IN THE COUNTY COURT AT CANTERBURY

Claim No. C07YY284

BETWEEN:-

DEREK MURPHY

Claimant

~ and ~

THE DOCTORS LABORATORY LIMITED

Defendant

JUDGMENT
Trial 11th, 12th and 13 November 2019
Judgment 21st November 2019

I direct pursuant to CPR Part 39 PD 6.1 that no official recording shall be taken of this judgment and that copies of this version, subject to editorial corrections, may be treated as authentic.

1. This is a claim for personal injury by the Claimant, Mr Derek Murphy. Mr Murphy was born on 28 July 1963 and he is now aged 56.

2. The Claimant was and is employed by SRCL as a lorry driver. He had worked in similar roles throughout his working life.

3. The material I have seen from his personnel file suggests that he was a conscientious and valued employee. Further, having heard him give evidence, I formed the clear view that he was and is a diligent and hard-working man who took pride in his work. His current line manager, Bryan Stevens, confirmed that he was a reliable driver, who was, so far as he was aware knowing him only in a work context, an honest man.

4. In the course of his employment at about 8.45am on 4 July 2013 the Claimant was at the Defendant's premises, The Doctors Laboratory, 60 Whitfield Street, London W1T 4EU, in order to collect clinical waste.

5. According to the Particulars of Claim, the Claimant was pulling a wheeled waste collection bin backwards into the waste storage area when he stepped with his left foot onto a sharps pot that he alleged had been left on the floor by a porter. That caused the Claimant to fall to the floor. As he did so, he put his hand out

to break his fall and struck his shoulder on the partition that separates clinical waste bags from the sealed units.

6. In his first witness statement dated 19/2/18 the Claimant described the accident as follows:

   "On the day in question I had collected around 4 to 5 50/60 litre waste bins from the Defendant's premises and loaded them on to the back of my lorry using the electric tail lift. When I returned to the building I took an empty 770 litre wheeled bin back in with me. I wheeled the bin to the clinical waste room which was on the ground floor. The room where the clinical waste is kept is very small and not big enough to be able to push a bin in forwards and then manoeuvre. You therefore have to walk backwards into the room whilst pulling the bin backwards. This was the way I was shown to do it by the person who did it previously. After I pulled the bin in to the middle of the room I let go of it and turned around. In doing so I felt something under my left foot. It was a round, yellow sharps part [*presumably typographical error for pot*]. It shot out from underneath my foot like a roller skate. I fell forwards as a result and my left shoulder collided with a wooden partition that separated bags from plastic 50 litre sealed units. I put my right hand out, which hit the floor heavily, in order to prevent my face hitting the floor. As I fell one of the 50/60 litre units hit my armpit. I immediately knew I'd hurt my armpit and hand but I was able to get up. I saw the sharps pot was on its side and it had some kind of liquid leaking from it."

7. He gave me a broadly similar account when giving his evidence. However, he clarified that he had already taken several 770 litre bins to the room, filled them and then placed them into his lorry before he returned with the bin that he had taken into the room immediately prior to his accident. The Claimant was not challenged about the mechanism of the accident.

8. Primary liability for the Claimant's accident is admitted by the Defendant.

9. However, the Defendant maintains that the accident was caused in part by the Claimant's own contributory negligence. I will deal with that issue first.

10. Apart from the issue of contributory negligence, the issue in this case is the nature and extent of the injury sustained by the Claimant as a result of this accident and, in particular, whether the Claimant has suffered ongoing pain and disability that is attributable to the accident for a period extending beyond 6 months from the date of the accident. Further, although inextricably linked to that issue, the Defendant alleges that the Claimant has been fundamentally dishonest in relation to the nature and extent of the injury sustained by him and on the question of his alleged ongoing symptoms and disability.

11. I have had the benefit of reading the following witness statements and hearing from each of the witnesses (save Ms Ash):-

    a. Derek Murphy (Claimant) dated 19 February 2018, 27 January 2019 and 22 October 2019;

    b. Jacqueline Murphy (Claimant's wife) dated 18 January 2018 and 27 January 2019;

    c. Gareth Coetzer (Defendant's Facilities Manager) dated 21 February 2018 and 5 September 2018;

    d. Naadia Ash (Intelligence Analyst at the Defendant's Solicitors) dated 12 September 2018 (with Civil Evidence Act Notice of the same date);

    e. Bryan Stevens (Claimant's line manager at SRCL) dated 8 August 2019 and 31 October 2019.

12. I have read the following medical reports and I heard oral evidence from both Mr Gillham and Mr Lyall:

    a. Mr Gillham (Consultant Orthopaedic Surgeon instructed on behalf of Claimant) dated 28 May 2014, 16 April 2015, 4 June 2016, 10 August 2016, 31 August 2017, 28 February 2018, 18 July 2018, 17 August 2018 and 24 October 2019;

    b. Mr Lyall (Consultant Orthopaedic Surgeon instructed on behalf of Defendant) dated 11 May 2018, 10 June 2018 and 9 October 2019;

    c. Joint Statement of Mr Gillham and Mr Lyall dated 13 March 2019.

13. I have been referred to a variety of documents that are contained in the trial bundle, in particular various images from the Claimant's wife's Facebook page to which I will turn in due course, as well as medical records in a separate bundle. Further, as I will come to, I have seen extracts from a number of CCTV recordings.

Contributory Negligence

14. The allegations in the Re-Amended Defence are, in summary:-

    a. The Claimant failed to follow the correct and common sense procedure of positioning the empty 770 litre bin outside of the waste store. It is said that this was the practice used by other SRCL drivers and there was no reason for the Claimant not to do that. Rather the Claimant pulled the bin backwards into the waste store;

b. The Claimant failed to check that his path was clear of hazards before entering or whilst he was pulling the bin backwards by checking over his shoulder;

c. The Claimant is put to proof that he was not responsible for the sharps bin being on the ground.

15. In addition, the Defendant seeks to rely upon the maxim res ipsa loquitur.

16. So far as that last matter is concerned, res ipsa loquitur has no application to the circumstances of the Claimant's accident.

17. Further, the burden of proof is on the Defendant on this issue and so there is no question of the Claimant being required to prove that he was not responsible for the sharps pot being on the floor. In any event, he denies that implied allegation and I have no hesitation in accepting his evidence. If he had left the pot on the floor, or if he had knocked it onto the floor on one of his previous visits to the room that morning, I find it inconceivable that he would have thereafter forgotten about its presence. Rather, although the Claimant told me in his evidence that he did not see a porter putting a sharps pot on the floor of the room that morning, I find that it is likely that the pot was left on the floor by a porter who was replenishing the room whilst the Claimant was at his lorry. I note that the CCTV disclosed by the Defendant from mid-2016 showed porters both collecting the empty containers / lids delivered by the Claimant, and depositing further waste for collection, whilst the Claimant was in the course of his duties (albeit that on this occasion the waste was left outside for collection, rather than in the room as it was on the day of the Claimant's accident).

18. The Claimant's evidence in his witness statement is firstly that the procedure he adopted was in accordance with the training he received from the driver who formerly undertook this job. He was not challenged about that part of his evidence.

19. Secondly, he had been doing the job on a daily basis for many months. There is no evidence that anyone from the Defendant (or his employer) had ever advised him that he should not go about the job in the way that he did. Mr Coetzer, the Defendant's Facilities Manager, agreed that there had been no such instruction.

20. Thirdly, the Claimant points out that it is in accordance with sound manual handling principles to limit the distance over which a load was carried. Therefore, bringing the 770 litre container close to the material to be loaded was the obvious procedure to adopt. Further, although there was a short distance between the room and the area outside where the Defendant says that the 770l container should have been left, he had to repeat the loading process

multiple times (perhaps hundreds). Therefore, the time and effort involved to complete the job would have been significantly increased;

21. Fourthly, the Claimant says that, if the bin was left outside of the room then it would be blocking a fire exit. However, he accepts that, when on a later occasion (9 June 2016) the porters left the material outside, then he did have the 770 litre bin outside notwithstanding the fire exit.

22. Fifthly, the Claimant relies upon the fact that, following his accident, the Defendant's own Group Health and Safety Manager directed improvements that were aimed at making it safer for the 770 litre to be taken in and out of the clinical waste room. She did not direct that the 770 litre bins should be left outside as suggested by Mr Stevens. She was, on the contrary, implicitly endorsing the system of work adopted by the Claimant.

23. I find that the Claimant was undertaking the job in the way that he had been trained. Further, I do not find that it was, as the Defendant suggests, common sense to leave the bin outside of the room. On the contrary, common sense would dictate placing the bin as close to the material that was to be disposed of as possible. The Claimant had been doing the same thing for many months without anyone telling him different. He was acting in a manner which was subsequently implicitly approved of by the Defendant's own health and safety manager. He was not at fault in adopting the method that he did.

24. So far as failing to look behind him and failing to spot the presence of the sharps bin on the floor is concerned, the whole point of regulation 12(3) of the Workplace (Health, Safety and Welfare) Regulations 1992 is that traffic routes and floors in workplaces should be kept free of articles that might cause a worker such as the Claimant to fall. Workers are conscientiously getting on with their job and they might well not spot even obvious objects. I find that the Claimant was just getting on with his work. He had not previously encountered objects being left on the floor as I find that this sharps bin was. He had no reason to suppose that there would be a hazard on the floor on this occasion, even though he knew that porters did replenish the room. Even if he had glanced over his shoulder as he pulled the bin into the room, it would have depended exactly when he did so and his relative position to the sharps bin whether he could or would have spotted it. He got the bin into the room and was just looking around when the accident occurred. In my judgment it is important that the Courts do not use hindsight or set an unreasonably high standard against which to test whether an injured worker should have their damages reduced on the grounds that their accident was caused partly as a result of their own failure to take reasonable care for their own safety.

25. In my judgment, Mr Murphy did not fail to take reasonable care for his own safety and I make no reduction for contributory negligence in this case.

Injury Sustained

26. I now turn to the significant issue in this case – what was the nature and extent of any injury suffered by the Claimant as a result of the accident on 4 July 2013? This topic raises a number of issues, both factual and medical, and I will address each in turn.

27. I start with the evidence of the Claimant and his wife. In doing so, I refer to some of the other pieces of evidence relied upon by either party.

28. Derek Murphy has filed 3 witness statements. In his first statement dated 19/2/18 (i.e. just over 4.5 years post-accident) he said that, despite the discomfort he experienced immediately after the accident, he brushed himself off and, since he was a stoic person, he carried on, undertaking 4 more trips with the 770 litre bin. At the end of his shift he reported the accident to the Defendant. An accident report form was completed.

29. The accident report stated that the Claimant suffered bruising to his right armpit, a sore left shoulder and a headache.

30. The Claimant had one more job to do that day – that involved collecting one wheelie bin that was not very heavy. He then returned to his employer's depot where he had to fill in a further accident report form. That has not been produced in evidence.

31. He went home and his right hand and left shoulder were sore. He took painkillers, but he did not do much that evening.

32. The following day he woke up and was in a lot more pain. However, he just wanted to get on with things and so went to work. He said that he asked his employer for someone to help him, but he was told that no one was available. He went to the Defendant's premises. He was not strong enough to pull or push heavy bins and so he was assisted by about 4 of the Defendant's porters who loaded his truck for him.

33. When he finished at the Defendant's premises, he rang his employer to say that he was unable to complete his shift because of the pain in his right hand and left shoulder. He went home. His wife told him that he needed to go to hospital and he attended A&E at Darent Valley Hospital. He said that he was x-rayed and told that it looked like he had broken his right scaphoid bone. However, apparently unknown to the Claimant at the time, the radiologist's x ray report of the same date in fact states that there was no fracture. His right arm was placed in plaster and he was referred to the fracture clinic. He said that the pain in his left shoulder was worse than that in his right hand at that stage.

34. The hospital record for that attendance on 5 July 2013 states that the Claimant was complaining of pain and reduced movements at his left shoulder and right elbow. On examination his shoulders were symmetrical and there was minimal swelling at the right shoulder. There was no bruising. The only tenderness was over the acromio-clavicular joint and the humeral head. There was a reduced range of movements. At his right arm there was bruising to the axilla where he had landed. There was tenderness over the outer aspect of the right elbow and around the distal radius and scaphoid tubercle. Movements of the wrist and elbow were reduced and tender. The emergency nurse practitioner concluded that he had suffered soft tissue injuries, but queried a left shoulder or right wrist fracture. There is no express reference to the right thumb.

35. The Claimant said that the pain eased off after around 3 weeks, but it was still very much present.

36. The Claimant said in his statement that he was informed at the fracture clinic later in July 2013 that he had fractured his scaphoid after further x rays were taken. He was to return a month later. Despite the x-ray report referred to above, the letter relating to the 17 July 2013 fracture clinic does record that he had a "right wrist scaphoid undisplaced fracture". On examination he was quite tender in his anatomical snuff box and on dynamic stress testing at the scaphoid. He was placed in a cast.

37. In August 2013 he said that his plaster was removed and he was given a splint. The record for the attendance on 14 August 2013 states that on examination the Claimant was "pain free in his anatomical snuffbox and on dynamic stretch testing of the scaphoid. He has been placed in a scaphoid splint today." The Claimant reported some left shoulder pain following his injury, but on examination he had a full range of movement, although impingement testing was mildly positive. Cuff power was intact. He was referred for physiotherapy "with regard to rehab review recovery for his traumatic impingement." X rays of the shoulder joints were normal. The Claimant was cross-examined about this record, in particular the reference to his wrist and scaphoid being pain / symptom free, and he pointed out that at this time he had just been taken out of his cast, he was on medication and he was off work.

38. 2 days later, on 18 August 2013, the Claimant's wife posted a photograph of the Claimant on Facebook which showed him asleep with his upper left arm raised almost vertical along the side of his head with, it appears, his forearm tucked behind or on top of his head. He was cross-examined about this in light of his assertion, in his statement and to the experts, about the restriction of movement in his left shoulder (see below). He said that he was on medication and asleep and therefore had no control over his limb.

39. Although the Claimant had been referred for physiotherapy, because of the 6-week waiting list, he saw a personal trainer, Danny Whittaker, who had been recommended to him by his wife (who is also in that industry) for 13 sessions that took place, according to the invoice produced, between 29 August 2013 and 19 December 2019. According to his witness statement he was taught techniques to strengthen his right hand and stop it stiffening up. However, the invoice states that "the main focus of rehabilitation was aimed at strengthening the left rotator cuff group". Mr Whittaker was not called to give evidence.

40. Although the Claimant originally said that he had about 8 sessions of physiotherapy, he accepted in evidence (and said in his later statements) that he only had 3 sessions. He explained in evidence that he had difficulties attending the physiotherapy sessions because of his work commitments and I accept that evidence.

41. Of some importance as a contemporaneous record is the initial physiotherapy assessment dated 11 October 2013. The record is quite difficult to read. However, the focus does appear to have been on impingement of the left shoulder, consistent with the intention of the Specialist Registrar in Orthopaedics who referred him for the treatment. The physiotherapist has noted a fracture of the scaphoid, but there does not appear to be any express reference to issues such as grip strength or thumb pain.

42. The Claimant said in his first statement that, despite the treatment that he received, the pain and restriction in his left shoulder and right wrist continued. The Claimant and his wife gave unchallenged evidence concerning the effect of his injuries upon his ability to do certain tasks in his domestic and social life.

43. The Claimant had returned to work at the end of August 2013, he says for financial reasons since he was now on half pay. In his statement he said that at this time he was still unable to raise his left arm above his head and he said that his left shoulder, right wrist and thumb were all very painful and sore. He said that he asked his employer about light duties, but he was told that there were not any.

44. In the Claimant's personnel records is a letter dated 7 October 2013 in relation to a grievance that he had raised (only very indirectly related to the accident). The Regional HR Manager stated that the Claimant had returned to work and was still experiencing some degree of discomfort. She had told him that she was happy to speak to the Transport Manger and explore whether an alternative route or workload could be identified. However she stated that the Claimant wished to remain on his current route and duties. She said that they agreed that he would notify his line managers at the earliest opportunity if he was unable to continue or needed alternative duties. The Claimant told me that essentially he knew that there was not an alternative better route at that time

and, although he asked verbally about lighter duties (although this is not recorded on his file), nothing suitable was offered until he asked for the change in 2016 (see below).

45. Although the relevant GP record cannot be identified, on 13 March 2014 the Claimant had an x-ray of his right wrist. The clinical information recorded by the reporting radiographer is "scaphoid fracture July 2013. Increasingly painful thumb base. Scaphoid avascular necrosis?". The report states "Minor degenerative change is seen in the base of the left metacarpal. No evidence of avascular necrosis is [sic] scaphoid is seen". This is potentially important because, as I will come to, when the Claimant was examined by Mr Gillham a couple of months later, there is no specific reference to a complaint about the thumb by the Claimant in his report. Unfortunately, neither he nor Mr Lyall were asked about this record, which was drawn to my attention for the first time during closing submissions.

46. According to the Claimant, although he carried on doing his normal duties until September 2016 (see below), he adapted the way in which he lifted heavy bins and just did the best that he could. That included using a metal bar or key inside his safety glove to assist with lifting as he explained to me. That provided support when lifting and meant that he could keep his hand open rather than gripping.

47. The Claimant was first examined by Mr Gillham, Consultant Trauma and Orthopaedic Surgeon, on 28 May 2014, almost 11 months post-accident (based on the date of the report). I will deal with the opinions of the medico-legal experts later. Mr Gillham recorded that the Claimant told him that he received a direct blow to the inner aspect of his right upper arm. He fell onto his right hand and also hit his left shoulder. Mr Gillham recorded that the Claimant had only 3 sessions of physiotherapy. The bruising on the inner aspect of his right upper arm settled within a few weeks.

48. At the time of Mr Gillham's examination, the Claimant was complaining of pain over the top of his left shoulder and of a loud and painful click with movement. He told Mr Gillham that he had learnt to work around his left shoulder pain. His right wrist remained painful with pain felt over the back of his wrist on the radial side. He complained that his grip was substantially decreased and he was not able to open a jar as normal. He had been off work for 7 weeks. He had not been able to play the guitar as much as previously and he had not been able to do his normal DIY activities. Some day to day activities remained restricted because of the lack of strength in his right hand. There is no record that the Claimant mentioned any issue with his right thumb at the time of Mr Gillham's first examination notwithstanding the referral for x-ray only a couple of months before.

49. On examination of the right wrist, Mr Gillham found that the Claimant was tender with pressure over the proximal pole of the scaphoid. The range of movement of the right wrist was restricted with a 10 degree decrease in dorsi-flexion and a 30 degree decrease in palmar flexion. He conducted grip tests using a JAMAR grip strength meter. The readings on the left (non-dominant, uninjured) were 37, 39 and 38 kgs and on the right (dominant, injured) were 24, 20 and 24kg. Mr Gillham concluded that there was a 50% decrease in grip strength of the right hand.

50. The left shoulder had a normal range of gleno-humeral rotation. However, abduction beyond 90 degrees was painful with an audible and clearly uncomfortable click from the region of the left acromioclavicular joint.

51. A Facebook post on 15 July 2014 (1-year post-accident) by the Claimant's wife referred to her having had "an amazing workout" with her husband. She goes on to say "Poor fella has become an exercise fanatic". On the following day she posted a photograph of him saying that he was "hot & bothered during his workout".

52. Jacqui Murphy is the Claimant's second wife and, whilst they married in 2012, they did not go on honeymoon (to Aruba) until Autumn 2014. Mrs Murphy is a personal trainer and she explained her ethos which is that, even if someone has an injury or limitation, they can still exercise. Both she and her husband state that, in early Summer 2014, the Claimant was keen to get fit in anticipation of their forthcoming honeymoon. However, they both say that he engaged in cardiovascular exercise, as well as some abdominal and lower back exercises. They deny that the exercise included lifting weights or any strenuous activity involving his arms. I accept that explanation. I also accept that, bearing in mind the nature of Facebook exchanges, the post by Mrs Murphy was intended to be slightly humorous. I find that the Claimant was trying to get fitter and that the lower back exercises were, as Mrs Murphy explained in her statement, aimed at trying to protect his back given his difficulties with lifting and the altered posture that he was adopting. I do not find that the Claimant was misleading or downplaying his capability or activity when asked by Mr Lyall in 2018 about what exercise he did, he only referred to walking / achieving a target number of steps and did not volunteer that, several years earlier, he had had a period of trying to get fit using gym equipment such as an exercise bike.

53. The Defendant also relies upon posts relating to their honeymoon in October 2014. One photo shows them in snorkelling equipment. One shows the Claimant with his left arm outstretched, but well below 90 degrees. A third photograph shows the Claimant lying on his front on a lilo, with his arms outstretched and partially bent. It does appear in that photograph that his upper arms are both raised above the level of his shoulders, although quite how far is difficult to assess.

54. Mr Gillham had recommended that the Claimant underwent further investigations. Although an abnormality was identified on imaging in the structures on the ulnar side of the right wrist, he did not consider that this was likely to be linked to the Claimant's symptoms. No abnormalities were noted either on x-ray or ultrasound of the Claimant's left shoulder.

55. A photograph of the Claimant posted in February 2015 shows him seated on sofa with his left arm outstretched along the back of the sofa behind his wife who is seated next to him. He is leaning slightly to his left and it is therefore difficult to assess whether the arm is at or below 90 degrees. The Defendant suggests, however, that if there were any significant issue with the shoulder, then the Claimant would naturally guard it and not adopt such a position if he could avoid it. Another February 2015 photograph shows the Claimant making a 'V' sign. His upper left arm is outstretched at what appears to be an approximately 90-degree angle. The Defendant makes the same point about that photograph.

56. A photograph was posted on Facebook by the Claimant's wife on 28 March 2015, namely almost 1.75 years post-accident. It is agreed by the Claimant and his wife to show the Claimant performing the yoga position known as The Crane. It involves the Claimant supporting himself on both hands, with his head resting on a pillow and both bent legs off the ground. The wrists and knees are both bent at 90 degree angles. If the photograph had been taken at or about the time that the Claimant's wife posted it then it would be powerful evidence that there was not any meaningful issue with either of his wrists at that time.

57. However, when the Defendant served this evidence, both the Claimant and his wife stated that the photograph was in fact taken in June 2013, a couple of weeks prior to the material accident. The circumstances are described by each of them. Most importantly, Mrs Murphy has produced a photograph of the metadata of the photograph which confirms that it was taken on 22 June 2013. Further, on 5 July 2013 (the day following the accident), the Claimant's wife posted a photograph of him outside of A&E wearing a plaster cast. One person, ML, commented "What's he been up to? Not trying to do handstands again I hope". This comment is, in my judgment, consistent with ML being aware of the photograph of the Claimant taken about 2 weeks before. The Defendant now accepts that the photograph was taken prior to the material accident.

58. It is right to say that the comments by the Claimant's wife beneath the 2015 posting of the photograph do, if read literally, suggest that she was suggesting that he could do it in the future (suggesting a "balance off" with the other poster, AH). However, I accept her explanation that this was an exchange with an elderly relative and was a joke.

59. I find that the Claimant performed the handstand / Crane position in June 2013 and not in March 2015 and that he did not perform this manoeuvre after his accident. Further, he was not capable of doing so in March 2015 and neither he nor his wife thought that he was.

60. This posting is therefore irrelevant save that it demonstrates that (consistent with his medical records) the Claimant had no issues with his wrists before he had the accident on 4 July 2013.

61. In April and May 2016 photographs were posted of the Claimant with a) his left arm around his wife's shoulder and b) his left arm around his (taller) son's back with his hand on his shoulder. I do not consider that it is possible to make any findings based on either of these photographs given that the majority of the Claimant's arm is hidden from view.

62. As I have mentioned earlier, the Defendant relies upon CCTV evidence of the Claimant from 9 June 2016. I will return to that evidence after setting out the what Mr Gillham records in his report following his examination of the Claimant only a matter of 2 or 3 months later.

63. Mr Gillham saw the Claimant again on 10 August 2016 or 10 September 2016 (the date is unclear), just over 3 years after the accident. At that time, the Claimant continued to complain of pain over the top of his right shoulder and that movements were accompanied by a loud and painful click. He had learnt to work around it. His right wrist remained painful with pain felt over the back of the wrist on the radial side. His grip was substantially reduced and he could not remove the fuel cap on his lorry due to being unable to push and twist at the same time. His restrictions in relation to guitar playing and DIY remained. He told Mr Gillham that, apart from altering the way that he lifted, he had not had any significant difficulties at work and he had not had any further time off. He was, however, hoping to change to lighter job in the near future. He said that this change was precipitated by his persistent shoulder and wrist pain.

64. On this occasion the main area of tenderness in his right upper limb was around the right thumb metacarpal-phalangeal joint, although he now had a full range of right wrist movements. When Mr Gillham undertook the JAMAR testing, he recorded 46, 40 and 46 kg for the left hand and 34, 30 and 43 kg for the right hand. It was suggested to Mr Murphy that he was deliberately not squeezing to his optimum ability on those first 2 results with the right hand. He said that he had tried the best that he could. I will return to those results later.

65. So far as the left shoulder was concerned, as at the time of Mr Gillham's first examination, he had a normal range of gleno-humeral rotation. However, abduction beyond 90 degrees was painful with crepitus from the region of the acromio-clavicular joint.

66. Footage from the Defendant's motion sensor activated CCTV from 9 June 2016 has been produced. Unfortunately, the original version (which I was shown) was inverted (making identifying left and right problematic) and it was not in real time. Steps could and should have been taken by the Defendant to resolve these issues before witnesses were asked to comment on it.

67. The version available at trial was much more satisfactory. It was not inverted and did not suffer from the same degree of time distortion. However, it was necessarily an incomplete picture because there were plainly segments of time missing as a result of the way that the movement sensors worked. I found, in particular, that it would be dangerous and unfair to make any findings about the Claimant's shoulder in relation to the sequences when the Claimant was throwing items, because of their jerky nature.

68. I also did not find evidence from this CCTV of the Claimant lifting or using his arm beyond that which he said that he could do in many of the passages upon which the Defendant relied.

69. However, there were 2 instances in which the Claimant did appear to use his left arm and shoulder in a way that was inconsistent with what he had said about his restrictions. Helpfully, stills from the CCTV were taken in the course of the trial. I find that those at 05.11 and 07.46 do show the Claimant lifting his left arm well above 90 degrees and, further, on the relevant CCTV sequences, in neither case does he pause either before or after carrying out what are fluid movements. There is no degree of hesitancy in his movement.

70. From September 2016, the Claimant said that he changed his work role and, according to the Claimant, he no longer had to lift as many bins. It seems that the opportunity to do the alternative route became available and he asked if he could have it. There is nothing in his personnel records to suggest that he was assigned it because of any ongoing restriction, but I accept the Claimant's evidence that it is lighter work. Mr Stevens' evidence was that the 770 litre bins that the Claimant now collects are already filled. Therefore, it is just a case of him leaving empty 770 bins and collecting the filled ones. He no longer has to do the repeated manual handling that he did at the Defendant's premises.

71. He says that he is concerned that if he were to lose his current job, then he would have difficulty finding alternative employment. He was previously employed as a delivery driver and is concerned that his inability to do heavy lifting would count against him.

72. In June 2017 the Claimant was involved in another accident at work, a road traffic accident, which resulted in his right thumb being bent backwards. It was really sore and he attended hospital. He was advised to take painkillers and do gentle exercise. According to the Claimant's first statement, the effects of that

accident lasted only a couple of weeks before his thumb resulted to the position that it had been in before the 2017 accident. I will return to this when I look at Mr Gillham's third substantive report.

73. In June 2017 the Claimant's personnel records confirm that he was offered an opportunity by his employers to progress to being a Class 2 HGV driver and that he discussed the offer with Mr Stevens. The record states that the Claimant was concerned about weekend working, but was reassured that it was a Monday to Friday role. The work was on the RCV (refuse collection vehicle). The record states that the Claimant "stated that he was happy where he was and felt that the RCV work was not for him." In his evidence the Claimant alleged that RCV work was heavy work, but Mr Stevens disputed that. I find that it was not particularly heavy work, but that the work or working conditions were not as congenial as the new route that Mr Murphy had been doing since September 2016. Therefore he was not tempted by the additional money and status it would have attracted. I do not find that any ongoing effects of the 2013 accident played a meaningful part in the Claimant's decision to decline this offer.

74. As at the date of his first statement (February 2018) the Claimant said that he still had pain in his right wrist and that his grip strength was nothing like it was before the accident. He estimated it at about half of what it was previously. He also got a pulling sensation in his thumb. He could not open the diesel cap on his lorry one handed and he struggled with heavy shopping bags.

75. So far as his left shoulder was concerned, he said in that statement "I can't raise my left shoulder any higher than shoulder height as it causes a lot of pain and a click and it makes me feel sick" (paragraph 42). As with his other statements, the witness statement was verified by a statement of truth.

76. In his February 2018 statement the Claimant said that he had to use a lot more of his body weight to lift heavy items. Although from September 2016 he was doing a lighter job (bins normally weighing 3 or 4kg), when he had the odd bin weighing 15kg he used his foot to start the lift and used his left, rather than his right hand, to lift. He struggled to lift them without assisted force.

77. At the end of the day his right wrist and thumb ached and stiffened up if he did not use them. His hand was also stiff first thing in the morning.

78. Mr Lyall, the Defendant's orthopaedic expert, examined the Claimant in May 2018, 4 years and 10 months post-accident. The Claimant described the accident to Mr Lyall. When he trod on the sharps pot, which was lying on its side, his foot shot out like a roller skate. He started to fall and put his right hand out. As he was falling he was struck in his right armpit by one of the sealed

units. He was also struck on the front of his left shoulder by a board. He fell to the ground and landed on his right hand.

79. Mr Lyall records an account of the aftermath of the accident that day and on the following days and weeks that mirrors and is consistent with that contained in the Claimant's witness statement. Following the removal of the cast he was given a splint as a precautionary measure and the Claimant told Mr Lyall that he used it daily at work for 2 years. He still used it when the wrist was painful or for lifting heavier items at work. After 2 or 3 sessions of physiotherapy (which did not help), and the treatment from the personal trainer recommended by his wife (which did help), the Claimant had not received any further treatment.

80. The Claimant told Mr Lyall that the bruising to his right armpit resolved fully after one month and had caused no further difficulties.

81. So far as the left shoulder was concerned, the Claimant had pain for 4 weeks. The pain then resolved. However, the left shoulder continued to click and grind if he raised his left arm above shoulder height, generally when lifting at work. The Claimant had therefore developed a different way of lifting without raising his left arm. Mr Lyall records that the Claimant told him that he had not lifted his left arm above shoulder height in the last 2 years or so, and not since he saw Mr Gillham, and that his left shoulder had not clicked in that time.

82. The Claimant continued to get a dull ache from the right wrist and thumb. Mr Lyall records him saying that the ache had "never been any better since the day they took the cast off" and his wrist "felt like a brittle twig". He stated that "he did not have confidence in its strength". The Claimant told Mr Lyall that he had undergone further investigation for his ongoing difficulties in the form of an ultrasound scan, but this showed no permanent damage. He also told him about changing his duties at work to lighter duties.

83. On examination Mr Lyall found tenderness over the volar aspect of the metacarpo-phalangeal joint of this right thumb and some lesser tenderness over the proximal phalanx of the thumb and over the interphalangeal joint. This tenderness reproduced the aching he described around his thumb. There was no tenderness in the areas of the scaphoid/anatomical snuff box. Mr Lyall found no abnormality of movement or instability.

84. Importantly from his perspective, he found that the girth of the right forearm was 27.5 cm and the girth of the left forearm was 26.5cm.

85. Mr Lyall used the JAMAR to test the Claimant's grip strength. He first did 3 straight tests on each hand to mirror what Mr Gillham had done. He obtained readings of 43, 46 and 40 kg on the left and 30, 25 and 25 kg on the right. Mr Lyall has helpfully brought the 3 sets of conventional JAMAR testing together

(2 by Mr Gillham and 1 by him) in a graph. They show that the left hand results are much more consistent that the right hand results. The right hand results are all substantially less than the left hand results, with the exception of the one reading of 43kg recorded by Mr Gillham when he tested the Claimant in 2016.

86. He also did a rapid exchange grip test. Whereas the results for the left hand went down as the test went on (highest (first) 44 kg and lowest (final) 30 kg), on the right the pattern did not have the same downward trajectory and the final reading (30 kg) was higher than the first 5 readings (ranging from 24 to 28 kg).

87. Mr Gillham's third examination of the Claimant took place in July 2018, 5 years after the accident. The Claimant informed him about the June 2017 accident and told him that he had changed to lighter duties at work as a result of persistent shoulder and wrist symptoms. His guitar playing and DIY activities remained impaired as before and he was restricted in some day to day activities because of the lack of strength in his right wrist.

88. However, although the Claimant told Mr Gillham about the June 2017 accident, he also told him that, despite attending hospital, "he did not had (sic) any time off work".

89. The hospital record for 17 June 2017 recorded that, as a result of the road traffic accident on 13 June 2017, his right thumb had been bent backwards. He had manipulated his thumb back, but had had a throbbing pain since. There was slight swelling and some bony tenderness. A soft tissue injury was diagnosed and he was discharged with advice to do exercises.

90. There was a further hospital attendance by the Claimant on 15 July 2017. This was not mentioned to Mr Gillham. The Claimant was recorded as complaining of abdominal pain for the last few weeks following the accident on 13 June 2017. It was noted that the patient lifts and pulls heavy objects and a hernia was suspected. When he gave evidence, Mr Gillham said that the possible hernia was not mentioned to him by the Claimant, that it was surprising that he could lift heavy objects and surprising that the Claimant had not mentioned this attendance to him.

91. Further, the Claimant's personnel records confirm that the Claimant had 3 days off work which he attributed to both the stomach pain and the hand injury he had sustained on 13 June 2017 (although he put it down as 13/7/17). He provided further details in a handwritten document dated 8 August 2017. In that document he stated that he was absent due to a stomach condition, thumb and wrist soreness and right shoulder blade issues. The latter problem was attributed by him to the lack of a back rest in a vehicle he was using. The first 2 issues were attributed by him to the road traffic accident. No mention was made of the left shoulder causing him to have time off work.

92. The Claimant denied in his evidence that in his first statement, which said that he had pain in his thumb for no more than a couple of weeks, and that it was now back to how it was before the road traffic accident, he had deliberately downplayed the effect of that accident. Further, he denied the suggestion that he had deliberately failed to mention the possible hernia to Mr Gillham because he thought that it might damage his case.

93. In his second statement dated 10 January 2019 (5.5 years post-accident) the Claimant dealt mainly with specific pieces of evidence relied upon by the Defendant. At paragraph 51 he stated that his injuries and restrictions remained as he had previously stated. He said that he still suffered from periods of pain in his right hand / wrist along with reduced grip strength. His right hand and wrist hurt when he lifted anything heavy. His left shoulder was mainly pain-free, save if he over-exerted, which he avoided. He said that he did not lift the shoulder joint above shoulder height because it "clicks / grinds" and made him feel nauseous.

94. On more physical days at work the pain in his wrist was aggravated, perhaps twice as much aching as usual. However, it would return to normal the following day. The aching could also become really uncomfortable when he was not using his wrist, such as when he was on holiday.

95. However, earlier in his statement (at paragraph 17) he said that, since he had returned to work, he had been able to carry out his job without any real restriction. He did not have a restriction lifting light weights. Although his job involved lifting clinical waste into large bins, the waste tended to be relatively light. He then went on to describe the aching that he repeated at paragraph 51 later in the statement.

96. He clarified his earlier statement and said that, whilst he could lift his left arm above shoulder height, he could not do so from the shoulder joint and he could not lift his arm into a completely vertical position. I bear in mind, however, that this statement was written after he had seen the CCTV from 9 June 2016 in particular.

97. The Defendant served a large amount of CCTV evidence from 2019. However, there was a conflict of evidence as to whether or not some of it showed the Claimant. In some cases the Defendant now accepts that it does not show the Claimant.

98. As with the earlier footage, I found that much of it was not particularly clear or helpful on the issues that I must determine. However, there was one point at which I find that the Claimant did raise his left arm well above the level that he has stated in his witness statement and oral evidence that he can. That is the CCTV date printed 07.08.2019 at 14.18, which shows the Claimant's arm raised

to about 150 degrees and holding a gate post. The other still from CCTV specifically relied upon by the Defendant (date stamp 04.07.2019 at 07.05) is too indistinct for me to reach any conclusion based upon it.

99. The other piece of CCTV that was of assistance was from 20 June 2019 (second CCTV from that date). The Claimant jumps off the tailgate of a lorry and, as he does so, he raises his left arm up and out in an apparently spontaneous movement and without any sign of hesitation or adverse effect.

100. The Claimant's third witness statement is dated very recently (16 October19) and that again dealt with specific allegations made by the Defendant.

101. The Claimant's wife's evidence, both in her statements and at trial, was broadly supportive of that given by the Claimant both in relation to the history of his injury and its effect upon him and in relation to the specific pieces of evidence relied upon by the Defendant which involve her in some way. I have already addressed the Facebook evidence which was the subject of much of her evidence.

102. In her oral evidence she was asked why, although she dealt with problems that her husband experienced with his right hand, she had not mentioned any ongoing issues with the Claimant's left shoulder. She said that he avoided getting into a position where it hurt and therefore she did not see it. He deals with things was how she put it. From her perspective it was the wrist that was more of a problem that she could see day to day.

103. In the course of her evidence she mentioned two instances of the effects of her husband's injuries. One was when he had returned to work and wished to start cooking again. They moved the plates so that they were easier for him to reach. The second was an incident when he was washing a window. He raised his arm too high and she saw him flinch and slowly lower his arm. That was in about October 2013. According to Mrs Murphy the Claimant had difficulties opening some objects and she said that there were restrictions of a personal nature that she did not wish to go into.

104. I have already dealt with the evidence of Mr Coetzer and Mr Stevens in so far as it is material to the issues in the case. Ms Ash merely produces the various Facebook exhibits and I do not need to address her evidence further.

Mr Gillham

Right Wrist / Thumb

105. In his first report in 2014 he thought it possible that the Claimant had sustained a ligament injury to his wrist (supported by a suggestion of a gap

between his scaphoid and the lunate in his right wrist). He was unable to give a diagnosis for the shoulder and recommended the further investigations that were subsequently undertaken. After reviewing the imaging he considered that the Claimant suffered a soft tissue injury to the right wrist with a possible bony injury. He would have suffered significant symptoms for up to 3 months and lesser symptoms thereafter. He would have recovered from the majority of his symptoms in his right wrist within 6 months, but that any symptoms persisting thereafter would be permanent. There was no increased risk of the Claimant developing arthritis. He had assessed the loss of grip strength at the time of his examination, based on his JAMAR testing, at 50%. It was this that gave rise to a potential disadvantage on the labour market.

106. In his second substantive report, Mr Gillham suggested that the Claimant's symptoms had progressed. However, in his oral evidence, he accepted that this was not so in so far as that suggested a deterioration in his condition. He also accepted that his finding of thumb tenderness was a new finding and represented a shift in the focus of his symptoms. Unfortunately, he was not asked about the referral in 2014 (before his first examination) in which the issues with the thumb specifically were first documented. In this report Mr Gillham noted an improvement in the Claimant's grip strength on testing (now a third reduction). He concluded that the Claimant had sustained a significant soft tissue injury to his right wrist and the reduction in grip strength was likely to be permanent. In his oral evidence he said that, by soft tissue, he was referring to possible ligament damage as he had stated previously. Although he referred to a theoretically increased chance of degenerative change as a consequence of the accident, his oral evidence made it clear that this was a negligible risk. Again, he said that the Claimant's disadvantage on the labour market was linked to his reduction in grip strength.

107. In his supplementary report dated 31 August 2017, Mr Gillham stated that it was likely that the Claimant sustained a stretching of the wrist ligaments and on the dorsal wrist capsule.

108. In his report dated 28 February 2018 (although it may be 2019 since it refers to Mr Lyall's report) he stated that he would not necessarily expect muscle wasting if the reduction in grip strength was around one third. However, in his oral evidence he agreed that, if there was a continuing reduction in grip strength of one half or one third, after a period of 5 years (i.e. from 2013) he would expect to see evidence of muscle wasting.

109. So far as the variation in the JAMAR results were concerned, he said that there is no responsive feedback or feel and therefore it is difficult to deliberately manipulate it. He also relied upon the fact that, apart from his single reading of 43 kg, the readings that he and Mr Lyall recorded were broadly consistent. He did not consider that a single measurement could be relied

upon, although he said in evidence that it was a cause for concern. However, in his oral evidence he did accept that the rapid exchange testing should normally result in a decrease in readings as the test went on due to fatigue, and he agreed with the description of the Claimant's readings for the right hand as unusual.

110. In his oral evidence Mr Gillham agreed that, if there was a significant reduction in grip strength of the order of 50% or 33%, then it would be expected that this would show up on an x-ray, although less significant impairments might not.

111. He was asked about Mr Lyall's evidence that he would "ordinarily expect full recovery after not more than six months at most". He agreed with this general proposition, but he said that, although that was the expectation for most soft tissue injuries, a cohort of patients would continue to suffer symptoms beyond that period, some on a permanent basis. It was impossible to predict who, although age could be a factor.

112. He was also asked about the CCTV footage showing the Claimant throwing bags of waste. The Claimant's evidence was that they were very light and Mr Gillham did not consider that this particular evidence was inconsistent with his complaint of a lack of grip strength.

Left Shoulder

113. In his first report Mr Gillham was unable to provide a diagnosis or prognosis for the pain that the Claimant was complaining of on abduction along with an audible and uncomfortable click. Following sight of the imaging (x ray and ultrasound) that showed no abnormalities, he concluded that the Claimant had suffered a soft tissue injury. It was possible that there were early degenerative changes that were not visible on the imaging. He attributed six months of symptoms directly to the accident. His ongoing symptoms might be related to the degenerative changes and were likely to be permanent.

114. At the time of his second report in 2016 he said in his report that the Claimant would have taken 12 to 18 months to recover from the soft tissue injury, but that symptoms from underlying degenerative changes were likely to have been advanced by 3 to 5 years.

115. Although Mr Gillham did not accept that the various Facebook pictures and CCTV relating to the shoulder were all necessarily inconsistent with the complaints being made by the Claimant between the dates of his first and second examinations, he did give the impression that he did not find the totality of the evidence entirely consistent with what he had been told. In particular, he

agreed that he would have expected caution in moving the shoulder to 90 degrees in someone who experienced the difficulties that the Claimant alleged.

116. Following his third examination, when the Claimant was making similar complaints about pain on abduction and a click, he maintained the period of 12 to 18 months for recovery and also considered that there was an advancement of symptoms due to underlying degenerative changes of 3 to 5 years.

117. However, when cross-examined, he agreed that his suggestion in his second report that the Claimant's symptoms had progressed was not in fact borne out by the evidence as he recorded it in his report. I understood him to concede that there was no reason to change his view as expressed in his original report following imaging. The third report following examination had also raised the possibility of the accident indirectly causing long term symptoms as a result of underlying degenerative changes. In cross-examination Mr Gillham said that this was a possibility rather than a probability. In re-examination, however, he appeared to go back to his original view as set out in his second and third substantive reports.

118. Mr Gillham accepted that he was currently subject to undertakings that included being directly supervised when carrying out shoulder surgery. The deficiencies in his practice included operative / technical skills, record keeping and relationships with colleagues and patients. The full details are set out in the GMC registration document. However, he continues to be a Consultant Trauma and Orthopaedic Surgeon. I reject the suggestion put to him by Ms Hughes that the undertakings mean that he is not a properly qualified and experienced expert.

Mr Lyall

Right Wrist / Thumb

119. Mr Lyall relied, in particular, upon the lack of muscle wasting and the inconsistent results on JAMAR testing to conclude that a) there was no objective evidence of a loss of grip strength and b) that the Claimant had used sub-maximal force when undergoing JAMAR testing.

120. This latter point is supported by the paper produced by him, "Sensitivity of the Jamar Dynamometer in Detecting Submaximal Grip Effort" by Ashford and others in the Journal of Hand Surgery. This deals with the conventional testing when 3 readings on each side are taken, rather than the rapid exchange testing. The conclusion of the authors is that the mean of the three results should be taken. If there is more than a 20% variation in those individual results, then it can be assumed that the patient is not exerting a full effort. However, when the detail of the paper is considered, their finding is that, even

with a variation of more than 20%, a significant percentage of participants (18%) were not faking as opposed to the percentage who were (57%). Further, and perhaps most importantly, the paper does not purport to explain why suboptimal effort would be applied.

121. Of course, there are patients who are deliberately failing to apply optimal effort. However, as Mr Lyall said in his evidence, there can be psychological and other reasons why someone might not perform optimally on testing. In this regard, I find that this paper needs the same health warning that comes with other testing in other areas, in particular the often relied upon Waddell signs in relation to spinal cases. A finding of variation in excess of 20% on testing does not prove dishonesty on the part of an individual. The variation may have a number of explanations and it is merely part of the evidence. It is not to be treated as something akin to a lie detector test.

122. Mr Lyall concluded that the Claimant suffered soft tissue injury to his right wrist. He stated that "I would ordinarily expect full recovery from a benign obscure soft tissue injury of this sort, and probably after not more than six months at most".

123. He also concluded that there was no medical evidence to conclude that the thumb problems were attributable to the index accident. He attributed them to the 2017 accident. Unfortunately, he was not taken to the 2014 record that indicates that thumb symptoms had developed by that time at least.

124. Mr Lyall was of the opinion that the various Facebook photographs and CCTV sequences of the Claimant were inconsistent with his reported complaints and restrictions. However, he repeated that, even without that evidence, his view was founded upon his finding of sub-optimal effort by the Claimant on JAMAR testing and the lack of muscle wasting. In relation to the former, he said on several occasions that, if the Claimant could exert 43kg on one occasion (as he did when tested by Mr Gillham for the second time) then he could do so consistently. He also relied upon the lack of fatigue pattern on the rapid exchange testing he undertook.

125. In his evidence Mr Lyall maintained his view in a forthright way. It was suggested that his report, which contained quotations from reports in the Claimant's records and noted matters such as the nature of his funding arrangement with his solicitor, betrayed a lack of objectivity on his part. He denied this.

126. I have come to the conclusion that the manner in which Mr Lyall compiled his report and gave his evidence did betray a certain lack of impartiality on his part. Selecting a quotation from a report from many years previously in the Claimant's records referring to him as an "amusing Liverpudlian" and another

suggesting that he gave “a vivid description of the litigation process” had no purpose it seems to me other than painting a certain picture. If, for example, the fact that the Claimant had made a previous claim was thought to be relevant from an orthopaedic perspective, then that could and should have been stated neutrally. Further, the reference to the Claimant’s funding of this litigation and that he sought legal advice promptly are, again, matters which are not relevant and their inclusion raises concern in my mind about Mr Lyall’s impartiality.

127. However, I was also concerned that Mr Lyall was prepared to give an opinion on the Claimant’s ability to perform certain tasks based on the original 9 June 2016 footage. Given its extreme limitations, I consider that any expert should have declined to proffer any opinion based on it.

128. I found the manner in which Mr Lyall gave his evidence to be too quick to dismiss possibilities advanced by Mr Wheatley on behalf of the Claimant. That being said, however, Mr Gillham essentially agreed with him concerning the two objective findings that he relied upon in reaching his conclusions (lack of muscle wasting and inconsistency on JAMAR testing).

Joint Statement of Experts

129. Before I turn from the expert evidence, I must mention the joint statement. It was barely mentioned in the course of the trial. The reason for that is to me obvious. It was prepared using agendas prepared by the parties. Those agendas, in particular, the one at the start of the joint statement, were more in the nature of a cross-examination of the experts. It is a worrying tendency and reflects a reluctance by parties (in this case, I deduce from the wording of the first part of the agenda, the Defendant in particular) to allow the experts to independently discuss and report on their areas of agreement and disagreement. By constraining them with such narrow and leading questions, the result was predictable – a document that merely entrenched previous positions and which did not allow the experts to identify overlaps in their respective positions and to clearly demarcate their true areas of disagreement with reasons. It was contrary to CPR 35PD9.3 which provides that “The agenda must not be in the form of leading questions or hostile in tone”.

130. I doubt that agendas are required in cases of this type at all. However, if they are, then they should cover broad topics such as nature and extent of injury, diagnosis, prognosis, treatment options, relevance of testing results and the like. If, following the joint statement process, there are any areas that have not been addressed or which need to be clarified, then that can and should be done by means of joint questions to the experts (preferably drafted jointly by the parties).

Conclusions About the Nature and Extent of the Injuries Sustained as a Result of the Accident

131. There is no dispute that the Claimant suffered a soft tissue injury to his right armpit from which he made a full recovery in a matter of weeks.

132. So far as the right wrist is concerned, there is agreement between the experts that the Claimant suffered a soft tissue injury to the right wrist. I did not understand Mr Lyall to be saying that all such soft tissue injuries must necessarily resolve within the 6-month timescale that he advanced. In so far as he was saying that, I do not accept his evidence on that point since it would fail to reflect the fact that, as Mr Gillham said in relation to this point, it is well known that some soft tissue injuries continue to cause symptoms, sometimes on a permanent basis, and the exact reason why is not well understood.

133. In this case, however, the objective evidence in the form of the lack of muscle wasting on the right arm and the combination of the variation in the conventional JAMAR testing by Mr Gillham in 2016 and the atypical results for the rapid exchange testing by Mr Lyall in 2018 lead me to the conclusion that, by mid-2016, the Claimant had little or no objective restriction in his right wrist or hand. That conclusion is supported, although only weakly bearing in mind the light weight of the bags, by his actions on the 9 June 2016 CCTV.

134. However, although the August 2013 examination reported the wrist to be pain free and the focus of the physiotherapy and personal trainer rehabilitation was on his shoulder, the March 2014 radiology report does support a continuing issue being present in relation to the right wrist area for the Claimant at that time as he reported to Mr Gillham a couple of months later. I do not find that the August 2013 Facebook photograph takes matters any further for the reasons given by the Claimant – he was on medication and not using his upper limbs at that time. Further, and most importantly, the JAMAR testing undertaken by Mr Gilham on that occasion did not have the variation in results that was so important in 2016.

135. I had the opportunity to observe the Claimant and his wife, not only when they were giving their evidence, but also when they were listening to other evidence and submissions.

136. I deal with the Claimant's wife first. I came to firm conclusion that Jacqui Murphy was a careful and straightforward witness who was genuinely doing her best to assist the Court. She did not embellish her evidence when, if she was merely seeking to bolster her husband's case, she could have done so. For example, she did not seek to suggest that she could give examples of issues concerning her husband's left shoulder beyond the months immediately after the accident. So far as his right wrist and hand were concerned, she was clear

that he had had issues for a considerable time following the accident and that he continued to do so from her perception.

137. The Claimant himself was a less articulate witness than his wife. He plainly found the Court process difficult and he did, on occasions, become agitated and engage in questioning rather than answering. However, ultimately I came to the clear conclusion that he was a working man who did not always express himself well, who felt great distress at the accusations being levelled at him by the Defendant, and who genuinely perceived himself to have the ongoing restrictions that he described. I accept his evidence that, for example, he continues to use a resistance band to strengthen what he perceives to be an ongoing vulnerability or weakness in his right hand. I also accept that he will still use the splint that he was provided with at the outset.

138. Overall, so far as the right hand is concerned, I find that the Claimant suffered a soft tissue injury to his right hand, probably involving the tendons. That resulted in pain and tenderness for a number of months. Thereafter the Claimant continued to experience a reduction in grip strength that continued well beyond the normally anticipated 6-month recovery period such that he was still experiencing genuine and objectively verifiable difficulties at the time of Mr Gillham's first examination 11 months post-accident.

139. So far as the thumb is concerned, although the focus of the injury (scaphoid / anatomical snuff box) was in a lay person's terms in the right sort of area, in the absence of specific evidence from the experts on the point and in view of the lack of reference to the thumb prior to March 2014, although I find it is the Claimant's genuine perception, looking back over time, that he suffered thumb problems from the time of the accident, I am unable to find on the balance of probabilities that the thumb issues are related to the material accident. The ongoing pain and discomfort in the Claimant's thumb, which is probably related to underlying degenerative changes in the joint, do help to explain why the Claimant continued to perceive himself as suffering pain in that limb. In his own mind, the original injury and the thumb issues that developed are all one and the same.

140. I find based on the totality of the evidence that from an objective medical point of view the Claimant's hand / wrist injury had largely recovered by mid-2016. In other words, from a physical perspective, I find that the Claimant was capable of exerting normal or near normal grip strength without material pain or restriction by that time (save the issues that he had developed in his right thumb).

141. However, in my judgment the Claimant genuinely continued to believe that he had an ongoing restriction in his wrist and that his thumb issues were linked to the accident. Whilst his performance on the JAMAR testing was

probably sub-optimal, I do not find that that was as a result of a deliberate or conscious approach to the testing. I find that, as he told me, he believed that he was applying full effort when he was tested by each of the experts.

142. Further, although the Claimant has been using his hand for some tasks involving gripping since at least mid-2016 (as shown on 9 June 2016 CCTV), he nonetheless still genuinely perceives that he has an ongoing problem. He continues to use the resistance band and the splint as a consequence. He continues to make adjustments because of his fear that his hand / wrist are not strong enough even though, objectively speaking, that fear is unfounded.

143. As Mr Wheatley submitted, it may well be that the Claimant had a perception that he had suffered a serious hand injury based on the fact that it was originally suggested that he had a scaphoid fracture, he was placed in a cast and thereafter given a splint. His evidence concerning his discussion with his GP about scaphoid injuries, namely that there was nothing that could be done and he would have to live with it, may well have reinforced the idea in his head that he had permanent damage which would not get better.

144. In the absence of psychiatric evidence to attribute the Claimant's ongoing perception and concern to the material accident, however, I consider that I must assess damages on the basis of the objective reality of the situation concerning the hand / wrist.

145. I do so on the basis of 12 months significant symptoms followed by a gradual recovery over a further 12-18 month period, with any residual objective symptoms thereafter being minimal and / or not attributable to the accident.

146. There is agreement by the experts that the Claimant experiences a loud click when he raises his shoulder above 90 degrees. I accept his evidence that this can on occasions be painful, even now.

147. However, although the Claimant's genuine perception has been that he restricts his use of his left shoulder because of a wish to protect it and a wish not precipitate that discomfort or click, I find that he can and does use the shoulder to a greater extent than he appreciates.

148. In my judgment the soft tissue injury to the shoulder was the source of significant difficulty for the first 6 to 12 months or so, particularly whilst the Claimant was undergoing treatment and investigations. Whilst he could physically lift his arm above the 90 degree mark, he would generally avoid doing so. There would be occasions, when the arm was supported (e.g. by having his arm across the sofa or around someone's shoulders), when he would voluntarily adopt a position approaching, or possibly going beyond, 90 degrees.

149. Over time the soft tissue injury to the shoulder improved such that the Claimant used it spontaneously on more frequent occasions. However, as with the hand / wrist, I find that he genuinely did not consciously appreciate that he was doing so. It is a frequent observation of Courts that injured persons, particularly when they perceive that someone else was to blame for their predicament, can have a distorted perception of their abilities or lack of abilities. They have got into the mindset of being injured and that self-perception remains even after the injury has, from a clinical objective point of view, recovered. That is not because those people are being dishonest. Rather their genuine perception of reality is distorted.

150. Taking into account all of the evidence, including my assessment having seen and heard the Claimant give evidence, I find that this is the case with this Claimant. He genuinely does not appreciate that he uses his left shoulder to a much greater extent than he realises. Even when he was shown the CCTV clips to which I have referred earlier in this judgment, he cannot see what the rest of the Court could see.

151. My finding is that, from an objective perspective, the shoulder injury caused acute symptoms and restrictions for 12 months which then largely resolved in terms of function over the following 12 to 18 months. However, the Claimant continues to suffer a click, which is uncomfortable on occasions, and which is in my judgment attributable to the accident.

Fundamental Dishonesty

152. 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."

153. The burden of proof lies on the Defendant.

154. Both parties are agreed that the test for dishonesty is that in the Supreme Court decision in *Ivey v v Genting Casinos Limited (t/a Crockford Club) [2017] UKSC 67.* The relevant test is set out at paragraph 74 by Lord Hughes:

"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."

155. Ms Hughes on behalf of the Defendant sought to argue that, even if a person genuinely believed that they had a particular disability or symptom, they would still be dishonest in saying that this was the case if a reasonable person in possession of the same facts would not hold such a belief. With respect to Ms Hughes, that is to conflate the two stage approach.

156. In my judgment the first question is to ask what the Claimant believed. If he did not genuinely believe that, for example, what he put in his witness statement or what he said in his evidence, was true, then the next part of the exercise is to ask whether what he did (making the statement) was dishonest by the standards of ordinary decent people. The question of reasonableness goes to the question of whether his belief is genuine at the first part of the exercise. However, if a belief is genuinely held, even if it is unreasonable from an objective standpoint, then it is not dishonest to state that belief.

157. In this case, as I have set out above, I find that the Claimant genuinely believed and believes that he has suffered ongoing problems with his right hand / wrist and his left shoulder as set out in his witness statements, as reported to

the medical experts and as advanced in his evidence before me. Further, I find that the Claimant genuinely believed that he was applying full effort when he underwent the JAMAR testing by both Mr Gillham and Mr Lyall. Further, I do not find that he deliberately or consciously misled either of the experts, either by what he said (e.g. not lifting his arm above shoulder height for 2 years when he saw Mr Lyall), or by what he failed to say (e.g. not mentioning the investigation for a possible hernia to Mr Gillham).

158. Whilst I have found that, from an objective perspective, he has recovered from the significant effects of the accident, save for the uncomfortable clicking on occasions from his shoulder, I do not find that he knowingly put forward a case so far as his injuries were concerned that he knew or believed to be untrue. In those circumstances, I do not find that he has been fundamentally dishonest.

159. For the avoidance of doubt, if I had reached a different conclusion on the issue of dishonesty, then such dishonesty would in the context of this case clearly have been fundamental dishonesty.

General Damages for Pain, Suffering and Loss of Amenity

160. I have set out my findings above. I bear in mind that there is a degree of overlap and that I must have in mind totality. Individually I find that the wrist injury is in category (d) and the shoulder injury in category (c).

161. Overall, I consider that an award of £9,000.00 reflects general damages for pain, suffering and loss of amenity having regard to the nature and degree of symptoms and their duration viewed objectively.

162. Interest from the date of service should be calculated by the parties.

Loss of Earnings

163. The Claimant's figures were not challenged in evidence and I allow £184.71 as claimed.

Recoupment of Earnings

164. Again the figures were not challenged and I allow £2,943.36 as claimed.

Care and Assistance

165. Neither the Claimant nor his wife were challenged about their evidence about the care and assistance provided. However, the basic rate is more appropriate (less 25% for gratuitous care).

166. I therefore allow £161.45.

Treatment Fees

167. I accept the evidence of the Claimant concerning the sums paid and the reasonableness of incurring these costs. I allow £455.00

Travel Expenses

168. At 45 pence per mile I allow £30.20.

Purchased Items

169. I allow in full at £42.95.

Miscellaneous

170. In the absence of a breakdown or specific evidence I allow £10.00

Total Past Loss

171. I allow a total of £3,827.67 for past losses.

Interest

172. The agreed rate is 1.59% which amounts to £60.86 interest on past losses.

Disadvantage on Labour Market / Loss of Earning Capacity

173. In view of my findings, I do not find that there is any disadvantage on the labour market or loss of earning capacity caused by the accident.

Conclusion

174. Subject, to argument on ancillary and other outstanding matters, the total award is £12,888.53 plus interest on general damages.

Her Honour Judge Catherine Brown

The County Court at Canterbury

21 November 2019