Neutral Citation Number: [2021] EWHC 2078 (QB)

Case No: QB 2018-000520

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/07/2021

Before :

CHARLES MORRISON
(Sitting as a Deputy Judge of the High Court)

- -

Between:

SEAN WAKEFIELD	**Claimant**
- and -	
NJS SCAFFOLDING LIMITED	**Defendant**

- -
- -

Charles Sparling (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Huw P Davies (instructed by **DWF LLP**) for the **Defendant**

Hearing dates: 23-25 June 2021

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Approved Judgment

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

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CHARLES MORRISON

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be on 23rd July 2021.

Charles Morrison (sitting as a Deputy Judge of the High Court) :

Introduction

1. On the 11th January 2016, a large, heavy scaffolding pole probably weighing in excess of 25kg, fell on the Claimant's back (the **Accident**) whilst he was at work bent over on all fours. Although he was discharged from hospital after a radiological examination revealed no bony injury (or other identifiable trauma), the Claimant maintains that he has suffered pronounced restrictive pain in the mid-thoracic area of his back ever since the Accident. It has he says, affected all areas of his life, including his capacity for manual work.

2. In early July 2016, the Defendant admitted liability for the Accident, which admission, in its Defence delivered in these proceedings, also took the form of an admitted breach of duty. What the Defendant did not admit was the consequential injuries, to which the Claimant was put to proof. Thus the amount, if any, of any compensatory award of damages was the principal focus for the trial which took place before me on the 23 to the 25 of June.

The issues

3. The principal matters for me to decide in this case are whether the Claimant has suffered from bad spinal pain; and if he has, was the Accident the cause of this pain? Not only does he suffer pain, the Claimant says that he has been prevented from working in the way he did before the Accident. He also says that he needed care and help at home during the period following the accident and that he continues to need it now.

4. Mr Davies who appeared for the Defendant sees the case in a very different way. His client's position is that as a consequence of the Accident, the Claimant suffered a modest orthopaedic injury, there being no bony injury sustained and no neurological abnormalities found. He says, and as agreed by the medical experts, the pain in the thoracic spine should not have persisted for more than six months at the most. For him that is the end of the matter. Any pain or restriction now being experienced by the Claimant, if there is any at all, is not such as to prevent the Claimant returning to work to the extent that he would in any case have been able. The simple corollary is that the court need not be troubled be any awards for future loss of earnings, future care or for pain. The Claimant must look after himself as he is perfectly able to do.

The evidence

5. During the trial I heard from the Claimant and also his eldest daughter Sharaine Wakefield. I also heard evidence from the lady for whom the Claimant carries out property maintenance work, Ms Helen Cowie; and from the Claimant's former employer Mr Tony World.

6. The remaining evidence, and there was a wealth of it, was from professionals. The evidence covered the following matters: Orthopaedics, spinal, pain and psychology. The Claimants team covering these matters in turn was comprised, Mr Tomlinson, Mr Spilsbury, Dr Ramos-Galvez and Mr Easton (though I did not hear evidence from Mr Tomlinson). The Defendants relied upon Mr Foy (spinal/orthopaedic), Dr Edwards

and Professor Edelman: I did not hear from Mr Tomlinson however his report was provided to me in an agreed bundle.

7. I had the benefit of Joint Statements from each of the relevant expert pairings, Mr Tomlinson being the only expert not to feature.

The non-expert evidence – the Claimant

8. I allowed the Claimant's witness statements of 1 October 2017, 7 January 2020 and 27 July 2020 to stand as his evidence. His first statement tells of the Accident and recounts the pain that he has suffered since. He was on his hands and knees painting steel, when he felt a sharp pain to his back. The Claimant then saw a length of scaffolding land beside him. The Claimant was taken to hospital where he was given a CT scan and X-Rays. Nothing abnormal was detected by these test procedures and albeit that he reported a difficulty in walking and numbness in his hands and feet, the Claimant was discharged that day.

9. Perhaps not unexpectedly, the Claimant began to worry about just how serious his injuries might be, and whether he might become paralysed. Previously deceased family members came to mind in what all in all was said to be a "very scary time".

10. The Claimant was at the time living in a third floor, one bedroom flat, on his own. On his evidence, he was assisted around the home by his daughter Alice, and her boyfriend. For some four weeks, Alice did all his shopping, cooking, cleaning and laundry. After this period, the Claimant reconciled with his former partner Penelope and once again set up home with her. Penelope then assumed responsibility for all cleaning and washing.

11. The Claimant says that each morning it takes him at least an hour to get dressed. He assesses his pain on an average day to be approximately 7/8 out of 10. It is suppressed to this (albeit high) level only on account high doses of pain-relieving medication. On "a bad day" the Claimant says that he is unable to get out of bed and does nothing at all. For a period the Claimant tried to stay active by attending a gym however his daughter can no longer afford the membership fee. Whilst he can still drive a car, the Claimant says that he has to break his journeys and can no longer drive as far as he was accustomed to travelling, before the Accident.

12. Since the Accident, the Claimant has been working as a general handyman. He looks after three houses, three flats and a shop. Whilst prior to the Accident he would have carried out all the work himself, save for electrics and gas, now he has to pay for a third party to undertake all but the most minor of tasks.

13. In a central piece of evidence so far as this case is concerned, the Claimant says that he is unable to return to his employment as a fabricator and welder with his previous employer, Specialised Fabrications (**SF**). By the Claimant's evidence, SF was at time of the Accident, part-way through a lengthy contract with "a considerable amount of units still left to build." The reason the Claimant offers as to why he cannot return to work is that it takes him a long time to "get sorted in the morning"; and he does not know how his back will be on a particular day. SF asked him to return to work as they had "such a long way to go on the contract", but he was unable to accede on account of the ongoing pain and discomfort in his back.

14. In 2013, the Claimant experienced a problem with his back which necessitated a hospital attendance. He had been lifting 90kg steel plates at work. The pain persisted and so he had an MRI scan. Further investigations revealed Schmorl's nodes and so along with being prescribed pain killers, the Claimant was referred to physiotherapy. The pain experience also led him to the Pain Team at Southampton hospital. He was he says managing at work but was part-way through the Pain Team referral when the Accident occurred.

15. As to pain, the Claimant says that he can distinctly appreciate the thoracic pain which he believes is linked to the Accident, and also, separately the pain in the area of his lumbar spine which was pre-existing but since the Accident is "a lot worse". In April of 2016 the Claimant reported experiencing numbness in his finger, extending into his arm and as a result he had a further MRI scan. Pain remained a problem and so he was put on a ten-week pain management programme. A pain management programme concluded in March 2017, since when he has continued to experience back pain.

16. Mental health has also been a concern of the Claimant and following a referral for counselling, he participated in 16 sessions of interpersonal therapy up to July 2016. On the Claimant's evidence there has been an impact on his personal life too and in particular, his ability to engage in sexual activity with his partner. All because of the Accident.

17. In sum, the Claimant asserts that he is, as a result of the Accident, an altogether different man. He does not feel the same person; relationships have suffered; he has difficulty concentrating; he cannot work save for minor maintenance tasks; and he is reliant upon his family to provide for him. He is not a little concerned as to whether the pain he is experiencing will continue; or indeed become worse.

18. By the time of his second statement in January 2020, thoracic pain remained a serious problem. The pain remained at 7-8/10 and could on a bad day be 10/10. He referred to the pre-existing back pain and then the pain that "has been bothering [him] since the Accident." If he lifts things he gets dizzy and suffers badly afterwards. As before, the Claimant explained that he could not return to metal fabricating work but could busy himself with general light duties associated with property maintenance. When pain is bad it can remain with the Claimant for weeks. It is more comfortable for him to eat whilst on the floor where he has the ability to stretch. Any prolonged sitting or standing would result in discomfort and, on the Claimant's evidence, he would "have to shift around a lot." Sleep is a problem for the Claimant and he rarely has a full night of rest without pain. Driving too continues to pose difficulties as he becomes "stiff and achy" and he needs regular breaks.

19. At the conclusion of his second statement the Claimant pronounced that all in all he had been stretched to breaking point. Although he had "a really good attitude to pain generally before the Accident", the Accident and the constant pain had really affected him and his outlook on life.

Cross examination of the Claimant

20. Difficulties with the Claimant's evidence began to emerge almost immediately from the commencement of cross examination, conducted by Mr Davies on behalf of the

Defendant. First, the Claimant refused to acknowledge any previous problem with his back. "None that I can remember" he said when asked about it. When taken to documentary evidence confirming a history of some 15 years of back pain, the Claimant could not "remember any of that." When pressed, he said, "I can't remember ever having back problems".

21. When asked about his 2013 back problem, the Claimant was evasive. He thought it might have been a spasm from a previous injury but he could not really remember. He said that he would not have stayed in bed but could not recall whether he went to work or not. It was all very vague. But the Claimant did accept that he had visited a doctor because of back pain in May 2014. This was following an incident some months previously lifting 92kg weights; there was a further problem from simply lifting a bag of nuts, as a consequence of which the pain was making him feel sick. Another issue came to light on 26 July 2013, with a note of telephone triage which recorded a complaint of back pain brought on by lifting. A yet further report of back pain was seen in a clinic report in March 2015. This followed a visit by the Claimant to a Clinical Specialist Physiotherapist in the Solent NHS Trust, Rheumatology Department.

22. In his report of the visit, the Clinical Specialist Physiotherapist noted an 18-month history of back pain and an initial inability to walk following the original injury. The Claimant was then reporting a flaring up of the back pain. The pain was affecting his ability to sleep and also function in his job. It also curtailed his ability to play snooker and golf. Questioned about this visit, the Claimant accepted that his back pain was getting worse around the period of the consultation.

23. On 15 April 2015, the Claimant was seen by a Consultant Rheumatologist. His report is worthy of some attention. It was put to the Claimant and he acknowledged that he had pursued pain treatment at that time – because of lower back pain. The Consultant, Dr Holroyd, recorded the Claimant continuing to complain of back pain and how he was putting his back under "considerable stress with the amount of weight he has to lift on occasion." Dr Holroyd expressed the firm opinion that the Claimant's occupation was hampering his recovery and continuing to exacerbate his back pain. Strong advice was offered in terms that the Claimant should avoid any heavy lifting.

24. Subsequent to the accident, the Claimant attended a clinic in Southampton for Interpersonal Therapy. He was seen by a number of therapists including Jarna Bennett and Ben Watters. On the 11 March 2016, Mr Watters records a discussion about the Claimant's concerns in respect of losing his job following his drink driving conviction. The Claimant was feeling very low. Not least because of the break-up of his marriage. On that occasion there was no mention of back pain however there was when the Claimant was seen by Jarna Bennett on 29 March 2016. Ms Bennett records the Claimant as suffering from "long-term back pain" from 2013 onwards. It was a "lower back pain – he has had for 3 years from lifting". It was also noted that the Claimant was self-employed working in specialised fabrications but that "work had recently dried up" and he was now "looking after 7 properties as a landlord capacity but finding it difficult to concentrate."

25. In the "Events" recorded by Ms Bennett the Accident is mentioned, as is, separately, "losing job"; and also the drink driving conviction, where the Claimant plainly added

the telling observation that "losing licence would have severe implications on [his] employment."

26. On 7 April 2016 when the Claimant was again seen by Ms Bennet, he again talked about feeling low and this was linked to his fear of losing his licence. He also mentioned pain which made it difficult to play snooker. He only enjoyed driving – but that was pleasure he was about to be deprived of the following week, doubtless upon his attendance in the Magistrates' Court. A further comment worth noting is the Claimant's observation that his appetite was good however he could not "be bothered" to cook and was thus living on snacks. This was a problem since breaking up with his partner.

27. Under the section covering the Accident, Ms Bennett records the Claimant telling her that "work dried up"; the last day at work was 29 February 2016. He had then been arrested for drink driving on 5 March. Having requested a letter, for use in the Magistrates' Court it must be assumed, in terms that he was "currently in treatment", Ms Bennett also notes that the Claimant was worried that he might "end up in a nut house" albeit that he "used to cope".

28. The absence of loud complaint to his doctors about his back pain, was alighted upon by Mr Davies in cross examination when he put to the Claimant the record of his attendance before the Orthopaedic Surgeon instructed by his Solicitors. In his Report of 24 August 2016, Mr Tomlinson, who saw the Claimant on 16 August, explains that he was told by the Claimant that his pain varied in intensity but reached 8-10/10 on a scale where 0 was at the bottom. His lower back pain was now, since the accident, constantly 8/10.

29. It was however curious, claimed Mr Davies, that the Claimant made no mention of his lower back when he saw the Consultant Radiologist for an MRI scan on 8 August 2016. The upper and middle back were mentioned but nothing about the lower back, and nothing about it being worse since the Accident. So far as the Claimant was concerned he did not know why he had not mentioned it. In seeking to offer a reason for the fact that it had not been raised, and albeit that the severity of the complaint was not noted by the Radiologist, the Claimant pointed to the impact of his thoracic pain which "had been terrible". By 11 April 2017 however the Claimant had raised a complaint about his lower back pain when he saw his own doctor; "new" back pain having been noted from the 2 March.

30. On 24 April 2017 at the Hill Lane Surgery, the Claimant's GP Dr Shaw recorded a complaint of low back pain. Being reminded of this came as somewhat of a surprise to the Claimant who thought that he would have been complaining of thoracic pain at that time. "I don't know what to say" he remarked in evidence.

31. When asked about the availability of work as a metal fabricator the Claimant recalled that the work with his employer SF had dried up. It was a low period and they were waiting on instructions for new work. Pressed on the point, the Claimant eventually accepted that the reason money was tight for him in March 2016 was that work had "dried up" with his former employer. This evidence appeared at odds with his Witness Statement evidence at paragraph 18, where he explained that SF "had such a long way to go on the contract" and kept asking him to go back to the same job however he was unable to commit due to the pain in his back.

32. Having attended his GP in June and July complaining of variously, a back sprain, tingling in his fingers, pain in his arm, and numbness, in August he again saw a doctor and requested MED3 certificates to cover the period that "he had missed, not for benefits, but for his solicitor, for his injury claim." This note led to an uncomfortable exchange with the Claimant in cross examination. In the event, the Claimant conceded that he was attempting to obtain medical certificates to justify his unfitness for work despite not having been previously "signed off". Although he had in fact been working throughout the period, so far as the Claimant was concerned it was not work of a type that he had been previously doing and it was for that work that he required evidence of unfitness.

33. The Claimant had been working maintaining properties for a landlord. He said that he "did it for a bit of cash as I had no money, I was desperate for money". He also went to a Job Centre to enquire after new employment. He was looking for something light – something he could cope with but there was nothing suitable. But in the event, the Claimant accepted that MED3 Certificates having been issued to him, he ought not to have been working at all.

34. On the evidence of the Claimant, it seems that after the Accident, he had again been carrying out property maintenance work, certainly since March of 2016. His evidence was that for tasks requiring special skills or where the work was beyond him, he employed others and paid them cash for their work. By way of example, the Claimant fitted kitchen units but an electrician fitted the electrical sockets. He could do tiling and painting so long as not ceiling roller work and provided tiles were carried upstairs to him. The Claimant also accepted that he had renovated a large fish-pond. This involved cutting back bushes and changing filters and sponges.

35. It was the Claimant's case that during this period, care and assistance was given to him by his family and partner yet when he saw Jarna Bennett on 14 April 2016 he mentioned that he had been "requested to re-furbish a house", to which he could cycle. He also mentioned refurbishing his daughter's bedroom and putting a TV up; and also that his mood improved when he was "working with decorating the room". Of particular interest to Mr Davies was the mention by the Claimant of help from his daughter with shopping – but nothing else. It was also of interest that in one medical attendance the Claimant had described his daughter as lazy, a claim at once inconsistent with the suggestion of substantial care and assistance. At any rate the Claimant maintained the position in cross examination that he needed care now and that he had needed it during the periods that he says it was provided to him, albeit that he had no evidence from those he says delivered the care to him.

36. During cross examination the Claimant was taken to a number of surreptitiously recorded video films of him engaged in outdoor activity. In one film the Claimant is seen driving for a prolonged period. He is observed to get in and leave the car, on each occasion without obvious difficulty or discomfort. The Claimant accepted this, but pointed to the not insignificant doses of medication to alleviate pain that he was compelled to take daily.

37. The Claimant was then seen on various stages of his journey to Harley Street. At the commencement of the journey he was filmed walking quickly and without hindrance. He was also seen ascending, two steps at a time, up a flight of stairs to a bridge. This stair climb was described by Mr Davies as "bounding". It was certainly a surprisingly

fast rate of assent especially when compared to the Claimant's uninjured female partner who was with him on the journey. The Claimant was observed to place his hand on several occasions in the small of his back. Despite him being under the influence of strong pain-relieving drugs, the Claimant's evidence was that his hand movements revealed the pain and discomfort that he was suffering throughout. It was perhaps the pain medication that accounted for the fact that he did not pause or stop during this period of obvious exertion. He also pointed to the small depth of the stairs as well as the fact that he was hurrying to catch the bus.

38. In later footage the Claimant is observed sitting on a bus and using a mobile phone. He then alighted from the bus after a two-hour journey and took an underground tube train to Harley Street – walking throughout. In what was perhaps a surprising passage of the film, having left the Harley Street appointment and despite the rigours of the long day, the Claimant is seen to go shopping in the West End of London. He is seen walking in and out of large stores. Whilst the Claimant's evidence was that he had at one point stopped for a coffee, he accepted that a significant period during his wait for the bus back home was spent browsing in busy central London shops.

Sharaine Wakefield

39. Out of his family circle, only the Claimant's daughter Sharaine gave evidence to the court. Her witness statement was dated 10 January 2019, and again, I allowed it to stand as her evidence in chief. In essence her evidence was that she had seen a change in her father since the Accident both physically and mentally.

40. Since the accident, Sharaine had seen her father three or four times. On each occasion the pain the Claimant was suffering was she said apparent to her.

Helen Cowie

41. The landlord for whom the Claimant had been carrying out maintenance work was the next to give evidence. Ms Helen Cowie explained in her witness statement how the Claimant had carried out numerous maintenance tasks for her, to a high standard. Following the Accident, the Claimant had altered both the amount and type of work he did for her himself. Ms Cowie's evidence was that the Claimant now only assisted her with light internal work. He used third parties to do any heavy labouring work or task that were too much for him; prior to the Accident however he would have done all the work himself.

42. Ms Cowie had seen the Claimant since the Accident and noticed the difficulty he had getting in and out of a car. This she saw on two occasions. She also saw him sitting on a chair, looking "incredibly uncomfortable". Seeing him in pain first-hand, Ms Cowie described as shocking.

Tony World

43. The Managing Director of the Claimant's former employer SF also gave evidence by way of a short, one-page, statement. So far as he was concerned whilst the SF contract that the Claimant had been engaged on at the time of the Accident had come to an end, the Claimant would have been transferred over to a new contract. He

would have been kept on at the same rate of pay – there had even been a recent rate increase. Mr World was not cross-examined.

The expert evidence

44. The expert evidence in the case was, as I have already remarked, extensive. The court was however assisted greatly by a number of joint statements which clearly identified several areas on which there was agreement between the medical experts. The joint statement of Messrs Foy and Spilsbury, resulting from their telephone discussion on 19 October 2020, was one such report.

45. The important elements of their agreement were set out in their report, at paragraphs 2-9:

> "2. He was not admitted to the hospital and no neurological abnormalities were found on clinical examination.
>
> 3. We note and agree that since that time he has been referred for physiotherapy treatment and has seen various specialists through the National Health Service. He has undergone MRI scans of his spine together with nerve conduction studies of the upper extremities. He has been seen in the Pain Clinic. More recently he has seen Mr McGillion, a Spinal Surgeon, who recommended a right cervical nerve root block to address some right upper extremity issues and this has significantly improved those right upper extremity symptoms. Mr McGillion has taken the view that there is no surgical treatment for Mr Wakefield's ongoing spinal symptoms and we would agree with that position.
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> 4. We agree that the scans that have been carried out show no evidence of any significant biological or structural injury. They show evidence of age related degenerative change in the spinal column.
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> 5. We note that after the index accident Mr Wakefield was unable to return to his work as a fabricator/welder. There were no light duties available in this job so he could not return. He was working on a part time basis in light maintenance work avoiding any heavy lifting when we assessed him. We agree that he should be able to continue working in this fashion until his chosen retirement date.
>
> 6. We agree that given the ongoing symptoms that he describes he would require help and assistance with heavy or awkward tasks and chores in the home. However we would encourage him to keep as active as possible to avoid deconditioning of the muscles that support his spinal column.
>
> 7. We note and agree that there was a past history of low back problems between 2013 and 2015.

> 8. We have both been asked to consider video surveillance footage and have commented upon this in our letters of 3rd August and 3rd September 2020 (Foy) and 21st August 2020 (Spilsbury). We both found the surveillance footage did not show Mr Wakefield doing anything particularly heavy but equally it showed him to be relatively mobile and reasonably active. He did appear to be in some discomfort in the mid-back on occasions. We did not consider that the surveillance footage affected our position on causation significantly, although we formed the impression that Mr Wakefield may have been more active/mobile than he led us to believe. Mr Spilsbury thought this may reflect a natural improvement of his pain, as time passed. We believed that review of the surveillance footage helped to confirm that Mr Wakefield was capable of continuing to work in a lighter capacity.
>
> 9. We discussed the matter of causation at some length. Mr Foy had discussed his position on this matter in paragraphs 72 – 77 of his report. As far as the most significant pain, that in the thoracic spine, he believed that in the absence of any biological or structural injury there was no reason why the pain should persist for more than six months at most. He believed that if the ongoing pain in that region was to be rationalised in terms of the index accident then it would have to be by way of central sensitisation with support from an expert in the field of pain management. He did not believe that causation was supportable in orthopaedic/musculoskeletal/spinal terms. Mr Spilsbury agreed that it was difficult to explain the persistence of symptoms and also deferred to the pain experts in this respect although he felt that it may have resulted from a chronic soft tissue injury to the back which had not responded appropriately to treatment"

46. As to the areas where no agreement could be reached between these medical experts, their report set out the following:

> "1. We discussed the cervical spine and right upper extremity symptoms. Mr Foy took the view that as it was some considerable time after the accident that there was any complaint of pain in the neck and right upper extremity it was most unlikely that these symptoms had any relationship to the index accident. Mr Spilsbury believed that if the Court accepted Mr Wakefield's position that symptoms in this area had been present since the accident then it is likely that they were caused by it.
>
> 2. We discussed the low back symptoms and again Mr Foy took the view that as there was no clear description of lumbar pain for quite some time after the index accident and because there was a clear past history of similar problems, it was more likely that the low back symptoms were constitutional rather than

> accident related. Mr Spilsbury took the view, for the reasons outlined in his reports, that if Mr Wakefield's account of his history was accepted by the Court then a three year aggravation/exacerbation of low back symptoms was reasonable."

47. Mr Spilsbury had himself seen the Claimant on 16 March 2018. On examination he noted that the Claimant "moved around the consultation room with relative ease." And then in his conclusions said this:

> "This is a difficult case, as there are a number of different problems. I have not seen Mr Wakefield's imaging, and it would be important to do so. He tells me that having been struck by a scaffold pole, he was unable to move his arms or his leg this suggests a SCIWORA (a spinal cord injury without radiological injury), though if he was struck in the mid-thoracic spine it is difficult to explain why he would have weakness in the arms immediately following the accident. There is a history of quite significant lower lumbar back pain in the two or three years prior to the index event. There is no suggestion that he had had thoracic back pain previously.
>
> Since the index event, Mr Wakefield has been diagnosed as having Scheuermann's disease, and presents now with two pains, pain over the area where he was struck (about T12), but also pain on extension in his lumbar spine, which is I believe is a result of facet joint overload. This second pain is I think probably related to his constitutional Scheuermann's disease. Mr Wakefield now presents as being quite disabled, and has suffered from depression. This depression preceded the index event, where he has had a number of stresses in his life outside work. This seems to have culminated in him losing his driving licence, all a time when he should have been returning to work following the index event.
>
> Clearly, Mr Wakefield suffered what could only be described as a frightening accident, which could have had life threatening consequences. At the very least, I would have expected him to have suffered from a significant thoracic soft tissue injury, with local bruising, swelling, with stiffness and loss of function.
>
> In a younger, fitter man with less life stresses, I would have expected a period of some two to three months off work, with some fear avoidance and significant long-term wariness, the need for cognitive behavioural therapy, and some requirement for rehabilitation. I think it is probable that Mr Wakefield would benefit from the use of Capsaicin cream, as well as some amitriptyline. I think these should be tried relatively soon. He would then benefit as part of this claim for having a psychological report and a report from a pain management specialist. It would be my opinion that Mr Wakefield would be

> able to return to work in a light manual capacity job, in a non-threatening environment, but think on the balance of probability, it is unlikely that he will return to his previous job, which clearly was heavy, and causing him problems with his lower back."

48. Mr Spilsbury saw the Claimant again on 10 January 2020. On this occasion the Claimant related to Mr Spilsbury that he struggled with the washing up and needed to break up the hoovering of the living room of his home into three stages. His "severe" thoracic pain was described as 8-9/10. The pain was 10/10 in the way it affected his general activity and pastimes such as walking, relations with others and sleep. DIY work was impossible as was any gardening; and driving the distance to see his children and grandchildren was now out of the question. Nevertheless the Claimant moved around the consulting room with ease.

49. When setting out his impressions and views as to prognosis, Mr Spilsbury said this:

> "Mr Wakefield was hit on the posterior thoracic spine by a piece of scaffolding nearly four and a half years ago. Prior to this, he had had no pain in this area, though he had been suffering from significant low back pain previously and had had time off work previously.
>
> It is clear that Mr Wakefield had an exacerbation of his low back pain, plus increased thoracic pain and cervical pain after the index event.
>
> I would agree with Dr Ramos-Galvez that according to Mr Wakefield, his lumbar spine pain is now back to how it was previously and exacerbation at an appropriate time is therefore appropriate. This exacerbation does seem to have been quite long and probably amounted to about three years which is more than I would expect. **However, assuming the court accepts Mr Wakefield's history, then this seems appropriate.** [emphasis added]
>
> After the accident, Mr Wakefield suffered significant pain in his neck, and underwent a right C7 nerve root injection. Dr Ramos-Galvez refers to this as "whiplash pain" which it certainly sounds like, though it is unusual for a "whiplash" type pain to resolve following a root block. This has, however, been very successful and has almost resolved his right arm symptoms (he still continues to get some pins and needles in his arm). I would agree with Dr Ramos-Galvez that these symptoms are unlikely to return at least in terms of the index event. He does, however, have a constitutional disorder of foraminal narrowing and if he does get an exacerbation of his right arm symptoms in the future, these are non-accident related.

> As far as Mr Wakefield's thoracic pain is concerned, this is more of a diagnostic conundrum to me but seems to have been explained by Dr Ramos-Galvez. He seems tender over the actual muscles and I find it difficult to explain why a constitutional disorder of osteoarthritis of the thoracic spine would in itself cause tenderness in the muscles. I think this is probably a soft tissue injury as a result of a direct blow that has failed to heal. Clearly, this would therefore suggest some form of chronic pain syndrome which I think probably Mr Wakefield is more prone to more than most people, having had a previous history of significant low back pain and had psychological sequelae of the accident as well as other lifestyle events, all of which could exacerbate a chronic pain syndrome. Clearly, this is an area outside my specialist expertise, but from an orthopaedic spinal surgeon, I find it difficult to explain the symptoms that he presents with now.
>
> I think there is perhaps not whole agreement with the pain specialists (Dr Baylis and Dr Ramos-Galvez), both seem to agree that he has chronic pain, and Dr Baylis has made suggestions of facet joint injections and possible facet joint neurolysis, which I do not believe Mr Wakefield has had. The examination findings between the two specialists seems somewhat at odds.
>
> In conclusion, from an orthopaedic spinal surgeon's point of view, I find it difficult to explain Mr Wakefield's continued thoracic pain, whilst I recognise that he does have evidence of Forestier's disease, I am more inclined to believe that his pain is not as a result of the Forestier's disease, but as a result of a soft tissue injury to the back which has not responded appropriately to treatment, and has gone on to become chronic."

50. In his further Report of 21 August 2020, Mr Spilsbury reviewed the video footage to which I have referred earlier in this judgment. In this Report, Mr Spilsbury included the opinion that

> "In conclusion, what one can say is that there is now little evidence of major disability. I am clear in my own mind that the evidence does suggest that [the Claimant] is in some discomfort."

51. Further on he adds:

> "The video evidence does, however, show that he is able to function relatively well, he is able to catch a bus, a tube and drive a vehicle. On the dates of the video, this does appear to be taken on more than one day (20.09 and 03.09) and therefore it does suggest that it is consistent.

> Mr Wakefield has not performed an Oswestry disability score this time, though previously when I saw him in March 2018, his disability score was 60%. The video evidence would suggest his Oswestry disability score is significantly better than this. There is nothing that he told me about his disability that specifically contradicts the video evidence but I do know that Mr Wakefield told me that he had difficulty washing, showering and dressing (though he said it was manageable), whereas the video evidence would suggest this is not likely to be a major difficulty."

52. In cross examination, Mr Spilsbury gave the view that the Claimant in all likelihood displayed the symptoms of Scheuermann's disease, in that he was round-shouldered and bent forward. This affliction, affecting the discs and not the vertebrae, meant that the Claimant was probably always round shouldered and pushed his head forward. This in turn means that he normally arches his lumbar spine backwards and causes discomfort in the lower back; this being constitutional and results in the lordosis that is in turn evidenced by the Claimant putting his arm into his back in order to stretch it forward.

53. Mr Spilsbury also confirmed that when he had seen the Claimant in March of 2018, no mention had been made of a worsening of lumbar spine pain; that any suggestion of the Claimant being in any sense disabled, was based on the Claimant's description and what he had been told - not what he had diagnosed. When he saw him again in 2020, some four years after the Accident Mr Spilsbury confirmed that the Claimant had walked around with ease, with no evidence of issues rising from a seated position. Nor was there any suggestion of relative muscle wastage.

54. In an important passage of evidence, Mr Spilsbury commented on the Joint Report to which I have already referred. He reiterated that he would have expected pain to have settled within six months of the Accident. If there was no evidence of pain immediately after the Accident, then there was no acceleration of lower back pain. There was no evidence of exacerbation of any lumbar spine problem immediately after the Accident. Whilst it might have been that the thoracic pain was operating as a distraction, "it was for the court to decide if there was Lumbar spine pain immediately afterwards as the evidence is not there."

55. Mr Spilsbury was however sure, without doubt, that there were degenerative changes in the Claimant's lower back – both orthopaedic experts had examined the thoracic spine and neither could determine the cause of the reported pain from the scans that had been seen. The first six months of reported pain could be understood, but not after that, absent pain expertise. He would expect most people to be better within three to six months. In answer to a question put by Mr Davies, Mr Spilsbury advanced the view "I can't explain why [the Claimant] did not get better, if he did not. I could believe he has the pain but I cannot identify an orthopaedic reason for it."

56. In regard to the video evidence, Mr Spilsbury thought that it showed that the Claimant experienced discomfort at times, but no disabilities. What was seen in the footage might reflect a natural improvement of pain as time passed; and whilst it "did not catch out" the Claimant, the disability was not as bad as he had claimed.

57. In cross examination, Mr Foy accepted that there appeared to be a consistent history of complaint of thoracic pain over a sustained period. He also accepted that if the pain was as described by the Claimant, then yes, some care might be needed and employment would be restricted; but neither he nor Mr Spilsbury, could explain the continued pain in orthopaedic terms: "where there had been a soft tissue injury to a degenerative spine, I would not expect or cannot explain the pain complained of."

58. As to the Video evidence, in Mr Foy's view it showed no significant discomfort "except the odd fist in the thoracic spine area; he goes up stairs fairly briskly, then a hand goes to [*his*] back; yes he is aware of discomfort or pain as a result; then he gets on a bus and is seen shopping."

59. When re-examined, Mr Foy touched on the question of the Claimant's disadvantage in the labour market. He was referred to the Rheumatologist opinion that the lumbar spine was deteriorating and went on to add his own view that where a patient has a heavy job and has worsening or recurring lower back pain, that patient should insofar as he is able to do so, avoid heavy work. Mr Foy's advice would be "to modify lifestyle; and if he carried on in that role, he was going to run into trouble and get worsening back pain."

60. In March of 2021, following diagnostic injections, the Claimant had received denervation treatment to the thoracic spine. As to that treatment, Mr Foy's view was that facet joint denervation kills nerves at the joints where the pain is coming from. The results can be good but symptoms do recur as the nerves grow back. The Claimant should be more functional and active if, as appeared to be the case, there was a 75% improvement in respect of lumbar symptoms and the position was 25% better in respect of thoracic.

61. As regards the Claimant's need for care and assistance, Mr Foy's view was that he should keep active and be sensible with his lifestyle. There were no personal care requirements save perhaps for heavy and awkward work. The Claimant would have to take care getting under a sink or getting into awkward positions. Slab laying or digging should be avoided, but mowing the lawn would be fine.

The Pain evidence

62. Following a telephone discussion in October 2020, the pain experts, Dr Ramos-Galvez and Dr Edwards, prepared a report setting out the points on which they had been able to reach agreement and also highlighting areas of disagreement.

63. Starting on the second page of the report, the experts addressed the issue of pain which is at the heart of the controversy in this case. The experts said this:

> "3. Dr Edwards commented that patient's with spinal pain are seen within secondary care by orthopaedic / spinal surgeons, who see the full spectrum of presentation including those who may have been involved in an accident. Pain clinicians in secondary care only see a very small minority of such patients in whom symptoms are much more troublesome that in the great majority. As such in Dr Edwards opinion an orthopaedic / spinal surgeon is far better place to give opinion as to the

organic cause of the Claimant's back pain and any relationship to the index accident. As such Dr Edwards would defer to orthopaedic / spinal expert opinion as to:

- The specific injuries sustained in the index accident;
- The expected recovery from those injuries;
- The cause of the Claimant's current symptoms, and any relationship to the index accident. However it seems clear whatever the cause of any spinal symptoms and any possible role of the index accident, the reported level of pain and disability is significantly greater than would normally be expected from the organic pathology.

4. Dr Ramos-Galvez agrees that the diagnosis of the skeletal injuries sustained in the index accident would be a matter of Orthopaedic opinion. However, he acknowledges that Mr Foy and Mr Spilsbury, whilst both accepting that Mr Wakefield suffers from thoracic pain, have been unable to explain his symptoms from an orthopaedic perspective and have deferred to Pain testimony. Dr Ramos-Galvez feels therefore that, in order to assist the Court, the pain experts should offer the opinion requested, particularly if, as expressed by Dr Edwards, we do see the "more troublesome cases".

5. Dr Ramos-Galvez highlighted that, in the presence of widespread spinal degenerative changes demonstrated by imaging, which were not clinically symptomatic prior to the index accident, and having suffered a blunt trauma of significant energy at the point of impact (the medical records suggest a scaffold pole weighing approximately 26Kg with a length of approximately 3m from a height that has not been stated), to assert that "the reported level of pain and disability is significantly greater than would be expected from the organic pathology" is a very subjective assessment that is not consistent with his extensive clinical experience dealing with musculoskeletal disorders that present with similar symptoms and equal lack of a surgical target on accounts of the widespread nature of the radiological findings.

6. Dr Ramos-Galvez notes that currently practising pain clinicians do so in a multidisciplinary setting, which includes, among others, close links to spinal surgery and radiology. As such, Dr Ramos-Galvez disagrees that a pain clinician who remains active in clinical practice in 2020 "only see a very small minority of such patients in whom symptoms are much more troublesome that in the great majority". Dr Ramos-Galvez sees in excess of 1200 patients per year in his outpatient clinics. Approximately 70% complain of axial pain at any level, mostly

degenerative although a non-insignificant minority complain of trauma including fractures both osteoporotic and secondary to accidents. Dr Ramos-Galvez sits in MDT meetings with spinal surgery on a monthly basis. As such, Dr Ramos-Galvez feels that, in accordance with his clinical experience in active practice as full-time Consultant in Pain Medicine with similar volumes of patients since 2007, to generalise that "the reported level of pain and disability is significantly greater than would be expected from the organic pathology" is not a true, impartial and fair representation of the disability experienced by the patients seen in a Pain Clinic."

7. Dr Ramos-Galvez is of the opinion that pain and disability are subjective experiences and that, as such, there is no objective manner to establish what level of pain and disability can be associated with a radiological image. Factors that have to be taken into account include the lifestyle of the sufferer. Whilst the radiological images of Mr Wakefield's thoracic spine may give little disability to an elderly person who no longer engages with remunerated work, Mr Wakefield's line of employment at the time of the index accident included professional welding of steel structures in construction sites, often at a level above shoulder height. Whilst the index accident did not cause a skeletal fracture, this is not to say that it was a trivial injury that has caused symptoms in excess of what would be expected. Dr Ramos-Galvez disagrees with Dr Edwards' assessment on the grounds of his ongoing clinical experience treating patients with similar symptoms, some secondary to trauma, some not, and assessing their response to treatment with regards to work capacity and quality of life.

8. Dr Edwards commented that it is well recognised that the presence of psychiatric and psychological issues can amplify an individual's perception of medical symptomatology including pain and disability. An important aspect of a Consultant in Pain Management's scope of practice is to recognise the presence of psychological and psychiatric factors in an individual's presentation, to ensure that an individual receives appropriate treatment for their condition, and that unnecessary investigation and futile physical treatments are avoided.

9. Dr Edwards undertook a forensic examination of the medical records preparing his original report. Dr Edwards felt that these records suggested that the Claimant had significant pre-accident psychological vulnerability and gave his reasons for that within his report. Dr Edwards noted that the medical records after the index accident also suggested significant psychosocial problems. Dr Edwards therefore came to the view that constitutional psychological vulnerability and other psychosocial issues may have resulted in psychological distress

> which has significantly magnified the Claimant's perceived / reported pain and disability. Dr Edwards also commented that such psychological vulnerability does not require a psychiatric diagnosis, it simply recognises that an individual is susceptible to abnormal beliefs and behaviours surrounding medical problems.
>
> 10. Dr Ramos-Galvez opines that "constitutional psychological vulnerability" would be a matter for psychological expertise. To this extent, he agrees that psychological vulnerability and psychiatric illness are two separate entities. However, he notes that there seems to be disagreement between the psychology experts with regards to pre-existing psychological vulnerability and that, whilst Professor Edelman opines that Mr Wakefield could have been suffering from depression at the time of the index accident on account of his personal and family life, Mr Easton is of the opinion that Mr Wakefield was not suffering from psychological distress at the time of the index accident and that absent the index accident he would not have developed the psychological difficulties he presents with."

64. Later on in the report at 12 and following:

> "Dr Ramos-Galvez feels that it would be ultimately a matter for the Court to opine as to whether Mr Wakefield's symptoms can be explained on account of the "constitutional psychological vulnerability" postulated by Dr Edwards. In order to do so, it would be important for the Court to assess the objective evidence from the medical records. However, Dr Ramos-Galvez, whilst accepting that Mr Wakefield was undergoing a stressful period at the time of the index accident and that psychological elements can in some cases act as predisposing elements, echoes the opinion of Mr Easton. Dr Ramos-Galvez also notes that Dr Edwards' opinion as stated in his report and as discussed in the conversation held on 12 October 2020, evolves solely around the "forensic examination of the medical records" that he quotes above at paragraph 9. Neither the consultation with Mr Wakefield, nor the physical examination conducted, or the results of investigations appear to have had any weight upon Dr Edwards' opinion. Dr Ramos-Galvez noted that neither expert who has seen Mr Wakefield for any discipline has noted him presenting any abnormal behaviours or beliefs. Dr Edwards did not comment upon this aspect despite concluding that Mr Wakefield presented with psychological vulnerability that explains his symptoms.
>
> 13. Dr Ramos-Galvez acknowledges that psychological and sometime psychiatric issues can magnify the reported disability in some cases. He notes however that neither expert has felt that Mr Wakefield presented with the avoidant behaviours often

> seen in patients with a psychological underlay despite all experts agreeing that he suffers with low mood.
>
> 14. Dr Ramos-Galvez notes that there also seems to be a disagreement between the experts in psychology with regards to the diagnosis, although they ultimately concur that Mr Wakefield does present with low mood and anxiety that is related to his reported levels of pain, financial difficulties and uncertainty for the future, all of which emanate from the index accident.
>
> 15. Dr Ramos-Galvez feels that Dr Edwards' opinion appears to be at odds with psychological testimony as related in paragraph 14."

65. This evidence can perhaps be summarised in this way:

    i) the experts agree that there is no real basis, grounded in organic pathology, for the pain complained of;

    ii) Dr Edwards took the view that,

        a) Orthopaedic experts were best placed to advise on the cause of the Claimant's symptoms because in his view, they went well beyond what could normally be expected from the organic pathology, and

        b) the Claimant was likely to be someone who took easily to abnormal feelings of pain, perhaps for psychological reasons;

    iii) Dr Ramos-Galvez was of the view that pain is ultimately a subjective experience and therefore what a patient says it is, because there is no objective way to determine, certainly from a radiological image, what level of pain will be suffered by a particular patient.

66. In cross examination, Dr Ramos-Galvez explained how he relied on patients to accurately report pain and restriction on activities. He also took into account an assessment on Waddell terms (the so-called eight "Waddell Signs", being a crude test for an absence of physical pathology); an examination of the patient; a verbal report from the patient; and the way he perceived the patient's demeanour during a consultation.

67. In his report of February 2020, Dr Ramos-Galvez included at section five, a form which set out a series of questions which had been answered by the Claimant himself. The questions and the answers given, were designed to provide an understanding of the Claimant's own perception of the pain he had been suffering. This section was entitled "Pain History". As regards the thoracic spine, when asked how severe the pain was at the time of the Accident, the answer given was 10/10. The answer was the same for one month after; and for "currently", the answer was 8-9/10. The same answer was given for the current experience of lumbosacral spine pain.

68. Dr Ramos-Galvez was then asked about the "Brief Pain Inventory" form completed by the Claimant, which suggested that during the previous 24 hours, pain interfered with his general activity, mood, walking ability, normal work, relations with people, sleep and enjoyment of life, at a level of 10/10. This level on the scale was in evidence described as, and taken by him to mean, either unimaginable pain or the worst pain imaginable: I did not take it that anyone involved in this case considered there to be much of a difference between the two alternatives. Dr Ramos-Galvez, untroubled, agreed with Mr Davies that this was "a degree of exaggeration" from the Claimant but explained that his final assessment took into account the discussion he had with the Claimant about these activities.

69. When pressed about the 10/10 scoring, which had decreased in intensity to just less than the worst possible pain imaginable, Dr Ramos-Galvez explained that he was not too concerned as patients often lose a "frame of reference". Patients view only one factor and they often don't get it right; they don't know how to explain properly the pain they are experiencing.

70. It was put to Dr Ramos-Galvez that on the Claimant's account, the pain was getting worse but he was at the same time saying to Dr Ramos-Galvez that pain was getting better. Dr Ramos-Galvez accepted that this was a matter of concern and that yes, the Claimant could have been exaggerating his pain symptoms. It could not be explained how it was that the Claimant reported 10/10 lumbar pain at the time of the Accident, yet that had never been mentioned when the Claimant first attended hospital.

71. There had however been no disclosure to Dr Ramos-Galvez of any tingling or pins and needles, and as a result he conceded that he was concerned as to the accuracy of the reported description of pain. He also agreed that from the examination taken alone, the Claimant did not appear to be suffering as badly as he had reported.

72. Dr Ramos-Galvez was similarly unaware, in the context of the 10/10 pain claims, of the Claimant in April 2016, painting his daughter's bedroom or playing snooker and turning down offers of work on account of his driving ban. Nor was he aware that the Claimant had been seeking work by attending the Job Centre.

73. When cross-examined, Dr Neil Edwards held firm to the views set out in his reports of March and August 2020 and also contained in the joint report to which I have already made reference. In short, his views were that an Orthopaedic expert was needed to give a view on organic cause of pain; and that any unexplained pain could be attributed to psychological causes. His opinion was that the Claimant's past record revealed a psychological vulnerability: the Claimant "reports in excess of underlying medical fact."

74. Dr Edwards went on to explain that psychologically robust people do very much better with nasty injuries and much better than those who are psychologically vulnerable. It was unusual to attend a pain clinic, as the Claimant had previously with an earlier injury: "almost everyone who does is psychologically vulnerable, that is why they go." Dr Edwards continued, "symptoms that cannot be reasonably explained can be explained by amplification by non-physical reasons. I recognise that [the Claimant] has psychological vulnerabilities – this then gives us a diagnosis. The treatment is exercise and psychological help."

The Psychological experts

Mr Simon Easton and Professor Edelman prepared a joint report on 15 October 2020. As to five points on which they were agreed, they said this:

> "1. We agree that at no stage since the index accident would Mr Wakefield have met diagnostic criteria for PTSD.
>
> 2. We agree that at the time of our respective assessments Mr Wakefield was experiencing psychological distress, secondary to the ongoing physical symptoms and associated disruption to his work and quality of life.
>
> 3. We note that, on the basis of information Mr Wakefield provided to us and his medical records and the medical reports to which we have had access, that since the index accident he has attended for counselling, pain management and Cognitive Behavioural Therapy, none of which he has found particularly helpful. We agree that at the present time any further formal psychological therapy is unlikely to be of substantial benefit for Mr Wakefield.
>
> 4. We agree that the ending of litigation is likely to be beneficial for Mr Wakefield psychologically.
>
> 5. We agree that, from a purely psychological perspective, there is no reason why Mr Wakefield could not be engaged in some form of employment; it is his reported pain that he states prevents him from working."

75. The areas of disagreement turned on the issue of psychological vulnerability, and causality. As to the former, Mr Easton's view as in his report of June 2018, was that:

> "on the balance or [*sic*] probability, had it not been for the index accident Mr Wakefield would not have experienced the substantial psychological distress reported by him at the time of his initial assessment in June 2018. …on balance of probabilities, preceding stressors would not in themselves have been sufficient to lead to onset of difficulties meeting criteria for Adjustment Disorder after the index accident, and notes that Mr Wakefield had had no psychological or psychiatric treatment prior to the index accident.
>
> ….the index accident and its adverse consequences would, on [a] balance of probabilities, have been sufficient in themselves to lead to onset of difficulties meeting criteria for Adjustment Disorder."

76. Professor Edelmann on the other hand noted that:

> "…there were several entries in Mr Wakefield's medical records in the year prior to the index accident referring to stress and an assessment in relation to his drink driving charge subsequent to the index referring to him as having been suffering from low mood for some years. […and] that given the life events Mr Wakefield experienced and his history of low mood it is more likely than not that at the time of the index accident he was low in mood if not clinically depressed. [thus it was] Professor Edelman's opinion that based upon the extensive research evidence indicating that a past history of low mood increases the likelihood of suffering subsequent episodes (estimates range from 30% to 80% increased likelihood with higher figures associated with a previous psychiatric diagnosis and treatment) that it is also more likely than not given Mr Wakefield's history he would have suffered a period of low mood at some stage in his life irrespective of the index accident. The physical symptoms Mr Wakefield reported subsequent to the index accident have served to exacerbate his existing low mood so he has become borderline clinically depressed."

77. As to causality, again consistent with the primary reports prepared by both experts, section three of the joint report recorded that:

> "Mr Easton is of the view that the ongoing adverse consequences (pain/restriction/disruption of employment etc.) reported by Mr Wakefield lead to the psychological distress which would appropriately be categorised as Adjustment Disorder as he has struggled to adjust to or come to terms with the impact of the index accident.
>
> Whilst Professor Edelmann agrees that Mr Wakefield is struggling to adjust to the ongoing pain and associated restrictions to his activity he reported he is of the opinion that any exacerbation of pre-existing psychological difficulties Mr Wakefield may be experiencing is entirely secondary to those physical symptoms and associated restrictions.
>
> Professor Edelmann notes from the medical reports that Mr Wakefield has a long history of back pain related complaints. In that context, Professor Edelmann is of the opinion that the portion of the pain that the pain experts attribute to the index accident (and which the Court determines is so attributable) will determine the proportion of any exacerbation of Mr Wakefield's pre-existing depressive symptoms which are correspondingly attributable to the index accident."

Discussion

78. In a particularly helpful written outline closing argument, Mr Sparling develops a clear and straightforward case. Its foundation is the plain and unarguable fact that at

the time of the Accident, the Claimant was working. But for the Accident, there is no reason for the court to come to the view that he would not have carried on working. He might have suffered from a bit of pain from time to time but, crucially, it did not prevent him from working in a hard and demanding job as a fabricator/welder. He would have carried on in that calling until retirement, but for the Accident.

79. Mr Sparling supports this submission with these additional points which he urges me to take into account:

i) no analgesic drugs were being taken by the Claimant prior to the accident;

ii) the denervation injections to the thoracic spine as recently as March 2021, were paid for by the Claimant out of his own pocket, despite his impecuniosity, and that this was further evidence not only of the persistence of pain since the accident but also that the thoracic pain was substantial enough for him to him to seek intrusive treatment; and

iii) if the cause of the pain could not be said to be obvious from the medical expert evidence, witness the chronology and the consistent reports of where and how the pain is.

80. Addressing the last of these points, it was submitted that the Claimant's credibility had to be assessed in the context of the chronology commencing with the examination by Mr Tomlinson and his report in August 2016. From that juncture on, the Claimant's position has been consistent. It must follow that on a balance of likelihood, he has been suffering the symptoms complained of.

81. This analysis, submits Mr Sparling, goes beyond credibility and into the realm of causation. If the court is troubled by the absence of solid orthopaedic evidence linking the pain to an organic pathological cause, attention should be directed to the same evidence of consistent reporting. In support of his argument, Mr Sparling invited my attention to the decision of His Honour Judge Platts, sitting as a judge of the High Court, in *Connery v PHS* [2011] EWHC 1685 (QB). In that case. as a result of an accident, the claimant suffered whiplash-type injuries to her neck and back, and from those injuries had, she claimed, gone on to develop a complex regional pain syndrome, giving rise to considerable pain and disability, principally to her right arm and right leg. My attention was drawn to a passage in the judgment where the learned judge posed the question, was the complex regional pain syndrome caused by the accident? Despite his finding that the claimant's evidence was in other respects unreliable as to her disability, and on the facts of that case at any rate, this was his view at [53]:

> "On the balance of probabilities, it was. In my judgment, there are sufficient temporal connection and physiological connection with the accident. There is no suggestion that the claimant has been symptom free since this accident. Although the complaint of leg pain was first made nearly three months after it, there had been consistent complaints of neck pain and back pain from shortly after the accident. Since then, the claimant clearly had a period of neurological involvement, involving first the arm and then the leg, before the diagnosis

> was made. In my judgment, it is highly likely that the trauma of the accident caused the condition. The only alternative explanation could be that it was a spontaneous onset. I am satisfied that, although spontaneous onset is not unknown, it is very rare, and it seems to me, on the balance of probabilities, highly unlikely in this case, in that it would have had to come on spontaneously coincidentally with symptoms from a known trauma."

82. I am also urged to avoid a frame by frame approach if the mechanism of causation is not explained by medical science. This submission is founded on the decision of His Honour Judge Coe QC, sitting as a judge of this court in *Murphy v Ministry of Defence* [2016] EWHC 0003. In that case, an engineer serving in Afghanistan with the elite parachute squadron of the army, had been hit on the head by a roll of temporary road fabric which was being unloaded from a vehicle. It was the claimant's case that he had as consequence of the accident, developed Chronic Widespread Pain. As to causation, at [148] the judge said this:

> "Essentially, if the Claimant is suffering from CWP and additional mental illness, has he proved on a balance of probabilities that but for the accident he would not be suffering from those conditions? That is for me to decide on the evidence I have heard."

83. The judge reached his conclusion in this way at [169]:

> "In the circumstances I find that the Claimant developed CWP following the trauma of the index accident and that causation is established. Of course each case has to be looked at on its specific facts and the situation is not that every case of CWP can be linked to an earlier trauma. Similarly, there may be cases in which there are multiple factors and one cannot on a balance of probabilities say what the specific cause was. However, in this case I prefer and accept the evidence of Dr Munglani. His experience seems to me to be more than sufficiently persuasive to establish the causative potential of the index accident. Moreover, there is a clear and logical pattern and a tight contemporaneous link between the accident and the onset of symptoms. The accident itself can properly be considered to be akin to cases in the authorities and in the literature where there has been shown to be a causative link between the trauma and the onset of CWP."

84. Although I was also asked to take account of the reasoning of Cheema-Grubb J. in *Connor v Castle Cement* [2016] EWHC 300, when pressed, Mr Sparling accepted that the case turned to a large extent on its own detailed facts, in particular in regard to the question of whether an alternative causal mechanism, other than the breach of duty admitted, could explain the onset of a severe psychiatric condition.

85. The decision of Mr Robert Francis QC, sitting as a Deputy Judge of this court in *Josefa Claudimary De Oliviera Malvicini v Ealing Primary Care Trust* [2014] EWHC

378 (QB), was put before me because of the suggested relevance of the findings of the learned Deputy Judge set out at [62]:

> "…Therefore I am satisfied on the totality of the evidence, but the expert evidence in particular, that the presentation of the claimant's condition as described by her to the court and to medical attendants is of a known and medically recognised chronic condition in which chronic and disabling pain is suffered, and genuinely suffered, without any discernible physical explanation, driven by psychological factors which may be known, or discoverable, but often are not."

86. Thus I am invited to the view that a clear medical cause of symptoms, especially pain, is not always discernible but such should not operate as a bar to a positive finding on causation.

87. Whilst the Claimant's various assertions as to the level of pain being experienced were perhaps something that would be of concern to the court, Mr Sparling reminded me that at no point had the Claimant attempted to exaggerate his suffering during any actual examination. And as to the video footage, whilst the Claimant could be seen running up a flight of stairs this was only because he needed to catch a bus three minutes later. The running style was not natural and as could be clearly seen on the film, the Claimant put his hand on his back on numerous occasions. This was a clear outward sign of pain. In answer to my enquiry as to why after a long day on public transport and attending a medical appointment in central London the Claimant chose to go shopping and not find somewhere quiet to rest, I was reminded by Mr Sparling that the Claimant had given evidence of a stop for a coffee and that the shopping trip was only on account of his need to kill time.

88. As to the Claimant's constitutional vulnerability, Mr Sparling points to the opinion of Mr Foy that acceleration was not a cause of the symptoms relating to the thoracic spine. It must therefore follow that if acceleration was irrelevant, the thoracic pain must result from the Accident.

89. Turning to quantum, the Claimant's case is that the prognosis in respect of the thoracic pain is not good and if it has not been successfully treated hitherto, and it has not, on a balance of probabilities it will be everlasting; but the court can take into account constitutional factors and the fact that the Claimant is a 60 year old man with a history of back problems and other degenerative factors.

90. I am invited to assess the back pain as severe but reducing, and also to make an award for the undoubted psychological suffering of the Claimant. I am also asked to make an adjustment as best I can, to take account of the impact of the intervening act in the form of the driving disqualification.

91. In respect of the claim for the cost of care, Mr Sparling accepted that he was in some difficulty by reason of the absence of evidence from those who had, on the Claimant's account at any rate, given him significant care and assistance. He also would have received some degree of help around the home from family in the ordinary course.

92. Finally, I should note that Mr Sparling, probably wisely, decided to devote little effort in any attempt to persuade me to make an award on the basis of *Smith v Manchester* principles.

Conclusions

93. The Accident in which the Claimant was involved must have been a frightening and very painful experience. There is no doubt that as a result, the Claimant suffered injury and also pain. The extent of the resulting injury itself seems to be tolerably clear. There was, mercifully, no long-lasting physical damage. There was soft tissue injury but that appears, as was expected by the orthopaedic medical experts, to have resolved itself. For this injury the Claimant must be compensated by an award of damages, liability not being disputed.

94. Moving on from the injury and the immediate pain and suffering, it is necessary to consider what further impact the Accident had upon the Claimant. In my judgment the Claimant was not a man who would or could have continued for any prolonged period working in the physically demanding job of a welder and fabricator. Had he done so, he would have suffered further pain and serious discomfort, just as he had been complaining of in his lower back, prior to the Accident. Because of that pain and precisely that risk, he was given a clear instruction by his Rheumatologist to refrain from heavy physical work. "It was his occupation that was hampering his recovery and continuing to exacerbate his back pain." The Claimant was "strongly advised to avoid heavy lifting". He said he would "see what he could do".

95. Lower back pain had been a problem for the Claimant since 2013. The Interpersonal Therapist he consulted just after the Accident noted it as "long term back pain" over three years. This was lower back pain resulting from lifting. But of course no mention of lower back pain was made to the Radiologist when the Claimant received an MRI scan in August 2016.

96. I was not a little troubled by the Claimant's unwillingness to recognise his previous lower back problems when he was cross-examined. It is not at all easy to reconcile the statement " I can't remember ever having back problems" with the facts of this case. In my judgment the Claimant's evidence taken as a whole, was confused and inconsistent. It was certainly sufficiently unreliable for me to make any finding that such lower back pain as has been experienced by the Claimant since January 2016 was either caused by, or exacerbated by reason of, the Accident.

97. The principal controversy in this trial was, as I have mentioned already, the extent of the Claimant's pain. The view I have formed of the Claimant is that whilst he does not himself necessarily believe that he exaggerates his feelings of pain, he comes all to readily, and not always accurately, to an expression of it being experienced. I have in mind his numerous medical visits. I also rely on the evidence of Mr Easton, which I found clear, reliable and straightforward, to the effect that the Claimant was disposed to worrying about pain: the corollary being, without necessarily having good reason. It is right that as a matter of law the Claimant must be taken as he is found, however that does not mean that the Defendant is liable for the experience of pain which is illusory or in any event below the threshold for being considered real.

98. When considering the nature and extent of the pain experienced by the Claimant, I cannot say that I was assisted by his confused and at times hard to follow evidence. Why did he not enjoy his snooker after the Accident – was it the behaviour of his relative with whom he was playing, as at one stage in his evidence the Claimant suggested, or was it the pain; if he was suffering such extreme and intense pain why was he looking for work at venues to which he could cycle, and why was he attending job centres? The evidence surrounding his post-Accident work was enormously troubling. It seems to me that despite Mr World's evidence, the fabrication work had "dried up" as the Claimant more than once reported. Nor could he attend such work on account of his driving disqualification. I heard no evidence that the Claimant would have secured lifts to that work from friends. The only relevant evidence was whether the Claimant could cycle to his place of work. Thus the Claimant busied himself with property maintenance work. In respect of that work it might well have been that because of his various back issues, including but not at all limited to the consequences of Accident, other tradesmen were involved in carrying out certain tasks, but that does not explain why the Claimant was so heavily engaged in this work at the time he was, subsequent to the Accident.

99. It seems to me that I cannot ignore the role that this litigation has played in determining the Claimant's behaviour. This is certainly evidenced by the admitted attempt to secure back-dated medical certificates to confirm an inability to work during a period when the Claimant knew he had been working and reporting himself available for work.

100. It is my finding that based upon the evidence of Mr Foy and Mr Spilsbury, the period that the Claimant was kept out of the employment market, that is to say the period of the restriction on account of the Accident, was six months. During that period he was, as I have already observed, unable to drive to any welding or fabricating work, had the same been available to him, by reason of his driving disqualification. Accordingly in my judgment the Accident cannot be treated as the cause of the inability to carry out this work. On the Claimant's evidence, such other work as was available to him, he carried out. Whatever one makes of Mr World's evidence and how it conflicts with the Claimant's own contemporaneous statements as to his work having dried up, it was not in my judgment anything connected with the Accident that would have prevented the Claimant taking up such work as Mr World had available.

101. Has the pain experienced by the Claimant operated as a restriction on his ability to carry out more remunerative physically demanding work? In my judgment it has not. Whilst it might be that in a proper case, and if the evidence leads to such a conclusion, the court can make a finding of pain and suffering and the referable causality, despite any, or any persuasive, evidence of an organic pathological cause, I do not hold this to be such a case. Whilst I accept that the Claimant has experienced a degree of pain, in my judgment and on an assessment of the evidence as a whole, including the Claimant's own evidence before me, and the evidence of Ms Wakefield and Ms Cowie it has been some way short of the levels he has claimed. The pain forms completed by the Claimant were entirely inconsistent with how he presented to the various medical experts, not just the pain expert. Those forms and the Claimant's evidence to the court also revealed a certain incongruity when placed in juxtaposition with the record of the Claimant's behaviour in the months following the Accident and when viewed in the context of the video footage. Whilst it might be that the pain

killing drugs being taken by the Claimant allowed him to run up the flight of stairs whilst on his way to catch a soon to be departing coach to London, I cannot accept that if the pain was as reported, after a long day on public transport journeying to central London for a Harley Street medical appointment, the Claimant would have filled in the hours before catching his coach back to Southampton with a trip around the West End department stores. This just does not add up. It is my finding that when the period of driving disqualification came to an end, the Claimant could have retrained to whatever work he would have been able to carry out having regard again to the clear advice of the Rheumatologist and the evidence of serious existing problems with lower back pain.

102. It will have been observed in my recitation of the medical expert evidence, the number of occasions on which those experts, in particular Mr Spilsbury and Mr Ramos-Galvez, conditioned their views to the extent the court was in due course willing to accept the Claimant's evidence as to the extent and intensity of the pain symptoms experienced by the Claimant. It will have become clear that I am not at all persuaded of the reliability of that evidence. In conclusion, I find that that there was pain and it was at times very uncomfortable. But I do not accept that it would have prevented the Claimant from obtaining such work as he was otherwise able to carry out subsequent to a point in time six months after the Accident.

103. Turning now to the damages to which the Claimant is entitled, and having regard to the Judicial College Guidelines, I make an award of £7,500 by way of general damages for the injury sustained by reason of the Accident.

104. Accepting that the Claimant was psychologically vulnerable, and taking account of his psychological suffering and the pain experienced by reason of and following the Accident, I make an award of £10,000.

105. Given the dearth of relevant evidence, I make no award in respect of the claim for care and assistance during the period following the Accident. I am unwilling to make any award on the basis of the Claimant's evidence alone. On the evidence before me, and I cite again in particular, the video footage and taking full account of the views of the medical experts, I do not accept that the Claimant is in need of any future care and assistance because of anything arising from the Accident. Nor do I find that the Claimant is entitled to any award for the cost of future treatment. I will allow the Claimant the amount claimed for Miscellaneous Expenses.

106. In light of my findings in respect of the restriction on the Claimant's ability to work, I make no award for any future loss of earnings. There was no loss of earnings during the six-month period of the restriction by reason of the Accident.

107. I will hear submissions from counsel in regard to the appropriate order.