by cold weather.. he always has pins and needles in hands and feet from existing nerve damage (so it was difficult to assess any neurological deficit)".

There are photographs of the Claimant lying across a landing (with the stick shown) and interestingly the paramedics noted "no obvious damage or marks to wall". He was given a soft collar there was no follow up.

Ms Collignon submitted that it was highly unlikely that this was anything other than a genuine incident which supported the Claimant's account of serious symptoms. I regret to say that given all the evidence in this case I am not able to reach any conclusion about this incident (which was a day before his review). The degree of exaggeration (including specific steps to falsely evidence the disability e.g. by Claiming the need to use a urine bottle at night) and the fact that the Claimant convinced the Local Authority that he needed a stair lift throw such a degree of doubt on how the Claimant presented to third parties that I am unable to determine what happened.

However what is clear (and important) is that the Claimant was already using a stick and Mrs Muyepa's evidence that her husband started using a stick after advice from the hospital after a fall is not correct.

3rd October 2017 Major Sarah Bremner recorded

"Review – here with wife and child. Needs more pain relief. Had fall yesterday with to ED – given codeine and told to get paracetamol and bruffen for acute pain (has not yet done) says given soft collar. Pain in feet limit activity/impact.

Examination – wearing soft neck collar and walking with stick.

Advised should come out of collar asap to prevent complications. Needs to start general reconditioning. Could use static cycle or treadmill".

25th October 2017 Ms. Winfred Formson (based at DCMH Tidworth) recorded

"Telephone consultation – reporting severe pain in hands and feet. Still low mood. Final discharge from army in January 2018 confirmed by patient. Process of applying British Passport. Having difficulties with Life in UK test due to lacking concentration and feeling tired/sleepy. Wants an exemption letter to support his application. Patient advised to learn different coping mechanism to revise and possible ask partner

to support him. Awaiting response from PIP and Swindon social housing. Also applied with Wiltshire housing and awaiting a response.

Comment – patient denied any thoughts of self-harm and suicidal ideas. Currently very low and worried about writing the life in the UK test".

27th October 2017 Ms Winifred Formson recorded

"Seen patient as arranged. Joint session with wife present. Patient still low mood, pain in feet and hands seem to get worse. Patient also distressed about difficulties memorising life in the UK test. Agreed for exempt form to be completed to support naturalisation application"

It is difficult to understand how the pain in the hands and feet would be worsening. Interestingly the complaints of low mood and difficulties with memory support a request for an exemption from a "life in the UK" test.

2018

15th January 2018 Dr. Sally Acton recorded

"Travelling to Malawi at the end of this month. Going for 4 months. Family remaining in the UK. Needs medication. Planning to move to Swindon".

Dr Friedman referred to the planned trip to Malawi as evidence that any adjustment reaction has resolved. It is also difficult to see how the Claimant could contemplate such a trip; travelling alone; if he had the disability and consequential care requirements which he claimed that he had.

16th January 2018 The Claimant was discharged from the Army on medical grounds.

22nd January 2018 It was noted that the Claimant was to travel to Malawi to visit family and friends on 31st January for 4.5 months. He was advised about vaccinations.

24th January 2018 The Claimant's release medical was undertaken by Dr. Sally Acton. She recorded

"Leaving for Malawi. Medically discharged.
Examination – walks with a marked limp. Slow gait and careful, uses a walking stick. Wears soft shoes for both support as his feet are swollen. Able to walk 50m at his own slow pace with a stick. Able to sit in a chair for 1 hour. Has difficulty getting up and out of chairs especially low chairs. Difficulty with stairs. Does 3 then rests and repeats this. Needs assistance from another person. Car – max 20

	minutes. Has had poor concentration. Does not drive for longer. Must be careful with water temperature. Wife monitors this and heating".
21st May 2018	The Claimant was examined by Dr. David Carey. It is my finding that the Claimant consciously and very significantly exaggerated his symptoms during this consultation.
23rd June 2018	Recording of a Facebook post. The Claimant is seen to perform/act as a DJ whilst at home. He is mainly seated but moving relatively from/to a seated position.
20th July 2018	Proceedings issued.
17th/22nd August	A Facebook post. Mrs Muyepa posted photographs showing Claimant at a restaurant and standing next to a car posing with her
11th September 2018	Claimant examined by Dr. Martin Baggaley.
2nd October 2018	Claimant interviewed at home by Mr Craggs (who does not set out a record of the Claimant's presentation at the time of the first interview)
29th November 2018	Particulars of Claim and outline schedule of losses
December 2018	Mrs Muyepa and the Claimant separate

2019

1st June 2019	Facebook post – Photographs and video from a wedding. I have already covered these in detail
23rd August 2019	Facebook post – Claimant filmed outside at a BBQ. Dressed as a chef. Seen dancing pain-free with unrestricted movements and without the support of a stick (although a stick is in the background). At one point holding a plate of cooked meat as he dances. I have already covered this video in detail
30th December 2019	Claimant visited by Ms Kerby. He remained on a raised high back chair for the majority of the visit.

2020

8th January 2020	The Claimant examined by Dr Siddery,
8th March 2020	Dr Friedman, examined the Claimant. I accept as accurate his view that the Claimant's psychological presentation was consciously exaggerated
16th March 2020	Dr Mumford, Consultant Neurologist, examined the Claimant. Dr Moran, Consultant in clinical neurophysiology also carried out nerve tests with the Claimant in advance of the examination by Dr, Mumford. I am satisfied so that I am sure that the Claimant feigned/faked a fall. This was a blatant attempt at deception and was inconsistent with being able to walk heel to toe
30th March 2020	Dr Edwards interviewed the Claimant via video conference.
8th May 2020	Ms Jill Ferrie interviewed the Claimant via video call.
21st May 2020	Claimant is examined again by Dr. Baggaley.
10th August 2020	Benefits (PIP) form. The Claimant confirmed that he used a walking stick all of the time. It is my finding that this was not an honest statement.
17th August 2020	The Claimant was re-examined by Dr Carey. He stated that his symptoms remained unchanged from initial examination
3rd September 2020	Surveillance footage. The Claimant is seen to be out of home for in the region of 2.5 hours. There are school and nursery drop offs and visits to stores. The Claimant is seen in the car park limping and with a stick in his left hand. As Dr Edwards observed if his problem is with left foot the stick is in the wrong hand The Claimants gets into his car easily (and must have been able to get out of the car without assistance).

2021

17th February 2021	Claimant's updated schedule of loss filed for £3,766,615.00. Past care claim of £131,649.00 and future care claim of £1,705,901.00.
May 2021	An article about the Claimant's case is published in the Daily Mail. As a result of this article Marlon Lessey comes forward.

324. I shall now draw together my conclusions upon the central issues in this case. Given the submissions made on behalf of the Defendant I start with the question of whether the Claimant has created or exaggerated his symptoms of a NFCI for gain

Conscious and dishonest exaggeration

325. I am satisfied that the Claimant has consciously and dishonestly exaggerated his symptoms.

326. The army provided financial security, but the Claimant was looking to leave. However he did not wish to do so "empty-handed" i.e. without a financial cushion. When faced with mild NFCI symptoms which were likely to impact on his army career, and specifically promotion, the birth of his third child with consequential very significant additional pressure on family life, and some issues in his marriage (to a very hard-working but ambitious partner) he decided to make sure discharge was a certainty and to obtain as much compensation as he could. The Claimant had friends and family with NFCI and had spoken to Marlon Lessey about it. He had gained very significant knowledge about the symptoms, testing and compensation.

327. The Claimant started to exaggerate symptoms by limping and using a stick. There was no reason for him to limp and he did not need a stick (and no medical practitioner advised him to use a stick). He told those examining him (as I have set out in detail above) of very considerable loss of function and an inability to walk any distance. The Claimant also alleged shooting pains up his legs and loss of balance which I am satisfied were also conscious exaggeration. I am satisfied that he feigned a fall when examined by Dr Mumford. Mrs Muyepa was a party to the deception. Early on in the process she started attending medical meetings to back up her husband's story. Because the Claimant was dishonestly exaggerating his symptoms, he was unable to be internally consistent in relation to his claims of symptoms/version of events (such as whether symptoms improved in the warm) or describe symptoms which were consistent with known physiology (haphazard symptoms and pains shooting up from the feet through to the back when his problem was solely peripheral neuropathy).

328. I am satisfied that the Claimant significantly exaggerated his symptoms to Dr Carey. He put on an act to try and convince the doctor that he was very significantly disabled, grimacing and rubbing his legs throughout the examination. There were a number of inappropriate signs on the examinations by Dr Carey and Dr Mumford that pointed to something other than purely organic symptoms. Dr Mumford initially gave the Claimant the benefit of the doubt although he clearly thought that he feigned a fall for effect.

329. It is important to carefully consider the Claimant's case as set out in the pleadings, reports and witness statements before the Defendant's investigations. The Claimant was presenting as a very disabled man. Reliant on a stick to walk and suffering with constant pain. He needed a stair lift and could not even go to the toilet unaided and relied upon a urine bottle when Mrs Muyepa could not provide assistance. He was not capable of basic domestic tasks or any employment and was presenting as a man so severely disabled by depression that he was virtually uncommunicative during his examination by Dr Friedman (who formed the view from the start that there was exaggeration).

330. The Claimant told Dr Carey on 17 August 2020

> "… his NFCI symptoms were the same as when I had last seen him in October 2018, in that he suffered continuous pain in his feet, the intensity of which varied with both temperature and analgesia, at worst his feet were swollen and extremely painful making it difficult to walk for longer than 10 minutes."

and that his legs

> "would feel shaky and because of this and the fact that he had fallen on several occasions felt unconfident on his feet and therefore relied upon a walking aid."

331. However the footage of what he could do in the summer of 2019 (a year earlier) tells its own story.

332. If the Claimant's presentation had been accurate and properly representative of his symptoms and functional limitations he would have been entitled to very large award of damages (although the care, aids and equipment claim would still have contained unrealistic elements).

333. The reality was and is very different. However, it took considerable effort and research to unearth evidence to prove it. Records proved that the Claimant and Mrs Muyepa had lied to the care experts. Social media clips and surveillance showed the Claimant was able to walk normally without a stick, dance, drive (getting into and out of the car unaided in respect of the former it was shown with ease) and undertake shopping. Not only did the Claimant not receive (let alone need) the care he claimed to receive he was also providing a significant amount of care to his disabled daughter.

334. Despite the best efforts of the experts instructed on his behalf (such efforts at times extending beyond the proper role of an expert) I am in no doubt that there was very significant conscious exaggeration for financial gain. To criticise the defendant for only having limited clips is unrealistic, unfair and misses the point that the Defendant can only be expected to undertake limited investigations given the costs involved. If those investigations prove that the Claimant has significantly consciously exaggerated on one or two occasions that is ordinarily enough to undermine the credibility of his accounts to the doctors and others and also before the court. The effect of credibility having been damaged will vary, but anyone

evaluating the history of symptoms is entitled to be cautious and sceptical in a way that would not be appropriate if credibility remained intact. Reading the Claimant's account of his disability and then watching the footage of him at the wedding and at the barbecue any reasonable person would be struck by the marked discrepancies. Those with significant neurological conditions would dearly love to be able to cast aside items such as walking aids for a day and to be able to walk entirely normally; but they cannot do so. People with severe depression would dearly love to have days when they function normally, attending weddings and barbecues and enjoy themselves, chatting with others normally etc, but as Dr Friedman explained the condition is unremitting and they, also, cannot do so.

335. The Claimant made significant attempts to maintain the deception. He probably followed the advice of, or history given by, others; for example claiming the use of a urine bottle (Mrs Muyepa retreated from the position outlined to the care experts, saying that she knew him only to have used it once; but the reality is it was just a prop within the acting).

336. The Claimant also exaggerated his symptoms to the benefits agency and others to gain financial assistance and aids and equipment which he knew would support his claim to have compromised function in his feet and legs.

337. The Claimant had a wide circle of friends and the Army community is a close one. As a result he was forced to deceive others; including those who came to give evidence on his behalf. I have some concerns about the evidence given, but in any event several were very uncomfortable when confronted with the fact that he could walk normally and without a stick. He claimed he was very happy with army life but the reality was that in spring 2017 he took the decision to ensure that he left it.

338. It is my finding that the Claimant continued after his exposures to have mild, and it is likely improving, NFCI symptoms. On occasions when his feet were cold he could have some pain and discomfort. The swelling witnessed by others is curious and may be linked to such symptoms. Given the extent of the Claimant's dishonesty I can go no further in terms of findings.

The effect of dishonesty upon breach of duty

339. I now turn to the impact of my findings on the Claimant's case on breach of duty.

340. It is the Defendant's case that the Claimant had either lied about the existence of any NFCI symptoms, or alternatively deliberately exposed himself to the wet and cold to gain relevant symptoms rested on three pillars. The first and main pillar for the assertions was the evidence of Marlon Lessey. The second was the Claimant's proven conscious and dishonest exaggeration and the third, and very much the thinnest of the pillars, was an extract from the report concerning the course which stated that

> "Gnr Muyepa also suffered a suspected NFCI at the same point of injury on 8 Mar 16. He, however, did not report cold symptoms to DS. Instead DS noticed he was cold and was

> wearing wet gloves. Gnr Muyepa was then given dry inner and outer gloves by a member of DS and placed in a Land Rover to warm up. He then returned to the exercise without complaint. It was not until he was assessed by the CMT on 11 Mar 16 that a suspected NFCI was noticed and subsequently confirmed by the Medical Centre at Dering Lines. Gnr Muyepa was RTU at that point."

Mr Ward submitted that this extract supported an argument that the exposure was deliberate as the Claimant did not complain, rather he was spotted as cold and wet. Why had he not complained or asked for dry gear?

341. Dr Carey was unshakeable in his conviction that the Claimant had not "made up the whole lot" and he was quite certain there was an underlying mild injury. He applied his very considerable experience to the contemporaneous records and found them entirely consistent with the existence of an NFCI. He also relied upon the thermo imaging. Further, he noted that two others on the course suffered NCFI and the Claimant, as an Afro-Caribbean soldier, had a heightened vulnerability to the condition.

342. I accept the evidence of Marlon Lessey as accurate. This means that I find that the Claimant had discussed making a claim in relation to NFCI in the past. Further that he was waiting for an exercise in the cold to do so. I also accept Dr Carey's opinion on the existence of a NFCI of some form and I find that the Claimant did develop mild NFCI after the course. The question is then whether I accept the evidence of the Claimant on the issue of how the breach of duty came about. The Defendant argues that, based on this extract and the evidence of Marlon Lessey it is likely that if the Claimant did suffer injury he engineered it. However the Defendant did not call the author of the report to give evidence. I also have the evidence of Mr Oliphant on the issue of breach of duty.

343. I have been very troubled indeed by this issue, but in the end I am satisfied by a narrow margin that there was a breach of duty. I find that the Claimant, who did well on the course, simply followed his instructions and did nothing to enhance or create a risk of injury.

344. I now turn to other factual issues.

What would have happened to the Claimant if he had not had a NFCI?

345. I am satisfied that had the Claimant not suffered an NFCI he would have left the army within a relatively short period of time in any event i.e. he would not have served 20 years. This conclusion rests upon my acceptance of the evidence of Marlon Lessey about the Claimant's comments about unhappiness with army life, the medical entries in November 2015, his changed family circumstances and marital issues. For the avoidance of doubt I should state that I have carefully considered the evidence of the witnesses called on behalf of the Claimant in relation to the Claimant loving and missing army life. I have no doubt that he gave this impression. However, he also gave the impression that his marriage continued to be happy even after his

wife moved out. I have come to the conclusion that for whatever reason he was not always frank with his friends/relatives on this issue.

What would have happened if the Claimant had not exaggerated his symptoms?

346. What would have happened had the Claimant not exaggerated his symptoms is also a very difficult factual issue to determine, primarily due to the Claimant's dishonesty. I am quite satisfied that he very significantly exaggerated his symptoms because he wished to ensure that he was discharged from the army. In my view this means that he must have been concerned that if he disclosed the true extent of his symptoms he would not be discharged. It is clear from the evidence of Dr Carey, Dr Mumford, Mr Craggs and Mr Cameron that soldiers do remain in service with a NFCI. I find that the Claimant would have known this. His future would have depended upon whether his commanding officer could support his retention given continuing restrictions.

347. The burden of establishing fundamental dishonesty rests on the Defendant. However, the burden of establishing the causation of loss remains at all times upon the Claimant. Where there is an evidential lacuna due to a party's dishonesty the court is properly entitled to be cautious in relation to factual findings.

348. It is clear from the July 2016 note that the Claimant's commanding officer thought highly of him. Also, he was qualified as a driver and could assist with logistics (although I appreciate that his was not a logistics unit). Taking all available evidence on the issue I am not satisfied i.e. I do not think that it is more likely than not, that he would have been discharged, at the very least initially. Thereafter he may well have become disenchanted with his reduced role and given notice. However, as I set out above it is my view that he would have given notice in any event.

Valuation of the claim

349. The determination of the correct amount of damages in a claim where a Claimant has significantly and dishonestly exaggerated his symptoms is often difficult and again the court is entitled to approach the assessment with considerable caution. As Lord Clarke observed in **Fairclough Homes -v- Summers;**

> **"[52]** A party who fraudulently or dishonestly invents or exaggerates a claim will have considerable difficulties in persuading the trial judge that any of his evidence should be accepted. This may affect either liability or quantum. In the instant case, as explained above, the Claimant's fraud and dishonesty led the judge to reject his evidence except where it was supported by other evidence. The judge naturally refused to draw any inferences of fact in his favour. It is likely that, if the Claimant had told the truth throughout, his damages would have been assessed at a somewhat larger figure than they were in fact. This is often likely to be the case."

350. My assessment is as follows

General damages

351. The 16th Edition of the Judicial College Guidelines provides the following guidance;

> "(C) Cold Injuries
>
> These injuries encompass freezing cold injuries (such as frostnip or frostbite) and non-freezing cold injuries.
>
> (a) Less serious cases of long-term cold sensitisation of the hands only or feet only, resulting in intermittent discomfort or pain in cold conditions which are manageable with warm clothing or by limiting cold exposure.
>
> Around £15,000.
>
> (b) Aggravating features taking an award above that level will include: (i) symptoms affecting both hands and feet; (ii) an inability to manage the symptoms (with warm clothing or heating); (iii) continuous (rather than intermittent) discomfort or pain in cold conditions; (iv) the additional immediate impact of a freezing cold injury; (v) effect on employability or amenity. Cases involving a combination of aggravating features will justify greater awards. The combination of chronic pain and sweating in hands and feet with difficulty being outdoors in colder months, acute psychological symptoms, and probable acceleration of future joint problems warrants an award in the region of £32,500."

352. Based on my findings including as to the existence of an adjustment reaction, an award of £15,000 is appropriate. I make an additional award for loss of congenial employment of £250 as the Claimant would have left the Army had the injury not been sustained.

353. I assess the figure for interest on general damages to be for four years at 2%; £1220.

Past losses

354. If the Claimant had remained in the army the employment experts were able to agree his likely progression. However, my finding is that he would not remain in the army longer term and on balance would have left before the trial date. Quite when he would have left is very difficult to determine given his case (which I reject) that he was very happy in the Army and would have completed his full service.

355. The Claimant's mild NFCI would have impacted upon his promotion prospects, pay and earning capacity in and out of the army. Doing the best that I can with the available evidence I am not satisfied that the Claimant would have been discharged without significant attempts to accommodate him, at least initially, probably within logistics. His mild symptoms probably improved in the summer months so the real

challenge would have been in the winter of 2017/18. I suspect that matters would have been reviewed at that stage.

356. So the following issues require to be addressed:

(a) When would he have left the army in any event absent the injury and what would he have earned in civilian life?

(b) If the Claimant was initially not discharged despite his mild NFCI for how long would he have been retained (given that the symptoms were likely to have been improving)? What would his promotion prospects have been (if any)?

(c) If he was discharged what is the difference between what he would have been able to earn with a mild (and improving) NFCI and what he could have earned without a NFCI.

357. The difficulty with assessment of these features is that the exaggerated nature of the claim means the evidence which should have been available on any claim in relation to the "true" NFCI is not available. As a result they can properly be described as "imponderables".

358. When dealing with future employment related losses it is not infrequently the case that the court deals with imponderable factors by a lump sum assessment to cover loss of earning capacity, loss of benefits and allowances and pension loss. Such an approach is well established and has been known for many years as a "Blamire" award following the decision of the Court of Appeal in **Blamire-v-South Cumbria** [1993] PIQR Q1. The Claimant still bears the burden of establishing loss and a Blamire award is an assessment of loss based on available information before the Court. It does not ignore, or negotiate around, any evidential lacuna which is due to the Claimant's conduct or presentation of the case[35].

359. I see no reason in principle why such an approach cannot be used for the assessment of past employment related losses and this appears to have been the view of the Court of Appeal in **Willemse-v-Hesp** [2003] EWCA Civ 994. Lord Justice Potter stated

> "Miss Perry's alternative submission is that, in any event, the judge was wrong to take a multiplier/multiplicand approach even on the basis of £10 an hour for earnings loss in the light of the uncertainty as to the number of hours worked by the claimant upon the boat. She submits that the judge should simply have attempted a broad assessment on the lines approved by this court in *Blamire v South Cumbria Health Authority* [1993] PIQR/Q1. The approach in *Blamire* was of course one which related to award of a global sum to assess as at trial the present value of the risk of *future* financial loss. However, to the extent that it represents an example of the necessity on occasion, in the light of uncertain circumstances, for the court to award a global (and

[35] See e.g. the analysis of Yip J in Welsh-v-Walsall Healthcare NHS Trust [2018] EWHC 1917

> somewhat impressionistic) sum, I accept that it affords Miss Perry some assistance in principle in relation to pre-trial loss. Had the judge decided that, on the general state of the evidence and his judgment of the claimant, a *Blamire* (i.e. round sum) award was all that was appropriate, I cannot think that this court would have interfered. Equally, however, the judge having felt able to take the approach he did as the just way of dealing with the difficult question of past-earnings loss, I do not think that this court should interfere with the sum awarded in that respect."

360. On occasions whilst the Court may be satisfied on the evidence that there has been past loss, it may not be possible, due to the nature and extent of factors which are very difficult, if not impossible, to individually assess on the balance of probabilities, to set out a precise calculation up to trial. It would clothe matters in too much certainty. The court has to do the best it can, bearing in mind that the burden is on the Claimant, to assess the loss globally taking into account the relevant factors that bear upon employment. At times the Court has been very candid about such a process as regards future employment related losses. In **Tait-v-Pearson** [1996] PIQR Q92 Butler-Sloss LJ set out that;

> " It would, in my view, be preferred at this stage in the Court of Appeal to stand back and look broadly at the figure, and to do what judges over the years have done, which is to pluck a figure from the air as best to provide an appropriate recognition that he has a financial loss of the future, because it is known that he will not be able to earn at the rate that he has earned in the past, but allowing for all the vagaries, uncertainties of partly, unemployment and partly not."

361. The employment experts agree that if he had remained in the army uninjured the Claimant would have been promoted to lance bombardier between September 2016 and January 2017 (with an increase in net pay of £981 per annum to salary of £23,980 net) and, on the assumption that he performed well in the role, promoted to bombardier between November 2020 in January 2021 (with a pay increase of £1,964 per annum). With a mild NFCI the Claimant is likely to have been unable to achieve the promotion to Lance Bombardier with effect from 1st January 2017. Whether he would ever have achieved the promotion would have depended on the timescale and extent of his recovery. I doubt he would have done so.

362. I am not satisfied that, absent injury, the Claimant would have remained in the army for a sufficient length of time to achieve promotion to bombardier; but there is a chance that he would have done so. It is very difficult to assess what employment he would have obtained in civilian life without a NFCI. It is also extremely difficult to determine what he would have been capable of with mild (and likely improving) NFCI symptoms. I note Marlon Lessey who has NFCI is a HGV driver.

363. The Claimant's last day of service was January 2018 so there is approximately 4.5 years of past loss of earnings and employment related benefits losses (longer separation allowance, health, fitness and medical benefits and subsidised accommodation). The schedule seeks £109,546 and £24,007 for these elements

respectively. Having considered all relevant factors I award a sum of £30,000 for past employment related losses.

364. As for care and assistance I am not satisfied that there should be any award given the Claimant had only mild symptoms.

365. In respect of aids and equipment I allow the cost of a foot massager to help alleviate mild symptoms; £90.

366. As for other losses I would allow the following sums:

(i) Medication

I would not allow I would not allow the prescriptions charges given the likelihood of staying in the army and the exemption. I would allow £50 for Neurofen.

(ii) Clothing.

I allow a figure of £75 for additional socks and gloves.

(iii) Gardening and DIY

The Claimant could have cut his own lawn with mild NFCI symptoms. With mild symptoms he was likely to have been compromised in work requiring use of a ladder. I would allow £50.

367. As for Interest, past losses total £30,265 and interest at 1.108% is £335.33

Future losses

368. As for loss of earning capacity, in line with findings of fact and analysis of past employment related losses the approach is again by way of lump sum given the imponderable factors; mainly due to the Claimant's dishonest exaggeration. Whilst the underlying mild NFCI is likely to have been improved it is likely that the Claimant still has some symptoms in cold weather. I accept this could have some impact on the open labour market. The Claimant is also still relatively young (at least from my perspective). Doing the best that I can to reflect the loss of earning capacity (and pension loss) I award a lump sum of £50,000.

369. I make no award in respect of care and assistance

370. As for other miscellaneous losses, save for two heads, I make no award. My assessment is as follows

a) Medication I would allow £10 a year on a reduced multiplier of 25 to reflect decreasing need through NFCI and increased need in any event in older age; £250

(b) For additional clothing I would allow £15 on a reduced multiplier of 25 to reflect decreasing need; £375

371. The total future losses of £50,625

372. The total award is £97, 595.33.

373. As HHJ Sephton QC very fairly observed in **Iddon** his assessment of damages but for the fundamental dishonesty was "conservative". I also recognise that if the Claimant had advanced an honest case, which would have led to different additional evidence before the court; particularly in relation to employment related losses, he may have achieved a significantly higher sum. However, he bore the burden of proving his case and the court should not engage in speculation in the absence of reliable evidence.

Fundamental dishonesty

374. I start with the legal framework

Relevant principles

375. Fraudulent personal injury claims have long been, and remain, a well-recognised and extensive problem. In **South Wales Fire and Rescue Service v Smith** [2011] EWHC 1749 (Admin), Moses LJ said of such claims;

> "2. For many years the courts have sought to underline how serious false and lying claims are to the administration of justice. False claims undermine a system whereby those who are injured as a result of the fault of their employer or a defendant can receive just compensation.
>
> 3. They undermine that system in a number of serious ways. They impose upon those liable for such claims the burden of analysis, the burden of searching out those claims which are justified and those claims which are unjustified. They impose a burden upon honest Claimants and honest claims, when in response to those claims, understandably those who are liable are required to discern those which are deserving and those which are not.
>
> 4. Quite apart from that effect on those involved in such litigation is the effect upon the court. Our system of adversarial justice depends upon openness, upon transparency and above all upon honesty. The system is seriously damaged by lying claims. It is in those circumstances that the courts have on numerous occasions sought to emphasise how serious it is for someone to make a false claim, either in relation to liability or in relation to claims for compensation as a result of liability."

376. In **Summers v Fairclough Homes Ltd** [2012] 1 WLR 2004, the Claimant had claimed over £ 800,000 from his employers following an accident at work on the basis that he was grossly disabled, unable to work and likely to remain so. As a result

of the accident, he suffered fractures requiring two arthrodesis operations. So, the initial injury was genuine and significant. Surveillance evidence showed that he appeared to have no ongoing significant disability and was in fact working and playing football. The judge accepted that the claim as presented was largely fraudulent, assessed his damages at just under £90,000 but considered himself unable to strike the action out as an abuse. The Court of Appeal agreed. The Supreme Court held that under both its inherent jurisdiction and CPR r 3.4(2), the court had power to strike out a statement of case, on the ground that it was an abuse of the process of the court, at any stage of proceedings, even after trial in circumstances where the court had been able to make a proper assessment of both liability and quantum; but that that power would be exercised at the end of a trial only in very exceptional circumstances where the court was satisfied that the party's abuse of process was such that he had thereby forfeited the right to have his claim determined.

377. In **Versloot Dredging BV and another v HDI Gerling Industrie Versicherung AG and others** [2014] EWCA Civ 1349 Lord Justice Clarke observed at paragraph 105:

> "Since *Summers*, judges have showed a willingness to strike out claims including personal injury claims before trial or award nominal damages where those claims were pursued fraudulently: *Scullion v Bank of Scotland* (HHJ Cotter QC, Exeter County Court, 24 May 2013), where a claim for personal injury was struck out on the basis of sustained dishonesty during the litigation[36]; *Homes for Haringey v Fari* [2013] EWHC 757 which records at [17] the striking out of an exaggerated claim for personal injury; *Joseph v Spiller* [2012] EWHC 2958 where Tugendhat J refused to award more than nominal damages in a defamation case because of the fraudulent presentation of special damages despite the fact that some were genuine."

378. In the Supreme Court in the same case [2017] AC 1, Lord Hughes, referring to the 'fraudulent claims rule', i.e., the rule that a genuine insurance claim supported by fraudulent evidence should fail even if valid in law, stated:

> "95. The need for such a rule, severe as it is, has in no sense diminished over the years. On the contrary, Parliament has only recently legislated to apply a version of it to the allied social problem of fraudulent third party personal injuries claims. Section 57 of the Criminal Justice and Courts Act 2015 provides that in a case where such a claim has been exaggerated by a "fundamentally dishonest" Claimant, the court is to dismiss the claim altogether, including any unexaggerated part, unless satisfied that substantial injustice would thereby be done to him. Parliament has thus gone further than this court was able to do in *Summers v Fairclough Homes*.

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[36] I stated "(this was) a claim which was realistically seeking about £75,000 with a true value of the claim which was, it was overwhelmingly likely, nowhere near a tenth of that" and "..the Claimant asked me to tease out, to pick out the elements of honesty from the dishonesty lest she lose some value element. Well, dishonesty of this scale will often result in personal loss when the person is caught."

> 96. Severe as the rule is, these considerations demonstrate that there is no occasion to depart from its very long- established status in relation to fraudulent claims, properly so called. It is plain that it applies as explained by Mance LJ in *The Aegeon* at paras 15-18. In particular, it must encompass the case of the claimant insured who at the outset of the claim acts honestly, but who maintains the claim after he knows that it is fraudulent in whole or in part. The insured who originally thought he had lost valuable jewellery in a theft, but afterwards finds it in a drawer yet maintains the now fraudulent assertion that it was stolen, is plainly within the rule. Likewise, the rule plainly encompasses fraud going to a potential defence to the claim. Nor can there be any room for the rule being in some way limited by consideration of how dishonest the fraud was, if it was material in the sense explained above; that would leave the rule hopelessly vague."

379. Parliament then acted. At the Committee stage of the passage of the Criminal Justice and Courts Bill through the House of Lords, Lord Faulks QC stated (Hansard, 23 July 2014, cols 1267–1268).[37]

> "Under the current law[38], the courts have discretion to dismiss a claim in cases of dishonesty, but will do so only in very exceptional circumstances, and will generally still award the claimant compensation in relation to the 'genuine' element of the claim. The Government simply do not believe that people who behave in a fundamentally dishonest way – and I will come to address the adverb in a moment – by grossly exaggerating their own claim or colluding should be allowed to benefit by getting compensation in spite of their deceit. Clause 45 seeks to strengthen the law so that dismissal of the entire claim should become the norm in such cases. However, at the same time, it recognises that the dismissal of the claim will not always be appropriate and gives the court the discretion not to do so where it would cause substantial injustice to the claimant. To that extent, some of the remarks of my noble friend Lord Marks were entirely appropriate. The clause gives the court some flexibility to ensure that the provision is applied fairly and proportionately.
>
> …

[37] This extract from Hansard is set out at paragraph 61 of the judgment of Mr Justice Julian Knowles in **London Organising Committee of the Olympic and Paralympic Games (In Liquidation) -v- Haydn Sinfield** [2018] EWHC 51 (QB).

[38] As per **Summers v Fairclough Homes Ltd** [2012] 1 WLR 2004

> I assure the Committee that the way that the clause is drafted should not result in the courts using the measures lightly. Civil courts do not make findings of dishonesty lightly in any event; clear evidence is required. The sanction imposed by the clause – the denial of compensation to which the claimant would otherwise be entitled – is a serious one and will be imposed only where the dishonesty is fundamental; that is, where it goes to the heart of the claim. That was very much what my noble friend said about what it was aimed at.
>
> Of course, 'fundamental' has an echo in the Civil Procedure Rules and the qualified, one-way costs shifting. An adverb to qualify a concept such as dishonesty is not linguistically attractive, but if we ask a jury to decide a question such as dishonesty, or ask a judge to decide whether someone has been fundamentally dishonest, it is well within the capacity of any judge. They will know exactly what the clause is aimed at – not the minor inaccuracy about bus fares or the like, but something that goes to the heart. I do not suggest that it wins many prizes for elegance, but it sends the right message to the judge."

380. Section 57 of the Criminal Justice and Courts Act 2015 provides:

> "Personal injury claims: cases of fundamental dishonesty
>
> (1) This section applies where, in proceedings on a claim for damages in respect of personal injury ("the primary claim") -
>
> (a) the court finds that the claimant is entitled to damages in respect of the claim, but
>
> (b) on an application by the defendant for the dismissal of the claim under this section, the court is satisfied on the balance of probabilities that the claimant has been fundamentally dishonest in relation to the primary claim or a related claim.
>
> (2) The court must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed.
>
> (3) The duty under subsection (2) includes the dismissal of any element of the primary claim in respect of which the claimant has not been dishonest.
>
> (4) The court's order dismissing the claim must record the amount of damages that the court would have awarded to the claimant in respect of the primary claim but for the dismissal of the claim.
>
> (5) When assessing costs in the proceedings, a court which dismisses a claim under this section must deduct the amount

> recorded in accordance with subsection (4) from the amount which it would otherwise order the claimant to pay in respect of costs incurred by the defendant.
>
> (6) If a claim is dismissed under this section, subsection (7) applies to -
>
> (a) any subsequent criminal proceedings against the claimant in respect of the fundamental dishonesty mentioned in subsection (1)(b), and
>
> (b) any subsequent proceedings for contempt of court against the claimant in respect of that dishonesty.
>
> (7) If the court in those proceedings finds the claimant guilty of an offence or of contempt of court, it must have regard to the dismissal of the primary claim under this section when sentencing the claimant or otherwise disposing of the proceedings.
>
> (8) In this section—
>
> "claim" includes a counter-claim and, accordingly, "claimant" includes a counter-claimant and "defendant" includes a defendant to a counter-claim;
>
> "personal injury" includes any disease and any other impairment of a person's physical or mental condition;
>
> "related claim" means a claim for damages in respect of personal injury which is made—
>
> (a) in connection with the same incident or series of incidents in connection with which the primary claim is made, and
>
> (b) by a person other than the person who made the primary claim.
>
> (9) This section does not apply to proceedings started by the issue of a claim form before the day on which this section comes into force."

381. The burden is on the Defendant to establish on the balance of probabilities that the Claimant has been fundamentally dishonest. I would respectfully agree with Lord Faulks' comment that application of the test within the section is well within the capacity of any judge who will know exactly what the clause is aimed at. I also do not believe any gloss is needed upon the plain wording. The issue is highly fact specific.

382. The first matter to be addressed in a case where fundamental dishonesty is raised is whether the claimant has been dishonest. The Supreme Court addressed the elements the court must consider in deciding whether dishonesty is made out in **Ivey v**

Genting Casinos UK Limited (t/a Crockfords Club) [2018] AC 391. Lord Hughes, with whom the other justices agreed, said at [74]:

> "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 of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

383. The next issue is whether such dishonesty can be properly characterised as fundamental in relation to the primary claim or a related claim. In **Howlett v Davies** [2017] EWCA Civ 1696 the Court of Appeal approved the following formulation by HHJ Moloney QC of 'fundamentally dishonest' in the context of CPR 44.16(1):

> "44. It appears to me that this phrase in the rules has to be interpreted purposively and contextually in the light of the context. This is, of course, the determination of whether the claimant is 'deserving', as Jackson LJ put it, of the protection (from the costs liability that would otherwise fall on him) extended, for reasons of social policy, by the [Qualified One-way Costs Shifting] rules. It appears to me that when one looks at the matter in that way, one sees that what the rules are doing is distinguishing between two levels of dishonesty: dishonesty in relation to the claim which is not fundamental so as to expose such a claimant to costs liability, and dishonesty which is fundamental, so as to give rise to costs liability.
>
> 45. The corollary term to 'fundamental' would be a word with some such meaning as 'incidental' or 'collateral'. Thus, a claimant should not be exposed to costs liability merely because he is shown to have been dishonest as to some collateral matter or perhaps as to some minor, self- contained head of damage. If, on the other hand, the dishonesty went to the root of either the whole of his claim or a substantial part of his claim, then it appears to me that it would be a fundamentally dishonest claim: a claim which depended as to a substantial or important part of itself upon dishonesty."

384. In **London Organising Committee of the Olympic and Paralympic Games v Sinfield** [2018] EWHC 51, Knowles J reviewed the authorities concerning 'fundamentally dishonest' and 'fundamental dishonesty' and concluded as follows:

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

385. In **Iddon-v-Warner** [2021] Lexis Citation 39, the Claimant brought a claim as a result of a GP's negligent late cancer diagnosis which had required her to undergo disfiguring surgery which she would not otherwise have needed. She claimed to have been left significantly disabled. Her total claim approached £1,000,000. The claim was dismissed under section 57 by HHJ Sephton QC, as fundamentally dishonest. He set out his view that:

> "Parliament has plainly concluded that the aim of addressing the evils of dishonest claims justifies depriving a claimant of the part of the claim he can prove and providing the defendant with the windfall of not having to satisfy a lawful claim, albeit one that may have been dishonestly presented. The only escape from the default position of dismissal arises if the injustice the dishonest litigant suffers is 'substantial.'"

386. The learned judge went on to hold that it would not cause substantial injustice to deprive the fundamentally dishonest claimant of the whole of her damages, notwithstanding she had used a large interim payment to buy a house which would have to be sold in order to repay the money. Permission was subsequently given to make an application for committal for contempt. After a hearing I imposed a penalty of seven months imprisonment for contempt.

387. As I have already set out, the determination of 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 can be difficult to assess and the court is entitled to approach the exercise with considerable caution. Dishonesty may well have a pervasive effect, and given that the claimant retains the burden of establishing the true extent of loss

it may be difficult to satisfy the court of what is likely to have occurred in the absence of objective or independent evidence which is unaffected by the dishonesty. In **Iddon** HHJ Sephton QC found that had he not dismissed the claim he valued it at just over £70,000. He recognised it was a "conservative" valuation.

388. In cases of this nature when considering whether the Claimant's dishonesty has been fundamental dishonesty in relation to the primary claim or a related claim I have found the following three questions (which have a degree of overlap) to be helpful

(a) At what stage and in what circumstances did the Claimant's dishonest conduct start? In some cases the true core of the claim, the base, can be determined without considerable difficulty and the dishonesty can be traced to a point/time when the Claimant decided to consciously exaggerate for financial gain, for example after an operation or treatment has alleviated symptoms. The timeframe may be an extended period, e.g. as residual symptoms gradually ease, or sharply defined. In other cases it may be more difficult to identify when the dishonest conduct started. In any event the court is entitled to proceed with considerable caution in answering this question given the limits of any reliable evidence.

(b) Does the dishonesty taint the whole of the claim or is it limited to a divisible element?

(c) How does the value of the underlying valid claim (which the court must assess) compare with that of the dishonestly inflated claim? There is no set ratio as to what constitutes fundamental dishonesty but it is usually important to consider relative values.

Analysis

389. Turning to the present case my analysis is as follows;

Was the Claimant dishonest?

390. I am wholly satisfied the Claimant was dishonest. He deliberately exaggerated symptoms and functional limitations for financial gain. I would have found so in the absence of any evidence from Marlon Lessey. As it is I accept his evidence. Had what he saw also been captured on camera I very much doubt the claim would have reached trial, certainly in anything like the form that it did.

At what stage did it start?

391. I find that the Claimant began to deliberately and significantly exaggerate symptoms in March/April 2017 in order to secure his discharge from the army with a payout. So he was dishonest from a very early stage and before the case was commenced.

Does the dishonesty taint the whole of the claim?

392. Once a Claimant has been proved to have dishonestly and significantly exaggerated his symptoms, by indisputable visual evidence, considerable care has to be taken when determining what the true extent of injury was and is. Sometimes a baseline was/is objectively verifiable by independent evidence (such as testing), or a person will have had an operation and the court may be able to conclude that the exaggeration only occurred when symptoms were alleviated by the procedure. In such circumstances it may be possible to carve out the dishonest element of the claim. However, in a case where the diagnosis primarily relies on the Claimant's reporting of the history of symptoms, the persistent and significant, dishonest exaggeration of those symptoms may taint the whole case making it very difficult to assess the extent of any true underlying claim. That is the position in this claim.

How does the underlying valid claim (which the court must assess) compare with the dishonest element.

393. I start with the claim advanced. At the start of the trial the Claimant's schedule sought damages of £2,977,821 and also an award of general damages of £60,000 plus interest); so total damages of over three million pounds. However, this was a reduction from the sum claimed in his Interim Schedule of Loss dated 17th February 2021 of £3,766,615 as the deception in relation to where Mrs Muyepa was living had been discovered. This dishonest deception alone wiped £675,363 off the Claimant's own valuation of future care (and altered the past care claim). As the Trial progressed the schedule figure was amended down due to concessions (so on the basis of the Claimant's own case) to £1,694,975 (a reduction of 55%) of the interim value. As I have set out above the award I make for the true extent of injury is £97,595.33. This is just over 3% of the claim when advanced at its highest and approximately 5.5% of the claim as advanced at the end of the trial. These figures, even if my assessment of the true value is necessarily conservative, speak for themselves.

Conclusion on the issue.

394. I find that the Claimant suffered a minor NFCI. After an initial period of trying to cope with the symptoms he decided to present a picture to the defendant, his friends, medico-legal experts and the court that he was suffering from a very severe NFCI which had left him greatly disabled. He fundamentally and persistently transformed the claim by dishonest exaggeration. His dishonesty tainted the whole claim from the outset.

395. I find that the Claimant has been fundamentally dishonest in relation to the claim

Substantial injustice

396. Where a Court finds fundamental dishonesty it must dismiss the primary claim, unless it is satisfied that the claimant would suffer substantial injustice if the claim were dismissed. In **London Organising Committee of the Olympic and Paralympic Games v Sinfield** Knowles J stated:

> "65. Given the infinite variety of circumstances which might arise, I prefer not to try and be prescriptive as to what sort of facts might satisfy the test of substantial injustice. However, it seems to me plain that substantial injustice must mean more than the mere fact that the claimant will lose his damages for those heads of claim that are not tainted with dishonesty. That must be so because of s. 57(3). Parliament plainly intended that sub-section to be punitive and to operate as a deterrent. It was enacted so that claimants who are tempted to dishonestly exaggerate their claims know that if they do, and they are discovered, the default position is that they will lose their entire damages. It seems to me that it would effectively neuter the effect of s 57(3) if dishonest claimants were able to retain their 'honest' damages by pleading substantial injustice on the basis of the loss of those damages per se. What will generally be required is some substantial injustice arising as a consequence of the loss of those damages."

I respectfully agree. Although, as with Mrs Iddon a substantial award would have been made had there been an honest claim, there is no substantial injustice by reason of its loss. I also do not accept that there are any other realistic grounds for arguing injustice.

Conclusion

397. I am satisfied on the balance of probabilities that the Claimant has been fundamentally dishonest in relation to the claim and therefore dismiss it by reason of section 57(2).

398. Had the claim not been dismissed the claimant would have been entitled to damages in the sum of £97, 595.33.

399. I leave it to Counsel to draw an appropriate order.

400. I should finally add that I found the evidence of Mr Lessey to be concerning on the issue of widespread dishonesty in respect of NCFI. I would suggest that the Defendant, which has paid out large sums in respect of NCFI claims should reflect upon his evidence. Of course, the problem may be very limited in scope and concerning only those Mr Lessey came into contact with. Alternatively, it may not be.

401. I was also surprised when I was informed by Dr Carey about the lack of studies into NCFI (including the lack of any base line testing of soldiers before any cold exposure) and by Ms Collignon's comment that, in her experience, there is still a widespread failure to adhere to available guidance as to the prevention of NFCIs. I have only heard one NFCI trial so my observations as to the general picture can carry limited weight. However, the history of industrial disease litigation provides the lesson that if an employer continues to breach its duty of care and personal injury claims can be made, wholly or substantially, on the basis of subjective reporting of symptoms there will be, along with the valid claims, some dishonest claims; both partially and fundamentally. The obvious solution is to carefully consider to what extent, and why, any breaches of the duty of care continue to occur, and then to take appropriate action.