Neutral Citation Number: [2017] EWHC 2772 (QB)

Case No: HQ16X03331

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2017

Before :

THE HON. MR JUSTICE SPENCER

Between :

Aviva Insurance Ltd	**Claimant**
- and -	
Aleksandar Kovacic	**Defendant**

William Featherby QC (instructed by **DWF LLP**) for the **Claimant**
The defendant appeared in person

Hearing dates: 16th and 17th October 2017

Approved Judgment

Mr Justice Spencer :

Introduction and overview

1. This is an application by the claimant, Aviva Insurance Ltd ("the insurers"), to commit the defendant, Aleksander Kovacic to prison for contempt of court. He is now 43 years old. The application arises from his claim for damages for personal injuries sustained in a road accident on 24th March 2010 in which he undoubtedly suffered serious injuries in a head-on collision. The allegation is that he dishonestly exaggerated the extent of his continuing disability in order falsely to inflate his claim for damages. The accident was the fault of the other driver. She died as a result of her injuries. The insurers admitted liability on 15th November 2011. Proceedings were issued on 23rd January 2013.

2. The particulars of claim and the provisional schedule of special damage and future loss were each verified by a statement of truth signed by the defendant, dated 16th January 2013. The total value of the claim, excluding general damages, was pleaded at a little over £1 million. On 27th June 2013 the defendant signed a statement of truth verifying the facts in his witness statement. He said that as a consequence of his injuries he could not walk very far, only about 30 metres with a walking stick on a good day. He said he could not carry heavy things. He could not help with the children. He did not think he would drive again. He had tried to drive but could not control the clutch with his left leg. He might be able to drive an automatic car.

3. Unbeknown to the defendant, by the time he signed that witness statement the insurers had undertaken covert video surveillance of the defendant between 19th March and 7th May 2013. There was further surveillance in July and August 2013. The surveillance evidence contradicted the defendant's description of his continuing disability. It showed that he could walk far greater distances, and without a stick. He could carry heavy items. He walked his children to school. He regularly drove his car without difficulty. Some 7 weeks before signing his witness statement he had driven the family to Skegness on a trip to the seaside, a distance of around 90 miles.

4. The defendant had been examined by a large number of doctors and other experts. The continuing disability he described to them was also contradicted by the video surveillance. For example, on 16th April 2013 he can be seen in the morning walking the children to school, moving easily and without a stick. The same afternoon he can be seen travelling by taxi to London for an examination by the insurers' orthopaedic surgeon. He can be seen walking with apparent difficulty, now with a stick, and apparently struggling to get in and out of the taxi.

5. The video surveillance evidence was served on the defendant's solicitors in September 2013. In due course the insurers made a Part 36 offer in the sum of £350,000, which was rejected. In February 2015 the case came on for hearing of the assessment of damages, before His Honour Judge Bidder QC, sitting as a judge of the High Court. By that stage the defendant's solicitors had withdrawn and he appeared unrepresented. The judge heard evidence from two of the doctors instructed on behalf of the insurers. The defendant gave evidence and called a witness.

6. On the fourth day of the hearing the judge gave his judgment. He found that the defendant had grossly exaggerated his continuing disability, as the video surveillance demonstrated. He was satisfied that the defendant had persistently told experts a succession of quite calculated

lies. He had deliberately attempted to portray himself as someone who was more seriously disabled than he really was. He rejected the defendant's evidence except where it was fully supported by reliable other evidence.

7. In the upshot the judge awarded damages of only £95,114, including £35,000 general damages for pain suffering and loss of amenity, £31,000 for past loss of wages, £20,000 for disadvantage on the labour market and £5,000 for past care. The defendant was ordered to pay the insurers' costs after 30th December 2013 (21 days after the Part 36 offer), and the costs of the surveillance evidence, all on the indemnity basis.

8. At the conclusion of the judgment counsel for the insurers, Mr Featherby QC, invited the judge to indicate whether he was satisfied to the criminal standard of proof in respect of the findings of deliberate exaggeration and dishonesty. The judge made it clear that he was so satisfied.

9. The defendant initially indicated that he did not propose to appeal. He changed his mind. He served an appeal notice and permission was refused on the papers. He renewed the application at an oral hearing on 19th July 2016 when the application for permission to appeal was finally disposed of.

10. In view of Judge Bidder's findings the insurers had always intended to apply for permission to bring proceedings for contempt. But for the delay caused by the appeal, those proceedings might well have been heard and determined by Judge Bidder himself. In the event the application for permission to bring these proceedings was not issued until 23rd September 2016. It was served on the defendant on 10th October 2016, just over 12 months ago. He was informed that he was entitled to apply for legal aid to be represented at the hearing. It is apparent that he took steps to obtain representation but at the permission hearing on 5th May 2017 he was unrepresented. In advance of that hearing the defendant had served a document headed "reply to the particulars of contempt", dated 31st March 2017, taking issue with the judge's findings and denying all the allegations of contempt.

11. At the hearing on 5th May 2017 Sir David Eady granted permission to bring contempt proceedings and gave directions. Importantly, he directed that the findings of Judge Bidder should stand and be admitted as evidence in the application, and to the standard of proof required for a finding of contempt of court.

12. Sir David Eady also directed that by 28th July 2017 the defendant should serve any affidavit in reply, and an affidavit from any other witness he proposed to call. No such affidavits were served.

13. The hearing before me commenced at 2pm on Monday 16th October. The insurers were represented by Mr Featherby QC. The defendant was unrepresented. He did not immediately ask for an adjournment to obtain representation but I explored that matter fully and concluded that the hearing should proceed, for the reasons explained below.

14. The particulars of contempt were set out in a schedule, which is appended to this judgment. The particulars run to 69 separate allegations, grouped under the following seven headings relating to different aspects of the defendant's alleged continuing disability:

(a) variability of his condition

(b) his ability to walk

(c) his use of walking aids

(d) his ability to bend

(e) his use of his arms

(f) his care for himself and others

(g) his driving and cars.

15. Within these groups there are (1) allegations of false statements made to the doctors and other experts as recorded in their reports and (2) allegations of false statements in the particulars of claim, the schedule of loss and his witness statement, all verified by signed statements of truth.

16. During the course of the hearing Mr Featherby provided, at my request, an annotated version of the same schedule helpfully setting out cross-references to the trial bundle, with the relevant passages from the judgment set out at the end of each group of allegations.

17. Mr Featherby called no witnesses, save for tendering the claimant's solicitor, Mr Ashmore, who had given formal evidence by affidavit. Mr Featherby relied entirely on the findings of Judge Bidder as set out in his judgment. He contended that I was bound by the judge's findings of fact, and that the allegations of contempt were unanswerable. I was provided with the DVD compilation of the surveillance evidence, which had been used at trial. I have watched the whole of the video surveillance evidence and studied it carefully.

18. The defendant elected to give evidence. He expanded upon the points raised in his reply to the particulars of contempt. He produced two lever arch files of documents, which were essentially the bundles compiled for the appeal. He took me to a handful of the documents from those bundles to illustrate points he was making. The defendant was cross-examined briefly by Mr Featherby.

19. Following Mr Featherby's closing remarks I afforded the defendant the opportunity to make any further points, so that he had the last word. In view of the volume and complexity of the material, I reserved judgment.

Lack of representation

20. It is regrettable that the defendant had been unable to obtain representation for the hearing. He provided me with copies of e-mails spanning the period 21st October 2016 to 19th May 2017 which show that he had attempted to find a solicitor to represent him, or alternatively representation through the Bar Pro Bono Unit. I was also provided by the insurers' solicitors with a bundle of copy e-mails passing between themselves and the defendant and solicitors acting for the defendant, spanning the period 22nd March 2017 to 13th October 2017. From these e-mails it is evident that by 17th July 2017 a firm of solicitors in Milton Keynes was on the record as acting for the defendant, a representation order having been obtained from the Legal Aid Agency. On 12th September 2017 those solicitors informed the insurers solicitors that they were no longer acting for the defendant "due to professional embarrassment". They had asked the defendant to notify them within 14 days whom he intended to instruct instead, so that legal aid could be transferred to the new solicitors. It

seems that the defendant was unable to find another solicitor to act. On 26th September the solicitors informed the insurers' solicitors that they had applied to the Legal Aid Agency for the representation order to be withdrawn. On 29th September they informed the insurers' solicitors that they were returning the papers to the defendant via a tracked and secure delivery service that day. He had not advised them of any new firm to whom his case was to be transferred. As they had applied to withdraw legal aid, it would be for the defendant to instruct new solicitors.

21. The defendant told me at the start of the hearing that there had been a substantial delay in the solicitors returning his papers to him. He had received them only on 6th October. He had tried to find other solicitors to represent him, and approached the Bar Pro Bono Unit, but without success.

22. I took the view that it was not appropriate to adjourn the proceedings to enable the defendant to attempt to obtain further representation. The history of the proceedings demonstrated that it was most unlikely he would find other solicitors or other representation in the near future. It was almost exactly a year since he had first been served with the application for permission to bring these proceedings. He had been represented by solicitors with the benefit of legal aid, who had to withdrawn for reasons of professional embarrassment. The whole proceedings had already been delayed very substantially because an unmeritorious appeal had been pursued. Two days had been set aside for the hearing. It was not in the interests of justice, and would not further the overriding objective, for the case to be adjourned further.

23. In deciding that the case should proceed I was also mindful that there were no witnesses to be cross-examined, and that the defendant was well able to give evidence on his own behalf (even though no affidavit had been filed). He knew the case inside out, and was very familiar with the papers. As it turned out the defendant was well able to present his arguments and make his points clearly. There were no issues of law requiring professional submissions on his behalf. I judged that he would not be disadvantaged by the case proceeding, and that proved to be correct.

The relevant legal principles

24. In this application for committal the insurers allege two forms of contempt, each of which is technically distinct in law, although in this case they overlap. First they allege interference, or attempted interference, with the due administration of justice by the defendant's making false statements about his continuing disability to doctors and other experts who examined and interviewed him. That form of contempt requires, in this case, the insurers to prove that:

> (i) the defendant deliberately set out to deceive the doctor or expert in question by falsely representing the extent of his continuing symptoms, either in the physical manner of his presentation or by lies told by the doctor or expert, or both;
>
> (ii) the defendant must have intended thereby to interfere with administration of justice ;
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> (iii) the conduct complained of must have had a tendency to interfere with the administration of justice.

For examples of contempts of this nature, see *Airbus Operations Ltd v Roberts* [2012] EWHC 3631 (Admin), and *Homes for Haringey v Fari* [2013] EWHC 3477 (QB).

25. The second form of contempt alleged in this case derives from CPR 32.14 (1) which provides:

> "(1) Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth."

CPR part 22 provides that among the documents which must be verified by a statement of truth are a statement of case (which includes particulars of claim), a schedule of expenses and losses in a personal injury claim, and a witness statement. The contempts alleged in this case include examples of false statements in all three such documents.

26. In relation to this form of contempt it must be proved that:

> (i) the statement in question was false;
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> (ii) the statement has, or if persisted in would be likely to have, interfered with the course of justice in some material respect;
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> (iii) at the time it was made the maker of the statement
>
> (a) had no honest belief in the truth of the statement; and
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> (b) knew of its likelihood to interfere with the course of justice.

These principles are well established on the authorities, and were confirmed (for example) in *AXA Insurance UK plc v Rossiter* [2013] EWHC 3805 (QB).

27. The standard of proof in respect of each of the elements of contempt is, of course, proof beyond reasonable doubt: the criminal standard of proof. The burden of proof is on the party who bring the proceedings for contempt, in this case the insurers.

28. It is important in a case such as this to concentrate on the nub of what is complained of at its most serious, rather than to consider and adjudicate on every detail of an oral or written statement which is alleged to have been false. The real thrust of this application for committal is that the defendant quite deliberately set out to deceive the doctors and other experts about the extent of his continuing disability, and that he verified by a statement of truth assertions of fact consistent with the things he had told the doctors and other experts knowing those statements to be false. I do not propose to make a finding in respect of each and every one of the 69 allegations of contempt but, even if it is not found to be a specific contempt, the fact that the defendant made a particular statement to more than one doctor or other expert may well provide evidence to support the inference that the central false statement was made quite deliberately knowing it to be false and knowing that it was likely to affect the value of the claim.

The factual context of the injuries and continuing disability

29. The injuries the defendant sustained in the accident, and the progress of his recovery, were set out by Judge Bidder at paragraphs 21 to 33 of the judgment:

> "21. At the time of the accident, Mr. Kovacic was employed as a senior support worker with Community Care Solutions Ltd. He worked with autistic adults with learning disabilities. The following summary of injuries were identified on his admission to the accident and emergency department. This can be seen from Mr. Morley's report, trial bundle 1, p. 13: Fracture of the right scapula; fractures of the right second rib; a proximal segmental fracture of the right ulna; Comminuted supracondylar fractures of both femurs; compound left tibial plateau fracture; rupture of the patella tendon in the left knee; avulsion of the right perineal retinaculum; right subtalar dislocation; fractures of the transverse processes between L2 and L4 in the spine; soft tissue trauma, particularly around the left knee.
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> 22. The claimant was admitted to the Intensive Care Unit. On the same day, he was then taken to the theatre where his wounds were excised, debrided, and the left femoral condyles were fixed internally. He was then immobilised in an external fixator. The femoral condyles were reduced and compressed with clamps and held together with a screw. The same approach was taken with the tibial plateau. The left patella tendon was partially repaired and the knee joint covered and closed. There were then further extensive procedures in theatre the next day, when the distal femurs, left and right were plated. There was an open reduction and internal fixation of the left tibial plateau. The left patella tendon was repaired, and a flap covering the left knee was undertaken by the plastic surgeons, with a split skin graft from the left thigh.
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> 23. A further operation was carried out on 31st March 2013, when the right ulna fracture was reduced and fixed with a locking plate. He was transferred to Bedford hospital where he stayed for two weeks before returning home, non weight bearing at that stage. His surgical wounds had healed by 27th May 2010, though there were some infections at the thigh donor site. The fractures, however, were in good position. Nerve conduction studies, which have taken place in this case, revealed a left perineal nerve palsy.
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> 24. On 1st July 2010, he was reviewed and referred to physiotherapy. It was also noted that the right elbow was stiff. In August 2010, it was noted that the femoral fractures were consolidating and he was allowed to start weight bearing on the right side and partial weight bearing on the left.
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> 25. As at 28 September 2010, he was able to walk into the clinic, fully weight bearing on the right leg, and partially weight bearing on the left. That, in itself, was a remarkable achievement, due to the claimant, and also due to the expert medical treatment that he had received. In November 2010, the metal work was removed from the

left tibia. On 8th March 2011, he was said to have been able to walk into the clinic with a normal gait and no inflammation. In July 2011, his right elbow was re explored and was released.

26. By the time Mr. Morley saw him, on 16th April 2013, he had been discharged from hospital, was receiving physiotherapy and some psychological report, and had been seen by an orthotist by whom he had been given an above knee stocking.

27. When Mr. Kovacic was returned home, after being released from hospital, he suffered very great pain upon being carried into his home by the ambulance staff. There was a delay in providing him with special equipment to help him get up and downstairs. Initially he was forced to use the bedroom he shared with his wife, for bathing toileting, and sleeping, and his children were also sleeping in the same room in cots. Later, he slept in a single bed in the lounge. He used a commode. He had infections in his lower legs.

28. In his statement, he says that it was not until early 2011 that he began to use crutches around his house. As at his statement on 27th June 2013, he said that he was still suffering from a nerve palsy which caused foot drop. He is ambidextrous. He writes with his left hand but plays all games with his right hand. His employment was terminated on 1 March 2012.

29. As to his background, he qualified as a teacher in Belgrade, specialising in challenging behaviour, and he worked there as a teacher for about four years before coming to England. Prior to the accident that I have indicated, he worked in a residential home for adults. He took care of those clients, organised their day, and arranged for them to attend schools and day centres. He organised cooking, gave out medication and looked after the books.

30. In his statement, he said that he loved his job very much. He claims that had it not been for the accident, he would have achieved the role of deputy manager and later, manager. By the age of 50 he contends that he would have become an area manager. He told Mr. Morley that he would like to retrain and work as a social worker. Before the accident, he used to enjoy playing tennis but has not returned to that.

31. Importantly, he told Mr. Morley, at his examination on 16th April 2013, that he his condition had not improved in the past one to one and a half years. Neither did he indicate that his condition had worsened. In other words, he had reached a plateau from about mid October 2011 to mid April 2012, and as the balance of the evidence strongly establishes, was as fully recovered as he was going to be by the end of 2011.

> 32. As he accepted in cross examination, at an examination on 20th February 2012, he told Dr Reid, the psychiatrist instructed on his behalf, that his recovery had plateaued, see trial bundle 1, p. 237. He also told Mr. Reid that he was concerned that his pain was plateauing and might be worsening, but reported that there had been no improvement in his physical condition over the last three to four months. Again, he told Mr. Osborne, the orthopaedic surgeon, instructed on his behalf, at an examination on 31st May 2012 that he did not feel that there had been any improvement in his condition since October 2011. Mr. Osborne noted that he had undergone surgery to his right elbow in June 2011, which had resulted in an increased range of right elbow movement. There is, therefore, and I have not quoted all of it, consistency in the evidence that in the period from mid October 2011 to mid April 2012, and most probably by the end of 2011, his physical state had improved as much as it was going to. The real question is to what extent had it really improved.
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> 33. On the basis of that evidence, there really should be very little difference between the condition of the claimant on the video surveillance evidence, taken from March to August of 2013, and that which it was in December 2011.On the balance of probabilities, I find that there was indeed no significant difference."

30. The defendant was examined and/or interviewed by the following doctors and other experts on the dates set out below. All were instructed on behalf of the defendant himself, save for Mr Morley, Dr Master and Ms Makda (as indicated).

(a) Mr Osborne (orthopaedic surgeon) on 26th November 2011

("Osborne 1")

(b) Dr Read (psychiatrist) on 20th February 2012 ("Read 1")

(c) Mr Osborne (orthopaedic surgeon) on 31st May 2012 "Osborne II")

(d) Mr Jenkins (vascular surgeon) on 26th June 2012

(e) Ms Gowings (care expert) on 11th October 2012

(f) Mr Miller (accommodation expert) on 12th December 2012

(g) Dr Cockerell (neurologist) on 30th January 2013

(h) Mr Morley (orthopaedic surgeon) on 16th April 2013 (instructed by the insurers)

(i) Dr Leng (neuropsychologist) on 9th May 2013

(j) Dr Read (psychiatrist) on 9th July 2013 ("Read II")

(k) Ms Makda (care expert) on 5th August 2013 (on behalf of the insurers)

(l) Dr Master (psychiatrist) on 14th August 2014 (on behalf of the insurers)

(m) Mr Osborne (orthopaedic surgeon) on 20th August 2013 ("Osborne III")

The defendant admits making to these doctors and other experts all the statements which they attribute to him, as set out in their various reports.

31. Many of the reports from the doctors and other experts (listed above) were, in any event, served with the particulars of claim, and to that extent formed part of the statement of case which was verified by a statement of truth signed by the defendant.

The surveillance evidence

32. The surveillance evidence consisted of a compilation of video recordings, in total lasting 1 hour 22 minutes. There was surveillance on the following dates in 2013: 19th and 22nd March, 16th April, 7th May, 4th, 5th and 9th July, 13th and 14th August.

33. The judge summarised the effect of the surveillance evidence at paragraphs 45-54 of the judgment:

> "45. It is now important that I should summarise the DVD surveillance evidence and give my view on the claimant's credibility. The DVD is described accurately in a summary of surveillance evidence prepared on behalf of the defendants. Apart from the video on 16th April 2013 and only in the afternoon of that day, when the claimant is filmed walking he does so without a stick. He has a noticeable but not heavy limp. He walks with his feet splayed with a rather wide gait. From time to time, particularly starting from a standing position and moving to walking, he rather jerks into motion. There is no obvious sign he is in pain, but I remind myself that that might not be obvious on his face. He rarely smiles in the video, but that, having seen him in court, and I observed him talking to his wife on numerous occasions, is his normal demeanour.
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> 46. On a number of occasions, he walked back and forward to his young daughter's school. There was no obvious gap between his arrival there and his return. He told me, in evidence, that from his house to the entrance door of the school was some 40 metres so that the overall journey was 80 metres. Again, on a number of occasions, he was shown getting into an out of and driving his Volkswagen hatchback. He got in and out of that car completely easily with no apparent stiffness or awkwardness. He chose, on occasions to take the car to do some light

shopping at two separate supermarkets. He can be seen inside the stores carrying a supermarket basket, selecting items and looking comfortable walking around the supermarkets and queuing patiently without shifting awkwardly on his legs.

47. On 7th May, he is seen carrying, using both arms, respectively a child's car seat and possibly another car seat, it is not entirely clear from the video, from his car, and later a large wooden board, a large and heavy looking sheet of glass, and in evidence he confirmed it was heavy, and a metal table frame.He subsequently fills the car with petrol, using his right hand. He later drives his children to the seaside at Skegness, a journey of some 90 miles. This was a treat on his birthday. He is, on this day, seen bending easily into the car to the ground and quickly and instinctively to the ground to pick up something which falls from the door pocket of the car. He walks to and along the beach and is seen lying down, though there is no film, I confirmed this with Mr. Featherby, of his getting down on to the beach, a point which the claimant contended was suspicious of selective filming by the surveillance experts. He walks slowly and behind his family up a quite steep sand dune. He later, drives back to his home from Skegness.

48. On one shopping journey, he is seen to carry easily, in his left hand and transferring it for a couple of steps to his right hand, a six pack of two litre plastic bottles of mineral water, back to his car, a weight of about 12 kilos.

49. Generally speaking, the ability of the claimant to walk without a stick, to go out regularly and unaccompanied, to bend, to carry quite heavy weights with both hands and arms to go shopping for modest amounts of shopping, to drive out of choice, getting in and out of his car with ease, is at very striking contrast with his description of his capacity to every expert who examined him at around or after the time the videos were taken.

50. The most obviously striking piece of observation is on the afternoon of 16th April 2013. That afternoon he had an appointment to see Mr. Morley in his Harley Street surgery. The defendants organised a taxi at the claimant's request, to collect him and his wife, to take them to London to the appointment. He is filmed being collected by the taxi near his home and getting into the taxi. He is a walking with a very heavy limp, holding and using a stick in his left hand. He gets into the taxi with great difficulty, on the rear passenger side, with much apparent difficulty in putting his left leg into the taxi. He is accompanied by his wife.

51. At Harley Street, he walks with a heavy limp, and also when the taxi stops for about half an hour at a service station again he gets into the taxi awkwardly.

> At no other stage in the lengthy surveillance, can he be observed to act in a way remotely similar to that shown on the afternoon of 16th April 2013.
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> 52. When I invited him at the start of his evidence to supplement his witness statements by commenting on the video evidence, the claimant told me that the DVDs, which, in his words and I quote, "look as if nothing was wrong with me" were unrepresentative. He said he did not take a stick with him when accompanying his children because he did not want his children to see him using a stick. He said he had to sit down before and after the visits to the school.
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> 53. He was not shown actually getting to a lying down position on the beach and that had that been done it would have shown him doing and I quote "very strange acrobatic moves which might appear laughable or awkward."The videos did not show his wife's brother in law, Mr. Grbic and children helping him put the large table and other objects into his VW.
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> 54. The day he drove to Skegness was his birthday and was not a normal day. He had difficulties in driving, in operating the clutch and in sitting in one position for a long time, and with pain in his left arm."

The evidential status of the judge's findings

34. The order made by Sir David Eady on 5th May 2017, when permission was granted to bring this application to commit the defendant for contempt of court, was that:

> "For the avoidance of doubt, the findings of HHJ Bidder QC in his judgment delivered on 19th February 2015 shall stand and be admitted as evidence in the application, and to the standard of proof required for a finding of contempt of court for the purposes of the application to commit the defendant to prison. To that end the transcript of the judgment... shown to the court today shall be admitted as evidence as Judge Bidder's judgment."

35. Mr Featherby submits on behalf of the insurers that the defendant cannot, in these proceedings, go behind the judge's findings set out in the judgment. He submits that the doctrine of *res judicata* applies, and that I am bound by the judge's findings. In other words where, for example, the judge has made a finding that the defendant has deliberately and dishonestly exaggerated an aspect of his continuing symptoms in order to inflate his claim for damages, I am bound by that conclusion.

36. It is unnecessary for me to explore the legal principles in any detail. The basic principle, for present purposes, is that a domestic judgment of a court of competent jurisdiction which includes a decision on a particular issue forming a necessary ingredient in the cause of action being litigated will be binding as to that issue in subsequent proceedings where that issue is relevant, but there is an exception where there has become available further material relevant

to the correct determination of the point: see *Phipson on Evidence* (18th ed. 2013), at paragraph 43-15.

37. For the purposes of this application I proceed on the basis (1) that the judge's findings are evidence of the facts found, including adverse findings as to the defendant's credibility and the deliberate exaggeration of his continuing disability, and (2) that I am entitled to treat them as conclusive evidence on those matters unless there is now further material to show that the finding in question was not justified. I bear in mind that these are, in effect, criminal proceedings. The defendant cannot be shut out from putting forward material which may cast doubt on a particular finding. On the other hand, as I made clear to the defendant at the outset of this evidence, he is not entitled to reopen all the matters upon which the judge found against him.

38. Mr Featherby accepted, very properly, that in addition to considering the findings of the judge, which naturally carry very great weight, I have to consider all the evidence, including the defendant's evidence in these proceedings, in order to decide whether any given allegation of contempt is proved to the criminal standard in accordance with the principles already identified.

39. I bear in mind that discrepancies between a factual assertion verified by a statement of truth, on the one hand, and video surveillance evidence, on the other, do not automatically give rise to a contempt of court. Ultimately, it is a matter of fact and degree. Some exaggeration may be natural, even understandable: see *Walton v Kirk* [2009] EWHC 703 (QB), at paragraph 13, citing *Rogers v Little Haven Day Nursery Ltd* (30th July 1999, unreported) where Bell J considered that the video evidence undermined the claimant's assertion that her right wrist was completely useless, but concluded:

> "... the exaggeration which I have described falls within the bounds of familiar and understandable attempts to make sure that doctors and lawyers do not underestimate a genuine condition, rather than indicating an outright attempt to mislead in order to increase the value of her claim beyond its true worth."

That dictum of Bell J was drawn to the attention of Judge Bidder in the present case and he made his adverse findings notwithstanding that cautionary advice, so strong was the evidence before him.

Analysis of the alleged contempts

40. I turn to a detailed consideration of the individual allegations of contempt, which I shall refer to as "counts", taking each group in turn.

(a) Variability of the defendant's condition, counts 1-7

41. There are seven allegations of contempt in this group, all based on statements made to doctors and other experts which are said to be have been deliberately false. The nub of the complaint is that the defendant made out that on bad days he had to stay in bed and would not go out at all, so severe was the pain. Even on good days he could only walk 50 metres, and only with a stick. The insurers' case is that on the contrary, on good days the defendant had

always been fully mobile and able bodied save for a slight limp, and even on bad days he did not stay in bed.

42. The statement that he could walk 50 metres with crutches on a good day is more appropriately considered under the next group of allegations of contempt concerning his ability to walk and his use of walking aids. (counts 8 - 21)

43. The highwater mark of the insurers' case on the frequency and effect of "bad days" is the allegation in count 7, the statement made to Ms Makda (the insurers' care expert) on 5th August 2013, coinciding with the end of the period of surveillance. Paragraph 7.11 of her report states:

> "On questioning, Mr Kovacic said that the majority of the time he has good days but maybe twice a week he has a bad day when he will be in bed all day..."

To prove the falsity of this statement the insurers rely upon the frequency of random video surveillance over a total of nine separate days. Reliance is placed on the judge's conclusion, at paragraph 80 of the judgment:

> "Virtually all of that is contradicted by the video surveillance. That surveillance is extensive. All the video material has been disclosed. It is significantly more than I have seen in other serious cases. All the experts looking at it have felt able to draw safe conclusions from it. It is simply not an answer to it to say, as the claimant frequently has, that it is unrepresentative. It is not. It has not, I am sure, been deliberately taken to put him in a bad light. The chances against the surveillance team happening to film him on nine good days and no bad days are huge."

44. However, the difficulty with this allegation is that the judge was not specifically addressing any of the statements pleaded in counts 1-7, made to the experts, but was addressing the defendant's more general assertion that the video surveillance evidence was unrepresentative.

45. Although I strongly suspect that the defendant was lying in making the statement to Ms Makda that twice a week he had a bad day when he would have to stay in bed all day, I cannot be sure to the criminal standard that the statement was false. The same goes for the earlier statements in counts 1-6. In any event, I do not consider that these counts go to the heart of the real case against the defendant, namely that he deliberately lied to the doctors and in his statements of truth about his inability to carry out specific activities. It follows that I make no finding of contempt in respect of counts 1-7.

The defendant's ability to walk, counts 8-20

46. The nub of these allegations is that the defendant pretended to the doctors, and falsely asserted in the particulars of claim and in his witness statement, that he could walk no more than about 30 metres, and then only with the use of a stick. The insurers' case is that the video surveillance demonstrated that he could walk much further than this.

47. The central allegations here are counts 13, 14, 17, 19 and 20.

48. Count 13 alleges that when interviewed by Ms Gowings on 11th October 2012 he told her that:

> "He estimated his maximum walking distance on a good day as approximately 30 metres before needing to sit to rest."

49. Count 14 alleges that in the particulars of claim, supported by a statement of truth dated 16th January 2013, it was stated:

> "His mobility remains substantially restricted - he is able to walk only approximately 30 yards and with the use of a stick."

50. Count 17 alleges that in his witness statement, supported by a statement of truth dated 27th June 2013, he asserted:

> "I still cannot walk very far I am wobbly on my feet... I could walk approximately 30 metres with a walking stick on a good day."

51. Count 19 alleges that when seen by Ms Makda, the insurers' care expert, on 5th August 2013 he told her, as she reported (at para 8.2):

> "On questioning, Mr Kovacic said he can walk 25-30 minutes [which should read metres] and that he has to sit and rest...."

52. Count 20 alleges that on 14th August 2013 the defendant told Dr Master (the insurers' psychiatrist), as he reported at :

> "I asked Mr Kovacic how his physical injuries affected his every day activities. He told me he carries a stick in his left hand and he said "I know it is should be right". Mr Kovacic told me that he never goes out without his stick and he never goes out unless he is accompanied."

53. On the basis of the video surveillance evidence the judge made very clear and trenchant findings as follows:

> "60. I am afraid, that having seen the claimant giving evidence in relation to that interview, and having seen the video, I am driven to the conclusion that he deliberately exaggerated his condition to Ms. Gowings. He can be seen in the video walking outside far more than 30 metres without a stick and without any time for a rest. He certainly did not need a stick to help him walk in March 2013 and I do not believe he needed either a stick or any support to help him walk in October 2012. Even at that stage, his maximum walking distance was far more than 30 metres.....
>
> 78. Later in his report, Dr Masters said that Mr. Kovacic had told him he had tried to drive on one occasion only and he confirmed that orally to me. I accept that he had a clear memory of that. It can, therefore, be seen, that on this issue of driving, the claimant has persistently told experts and included in a statement he knew would form the basis of his

> claim to the court, a succession of very similar, quite calculated lies which are entirely disproved by the video surveillance. On that basis alone, I would have had great difficulties accepting his evidence generally, without corroborating, but it did not stop there. In his particulars of claim, dated and signed by him on 16th January 2013, only two months before his first surveillance video, at p. 5 of the bundle, under "Particulars of Injuries" he stated:
> "His mobility remains substantially restricted. He is able to walk only approximately 30 yards and with the use of a stick."
> The context shows that he was talking of a good day.....
>
> 81. To Ms. Makda, in August 2013, he said he could walk 25 to 30 metres and then had to sit and rest. Her report mistakenly reads "25 to 30 minutes." That is a mistake which the claimant seized upon when at a low point in his cross examination. Her notes were checked and she wrote "mts". Clearly metres were intended. It is clearly the same lie told by the claimant. He went to see her, as he did to see Mr. Master, with a stick, when the video showed that he does not need it at all. In fact, the video surveillance on 16th April 2013 is particularly significant. In the morning of that day, he is seen walking perfectly well with a slight limp, with his children. In the afternoon of that day, when he knows he is to be picked up by a taxi driver, paid for by the defendants, and take to an appointment with the defendants' orthopaedic surgeon he is videoed walking with a heavy limp and using a stick."

54. In relation to Ms Makda's mistake over "minutes" and "metres", it is to be noted that the defendant also gave the figure of 30 metres to Mr Jenkins on 26th June 2012 (count 12) and to Ms Gowings on 11th October 2012 (count 13). The figure of 30 yards or metres was specified in the particulars of claim (count 14) and in his witness statement (count 17). The figure he mentioned to Dr Master on 20th August 2013 (count 20) was 25-30 metres. Like Judge Bidder I am sure that he told Ms Makda 25-30 metres and not 25-30 minutes. Her notes confirm that it was simply an error in the report. The coincidence of all these similar estimates is particularly striking.

55. In his evidence before me the defendant repeated the point made to Judge Bidder that he should not be held to such a precise distances as 30 or 40 metres. He said that although the distance from his home to the school and back was 80 metres the video surveillance did not show him having a rest in between. That was something he had not mentioned in his evidence before Judge Bidder. I am sure it was a late invention when he was put on the spot in his evidence before me.

56. I do not propose to make findings in respect of all five of these counts. Three specimens will suffice. **I am satisfied to the criminal standard that the allegations of contempt in counts 14, 17 and 20 have been proved.** The defendant was consistently asserting, quite falsely, that the furthest he could walk on a good day was only about 30 metres. That was a deliberate and consistent lie. I am quite sure he knew that if he persisted in it, it was likely to interfere with the course of justice in that it might affect the amount of damages he was awarded. That was the reason for the lie.

57. I make no finding in relation to the other counts in this group, aside from the five I have just considered. Most of them relate to the defendant's presentation on examination by the various doctors as walking slowly with a stick. This adds nothing to the allegations of contempt which I have found proved.

The defendant's use of walking aids, counts 21-34

58. This group of allegations overlaps with the last group, the defendant's ability to walk. The nub of the allegation of contempt is that the defendant deliberately and dishonestly exaggerated his need to use a stick for walking, which is wholly contradicted by the surveillance evidence. The only occasion on which he was seen using a stick in the whole of the surveillance evidence was the afternoon of 16th April 2013 when he travelled by taxi to London to see Mr Morley, the orthopaedic surgeon instructed on behalf of the insurers. The video showed that earlier that day, when he was walking the children to school, he was not using a stick. The judge expressly found, at paragraph 64 of the judgment:

> "I have absolutely no doubt that he was play acting on that afternoon".

59. More generally, the judge's finding in relation to use of a stick were:

> "79. As I have indicated, I am satisfied his condition was the same in April 2012 as it was in March 2013, and it was certainly no different in January 2013. As the claimant well knew, he regularly walked 80 metres or so without a rest and without a stick, taking his children to the school. The Skegness outing shows him walking on sand and up a sand dune without a stick, and for far greater distances than 30 yards, and without a stick. What he said in his particulars of claim was simply untrue. Similar lies about the restriction of his ability to walk and the necessity of using a stick are repeated to a number of experts. He told Mr. Morley that he needed to use a stick and came to the appointment with a stick...."

60. Many of the allegations of contempt in this group are the same, namely that he presented himself to the relevant doctor or other expert walking with a stick (counts 22, 23, 24, 25, 28, 29, 30, 32, 34). That presentation was undoubtedly exaggerated quite deliberately. For example, count 29 relates to the visit to Mr Morley on 16th April 2013, captured on the video surveillance. He presented himself with a stick. The judge found that this was play acting. Having watched the video and having reviewed all the other evidence, I agree with that assessment. **I am satisfied to the criminal standard that the allegation of contempt in count 29 is proved.**

61. However, the real nub of the contempt is the false statements the defendant made, verified by a statement of truth, in the particulars of claim (count 27) and in his witness statement (count 31).

62. The false statement in count 27, in the particulars of injury was:

> "His mobility remains substantially restricted - he is able to walk only approximately 30 yards and with the use of the stick."

That was plainly untrue as the defendant well knew. The video surveillance gives the lie to the statement.

63. The false statement in count 31 was made in his witness statement, paragraph 41:

> "I can walk approximately 30 metres with a walking stick on a good day."

For the same reason that was plainly false. At paragraph 42 of the witness statement he said:

> "I carry a stick in my left hand to help me walk."

That was also untrue, for the same reason.

64. Another clear example of a false statement made to one of the doctors is count 33. When the defendant saw Dr Master, the psychiatrist instructed on behalf of the insurers, on 14th August 2013 Dr Master has recorded in his report:

> "Mr Kovacic told me that he never goes out without his stick and he never goes out unless he is accompanied."

That was plainly a lie. The video surveillance demonstrates that he regularly went out with no stick. The last video surveillance was only a week before the defendant saw Dr Master. However, this statement to Dr Master has already been covered in count 20, which I have found proved.

65. In his reply, the defendant insists that he does need walking aids and does use his stick, in particular whenever he goes somewhere new. For example, when he went to see Mr Master there were roadworks around his office and he and his wife had to park further away. The walking stick helped. He says that he does not need to use the walking stick when he is taking the children to school because the school is so close and he can sit and rest before going back. The defendant repeated these points in his oral evidence.

66. Whilst it may well be true that the defendant very occasionally needed to use a stick, it was very much the exception. The false impression he deliberately created to the doctors, and in his particulars of claim and witness statement, was that he always walked with a stick and could only manage to walk any distance if he used a stick. That was simply untrue. It is unnecessary to make findings in relation to counts 31 and 33. One sample from this group, count 27, will suffice. **I am satisfied to the criminal standard that the contempt alleged in count 27 has been proved.** I do not make any finding in respect of the other counts in this group because they add nothing to the overall picture.

67. The contempt alleged in Count 26 is that the defendant included a claim for a powered scooter. I make no finding in relation to that. The defendant says there was confusion over this. He only ever envisaged needing a scooter if his left knee deteriorated. The allegation in count 26 is based on Ms Gowing's report. It was her assessment, based on his walking distance, that a powered scooter should be recommended. The defendant signed a statement of truth for the schedule of loss including the provision of a powered scooter, but that is not the contempt alleged in count 26. In any event the allegation adds nothing.

The defendant's ability to bend, counts 35-38

68. The nub of these allegations of contempt is that the defendant pretended to the doctors that he had difficulty bending, when in fact the video surveillance evidence demonstrates quite the opposite. Counts 35, 37 and 38 are based on the demonstration, when examined or interviewed, of reduced movement of the trunk. On the other hand, as the defendant pointed out in his reply and in his oral evidence before me, when examined by Mr Morley on 16th April 2013 it was recorded that "movement of the spine was fair in all directions". The defendant relies on this to show that he was not pretending to be unable to bend.

69. The highwater mark of these allegation of contempt is count 36, arising from the defendant's interview with Mr Miller, the accommodation expert, on 12th December 2012. According to Mr Miller's report, paragraph (6.6) he was told by the defendant:

> "He has difficulty in bending and can not access low level cupboards in the kitchen. He advised that he would use the kitchen if it was accessible to him as he did cook before the accident."

This led Mr Miller to recommend that the kitchen be fitted out with accessible units, although in the event there was no claim in the schedule of loss for the cost of providing replacement units. Nevertheless it is plain that the defendant was closely cross-examined upon this statement to Mr Miller and the judge made clear and trenchant findings about the defendant's ability to bend:

> " 47. On 7th May.... [h]e later drives his children to the seaside at Skegness, a journey of some 90 miles. This was a treat on his birthday. He is, on this day, seen bending easily into the car to the ground and quickly and instinctively to the ground to pick up something which falls from the door pocket of the car...
>
> 49. Generally speaking, the ability of the claimant to... bend... is at very striking contrast with his description of his capacity to every expert who examined him at around or after the time the videos were taken....
>
> 69. In the even later report on accommodation, by Mr. Miller, based on an interview on 12th December 2012, only about three months before the start of the videos, he told Mr. Miller, see p. 536, paragraph 6.6, that he had difficulty in bending and cannot access low level cupboards in the kitchen.
> "He advised that he would use the kitchen if it was accessible to him as he did cook before the accident."
> That is a direct quotation from Mr. Miller's report.
> It is very obvious from that quotation that I have made that the claimant was aware that what he was saying about bending would be likely to be reflected in a claim for compensation relating to add adaptations for the kitchen at his house.
>
> 70. Having seen the video of his bending quickly to pick up something that fell from his car door, I am satisfied that what he told Mr. Miller was not true and was a deliberate exaggeration in order to obtain a larger

> amount of compensation. When cross-examined about this, he said he did not take things from lower down in the kitchen, and when asked what happened if he dropped something on the floor, he eventually said, and there were long pauses in his evidence at this stage, that his children might pick it up or he would pick it up if it was paper, or someone else if it was a plate. It was at this point when he was in obvious difficulties finding an answer to the question of what he would do if he dropped something in the kitchen, that his wife intervened from where she was sitting, at my request, at the back of the court and clearly and audibly prompted him with an answer.
>
> 71. He was wholly unconvincing when questioned about his ability to bend, unsurprisingly, when what is shown on the video entirely contradicts any suggestion that he had any difficulty in bending……
>
> 89.However, after seeing the surveillance evidence [Mr Morley's] conclusions were…and again I am grateful for Mr. Featherby's accurate summary….3. he bends over easily without obvious limitation and no evidence of pain…"

70. In relation to the contempt alleged in count 36, it does not matter that, in the event, there was no claim for damages based on the cost of providing accessible kitchen units. The extent to which the defendant was unable to bend was in itself an important aspect of his continuing pain and suffering and loss of amenity. I am satisfied to the criminal standard that the defendant deliberately set out to deceive Mr Master by falsely representing the extent of his continuing symptoms. He intended that Mr Master should rely upon that in providing his report, and the report was likely to affect the amount of damages recovered. It was untrue to say that he had difficulty in bending. His condition in December 2012 was no different from his condition during the video surveillance. The judge found that it was a deliberate exaggeration in order to obtain a larger amount of compensation. Having considered all the relevant material I agree with that finding. **Accordingly I am satisfied to the criminal standard that the contempt alleged in count 36 has been proved.**

The defendant's use of his arms, counts 39-42

71. The nub of the allegation in this group of counts is that the defendant grossly exaggerated his inability to carry anything heavy with his right arm. Counts 39 and 40 relate to statements he made to a doctor and to a care expert. Counts 41 and 42 relate to statements of truth in support of his particulars of claim and his witness statement respectively. The insurers' case is that the defendant could use both arms to lift and carry significant weights, as the evidence of the video surveillance demonstrates.

72. Count 39 alleges that the defendant told Mr Osborne, the insurers' orthopaedic surgeon, on 31st May 2012:

> "…he cannot lift anything heavy in the right arm because of elbow pain. He tends to drop anything that he is holding."

Count 40 alleges that when interviewed by Ms Gowings, the care expert, on 11th October 2012 he told her:

> "Lifting and carrying - he can carry a small, light item such as a newspaper but nothing heavier.... Shopping - he cannot carry heavy bags."

73. Count 41 alleges that in the particulars of claim, verified by a statement of truth dated 6th January, he asserted that there remained a restricted range of movement to the right elbow and a substantially reduced grip strength in the right hand together with pain in the right upper limb:

> "....precluding the claimant from lifting any significant weight without aggravating pain"

74. Count 42 alleges that in his witness statement, verified by a statement of truth dated 27th June 2013, he said at paragraph 40 under the heading "present position":

> "I cannot carry heavy things."

I note that later in the statement, at paragraph 42 he dealt in more detail with the consequences of the injury to his right elbow and said:

> "I cannot lift anything with my right arm because this causes pain and I feel as though my arm will drop off and I tend to drop things."

75. The judge's findings in relation to his ability to carry with both arms were, once again, clear and trenchant:

> 46.....He told me that he mainly used his left arm and that is consistent with the video evidence where he is often seen carrying shopping, including heavy items such as a pack of two litre bottles of mineral water in his left hand. However, he is ambidextrous and is seen in the video carrying what looked to be heavy items, using both arms. He demonstrated to me that he could use his left arm to make fine movements, such as doing up buttons. The surgery that he had had meant that his hand was no longer clawed....
>
> 47. On 7th May, he is seen carrying, using both arms, respectively a child's car seat and possibly another car seat, it is not entirely clear from the video, from his car, and later a large wooden board, a large and heavy looking sheet of glass, and in evidence he confirmed it was heavy, and a metal table frame....
>
> 48. On one shopping journey, he is seen to carry easily, in his left hand and transferring it for a couple of steps to his right hand, a six pack of two litre plastic bottles of mineral water, back to his car, a weight of about 12 kilos.
>
> 49. Generally speaking, the ability of the claimant to... carry quite heavyweights with both hands and arms.... is at very striking contrast

> with his description of his capacity to every expert who examined him at around or after the time the videos were taken....
>
> 50. I should also add, without the need to narrate all the evidence in cross examination, that he similarly misled experts and exaggerated his inability to carry with both arms, which plainly is contradicted by the surveillance footage, of his shopping, carrying the heavy bottles of mineral water in both hands and unloading his car."

76. In his reply to the particulars of contempt, and in his oral evidence before me, the defendant emphasised that he still had pain in his right elbow. Indeed, there had been further surgery on 8th July 2013. The elbow was arthritic. Although the video surveillance showed him carrying the heavy six pack of bottled water in both hands, it was only in his right hand briefly before he transferred it to his left hand. The same was true of the large sheet (in fact a glass table top) he was helping to remove from the back of the car.

77. I have approached these allegations with a degree of caution, because there is undoubtedly some disability in the right arm, and the statements made to Mr Osborne and Ms Gowings significantly pre-date the video surveillance. However, in his witness statement dated 27th June 2013 (count 42) the assertion that he could not carry heavy things was plainly false. It was designed to give the impression that there was a continuing significant disability far greater than was in fact the case. The statement made to Ms Gowing's (count 40), which he does not deny making, was designed to give the same impression.

78. I make no finding in relation to counts 39, 40 and 41. In my judgment the nub of this contempt is count 42. **I am satisfied to the criminal standard that the contempt alleged in count 42 has been proved.** Having taken into account all the evidence, including the defendant's evidence before me and his written reply, I agree with Judge Bidder's assessment of the video surveillance evidence and I agree with his finding that the defendant had deliberately exaggerated his inability to carry with both arms.

The defendant's care for himself and others, counts 43-57

79. This group of allegations covers a wide range of statements said to be false. Some relate to the need for help in dressing himself, and with personal hygiene (counts 44, 45, 46, 50, 52, 54). Some relate to statements said to false as to the extent to which he was able help with the children (counts 43, 47, 53, 55, 57). Some relate to statements said to be false concerning his need for help with shopping (counts 51 and 56).

80. Many of these allegations relate to activities within the home, where there is no video surveillance to confirm or disprove what the defendant told the doctors and other experts. Some of the allegations are very general, for example, the statement to Mr Osborne on 31st May 2012, count 45:

> "He said he needed regular help".

Mr Featherby invited me to approach such general allegations, and allegations of activity within the home, on the basis of inference from the judge's adverse findings. Whilst that is, in theory, a permissible approach, it a step too far in the present case. It is necessary to concentrate on the most serious allegations, where the evidence is clear. There are two such

areas: the extent of his ability to do the shopping, and the extent of his ability to help with the children at least by walking them to school.

81. In relation to shopping, count 51 alleges that the defendant told Dr Leng (neuropsychologist) on 9th May 2013:

"he needs help with … shopping…"

This was in response to Dr Leng's enquiry about his level of independence. Count 56 alleges that the defendant told Ms Makda on 5th August 2013 that his wife did the weekly shopping and, if he accompanied her, he would sit while she did the shopping. The full quotation from Ms Makda's report (para 9.2) is:

> " Mr Kovacic said that his wife does the weekly shopping as well as any other shopping that needs to be done. If he accompanies her, he will sit in the café while she does the shopping"

82. The video surveillance demonstrates very clearly that the defendant was perfectly able to do some shopping at least, albeit it possibly not the full weekly shop. Because the pleaded particulars of an allegation of contempt have to be strictly proved, I would have to sure that the defendant was deliberately lying in saying that his wife did the weekly shopping and that if he accompanied her he would sit while she did the shopping. The video surveillance does not disprove that assertion because it may well be that his wife took the lead in the weekly shopping trip. However, had the particulars in count 56 also alleged, as he told Ms Makda, that he said his wife did "any other shopping that needs to be done", I would have had no hesitation in finding that allegation of contempt proved.

83. Although I can therefore make no finding of contempt on count 56, the statement alleged in count 51, made to Dr Leng, that the defendant needed help with shopping was unequivocal and false, as the video surveillance demonstrates. I am quite sure that the defendant was deliberately giving a false impression as to his level of independence in relation to the activity of shopping. That statement was made at the very time of the video surveillance in May 2013. Furthermore, even though I cannot for technical reasons find count 56 proved as a contempt, the fact that he told Ms Makda, quite falsely, that his wife did "any other shopping that needs to be done" confirms that he was deliberately making a false statement to Dr Leng. **I am therefore satisfied to the criminal standard that the contempt alleged in count 51 has been proved.**

84. In relation to helping with the children, the defendant made several statements which were misleading and may well have been false but in respect of which I make no positive finding of contempt. For example, he told Dr Reid on 9th July 2013 (count 54):

> "Once the children are out of the house, his wife attends to him and his care needs, slowly getting him up. .."

The plain implication of this statement is that he would never be up and about in time to take the children to school, which is wholly contradicted by the video surveillance evidence. Similarly, he told Ms Makda on 5th August 2013 (count 57) that:

"his wife makes him breakfast then she takes the children to school"

Again, the implication is that he would not be available or able to take the children to school himself.

85. The real nub of the allegations of contempt in relation to his ability to help with the children is count 53 which alleges that in his witness statement , supported by a statement of truth dated 27th June 2013, he stated:

> "Now I cannot help with the children at all."

That was simply untrue. Seen in the context of the other statements in counts 53 and 57 to which I have referred, the plain inference is that the defendant deliberately lied in his witness statement in order to exaggerate the extent to which his continuing disability affected his daily life.

86. I bear in mind that in his reply to the particulars of contempt, and in his oral evidence before me, the defendant insisted that he never took his daughters out alone on a regular basis because he was apprehensive that he would not be able to react in an emergency. He took them to school as often as he could but that was simply for the exercise it provided, and because the school was very close to home.

87. **I am satisfied on all the evidence, to the criminal standard that count 53 has been proved.** The defendant deliberately lied in his witness statement in saying he could not help with the children at all when he was in fact regularly walking them to school. He did so knowing that this false statement was likely to affect the assessment of his continuing disability and therefore likely to have an impact on the amount of damages he would recover.

88. In relation to all the other allegations of contempt in this group, counts 43-52, 54, 55 and 57, I make no finding.

The defendant's driving and cars, counts 58-69

89. This final group of allegations of contempt includes very specific statements made to the doctors and other experts to the effect that, at least up to the end of 2012, he had not driven and would not contemplate driving again (counts 58, 59, 60, 61, 62, and 63). At a later stage, from June 2013 onwards, he acknowledged that he had attempted to drive, but asserted that he was unable to do so (counts 66, 68 and 69).

90. The video surveillance provides incontrovertible evidence of the defendant's ability to drive, and the regularity of his driving. The video shows that he drives with ease to supermarkets and has no difficulty manoeuvring the car in and out of parking spaces, something which requires full control of the clutch. The defendant was confident and comfortable enough to be able to drive 90 miles to Skegness for a day out with his wife and children on 7th May 2013.

91. The judge once again made very clear and trenchant adverse findings:

> "49. Generally speaking, the ability of the claimant to … drive out of choice, getting in and out of his car with ease, is at very striking contrast with his description of his capacity to every expert who examined him at around or after the time the videos were taken…

73. The position in relation to driving becomes even clearer when one compares what the claimant said about it during the time covered by the video evidence. He saw Mr. Morley on 16th April 2013. At p.218, Mr. Morley continues his account of the claimant's present position, his complaints of continued pain, and what he told the doctor he could and could not do. He says in a paragraph in which he tells the doctor he could not do heavy work around the house, "at the present time, he will not drive".

74. In his closing submissions to me, Mr. Featherby cited to me a dictum of Bell J., in Rogers and Little Haven Day Nursery Ltd, an unreported case from 1999, in which his Lordship recognised that there could be, and I quote:
"exaggeration which falls within the bounds of familiar and understandable attempts to make sure the doctors and lawyers do not underestimate a genuine condition, rather than indicating an outright attempt to mislead, in order to increase the value of the claim beyond it is true worth."

75. I have no doubt that there is such exaggeration, but that is not the explanation for what the claimant told Mr. Morley about his driving. It is simply a deliberate lie. When he was cross-examined about that statement, he first told me that what he meant was that he told the doctor he was not driving that day. Then he said he did not enjoy driving. In the course of questioning when he showed increasing signs of desperation, when asked for an explanation of a plain statement by him, he actually volunteered that Mr. Morley had been writing down what he had been telling him at the same time as he was saying it. Having seen Mr. Morley give evidence, I have no doubt that that careful witness was indeed doing that. There is no question of this being a mistake. What I am afraid is also the case is that instead of accepting that that was a lie told at the time, to Mr. Morley, Mr. Kovacic, on oath, told me a series of further lies in order to try to escape from the consequences of that lie.

76. At p.81 of the bundle, in his own statement, made on 27th June 2013, right in the middle of the surveillance, he says at paragraph 53:
"I do not think I will drive again because of my physical symptoms and psychological symptoms. I have tried to drive but I cannot control the clutch with my left leg. I think I might be able to drive an automatic car."
When faced with that stark lie, he said that he had driven to Skegness and it was much easier to drive on the open road. He denied what he had said had been a frank lie, but that was, however, precisely what it was, and it was, as the context makes clear, a lie with the purpose of being compensated for purchasing an automatic car.

77. Similarly, to Ms. Makda, the defendant's care expert, when he was interviewed on 5th August 2013, he said, this is at paragraph 13.2, p. 476:

> "he tried to drive two to three times but he could not control the clutch." At p. 281, a report of an examination by Dr Master, the consultant psychiatrist, instructed by the defendant, this is noted:
>
> "I asked Mr. Kovacic if he has resumed driving. He said: 'I tried in my road but I could not control the clutch because of my foot drop.' However, he also feels anxious in cars. He first tried driving six weeks to eight weeks before I saw him."
>
> 78. Later in his report, Dr Masters said that Mr. Kovacic had told him he had tried to drive on one occasion only and he confirmed that orally to me. I accept that he had a clear memory of that. It can, therefore, be seen, that on this issue of driving, the claimant has persistently told experts and included in a statement he knew would form the basis of his claim to the court, a succession of very similar, quite calculated lies which are entirely disproved by the video surveillance…
>
> 113. …There are no continuing travel costs as the claimant is perfectly capable of driving the manual car that he drove before and after his accident..."

92. Because there is still considerable doubt as to when the defendant resumed driving, I make no finding in respect of any statement up to the end of December 2012 that he had not driven and would not contemplate driving. The real nub of these allegations of contempt is the falsity of the statements made during the period of the video surveillance and afterwards (May to August 2013) where the evidence is very clear indeed.

93. Count 66 alleges that in his witness statement verified by a statement of truth dated 27th June 2013, the defendant said he had tried to drive but could not control the clutch; he said he might be able to drive an automatic car; he said it was to early for him to think about driving. To put the allegation in context, the full quotation from his witness statement, at para 53, is as follows:

> "I do not think I will drive again because of my physical symptoms and psychological symptoms. I have tried to drive but I cannot control the clutch with my left leg. I think I might be able to drive an automatic car. I am not sure I am ready to drive psychologically. It is to early for me to think about driving both physically and psychologically. I am still preparing myself for each journey I make as a passenger as well as thinking about how I will manage when I get out."

94. As Judge Bidder pointed out, there was a large claim for motoring expenses, pleaded at a sum in excess of £100,000. The defendant therefore knew that his professed inability to drive a car with a manual gearbox, or to drive at all, were very important parts of his claim which would affect the level of his damages.

95. Count 68 alleges that he told Ms Makda on 5th August 2013 that he had tried to drive 2-3 times but he could not control the clutch.

96. **I am satisfied to the criminal standard that the allegations of contempt in counts 66 and 68 have been proved.** It was a blatant lie to suggest that he had tried to drive but could not control the clutch. The video surveillance demonstrates that he was well able to manoeuvre the car without difficulty on shopping trips. He would not have been able to drive 90 miles to Skegness if he could not control the clutch. In his reply to the particulars of contempt he denied that he drove regularly, insisting that his wife was the main driver. He asserted that he still had a problem with the clutch. It was easier to drive on the open road but harder to drive in tight places and negotiate parking which required control of the clutch the whole time.

97. In his oral evidence before me, under cross examination, he tried to suggest that by "control" of the clutch he did not mean simply depressing the clutch pedal to change gear, which plainly he must have done in all the journeys captured on video. He insisted that he was referring to control of the clutch in parking and manoeuvring in tight places. It was painfully obvious that in giving that evidence he was being evasive and untruthful, still refusing to acknowledge the obvious fact that he had been caught out by the surveillance evidence in misleading the doctors and other experts and lying in his witness statement.

98. Finally, count 69 alleges that the defendant told Dr Master on 14th August 2013 that he had first started driving 6-8 weeks before that and had driven only on one occasion and was then unable to drive. These particulars are not an entirely accurate summary of what Dr Master has recorded the defendant as telling him, which was (at para 3.2.13 of his report):

> "I asked Mr Kovacic if he has resumed driving. He said "I tried in my road but I could not control the clutch because of my foot drop. However he also feels anxious in cars. He first tried driving 6-8 weeks before I saw him. Mrs Kovacic said that he is very jumpy as a passenger and constantly tells her what to do when she is driving. Mr Kovacic said "when we are going on a motorway I am fine, but when we are going on a single carriageway I am nervous". He told me he has completely lost enjoyment and pleasure in driving. I asked Mr Kovacic why he tried driving a car for the first time 6-8 weeks ago. He told me he felt "obliged" to try to drive because his wife was about to be admitted to hospital to undergo surgery on her foot and he anticipated she might subsequently have problems driving."

99. This interview with Dr Master on 14th August 2013 was about 14 weeks after the trip to Skegness on 7th May, and 21 weeks after the first observed driving in the video surveillance evidence on 19th March 2013. It follows that it was simply untrue to suggest that he first started driving "6-8 weeks ago". He certainly never told any of the doctors or other experts that he had driven as far as Skegness. He confirmed in his oral evidence before me that he had not mentioned this to them. The suggestion that he had tried to drive the car only in his own road and could not control the clutch was completely untrue.

100. The particulars of the alleged contempt in count 69 do not accurately reflect what the defendant in fact told Dr Master. The defendant did not say in terms that he had driven only on one occasion, and that he was unable to drive. However, he did say that he had first started driving 6-8 weeks before he saw Dr Master, and that part of the particulars is substantiated. **I am therefore satisfied to the criminal standard that the allegation of contempt in count 69 is proved, to that more limited extent.**

101. In his reply to the particulars of contempt, and in his oral evidence before me, the defendant repeatedly stressed that he was not a criminal and that, as he put it, "my intention was not to do anything against justice deliberately". He insisted that his injuries had been very serious and that he continues to suffer significant disability. He still has to take a lot of medication to control his pain. He has not deliberately exaggerated his disability.

102. For the reasons I have explained in addressing the various allegations, I cannot accept the defendant's protestations of innocence. Like Judge Bidder, I am quite satisfied that the defendant deliberately and cynically lied about the extent of his continuing disability in what he told the doctors and other experts, and in what he said in his particulars of claim and his witness statement. But for the video surveillance evidence he might well have succeeded in recovering very much greater compensation than he was truly entitled to.

Conclusions

103. Accordingly I find the following twelve allegations of contempt proved:

Count 14: he said in the particulars of claim, verified by a statement of truth dated 16th January 2013, that his mobility remained substantially restricted and that he was able to walk only approximately 30 yards and with the use of a stick.

Count 17: he said in his witness statement, verified by a statement of truth dated 27th June 2013, that he could not walk very far, was wobbly on his feet, and could walk approximately 30 metres with a walking stick on a good day.

Count 20: he told Dr Master on 14th August 2013 that he could walk 25-30 metres then he needed to sit down, he carried a stick and never went out without it, and never went out unless accompanied.

Count 27: he said in the particulars of claim, verified by a statement of truth dated 16th January 2013, that he was able to walk only with the use of a stick.

Count 29: he dishonestly presented himself to Mr Morley on 16th April 2013 walking with a stick.

Count 36: he told Mr Miller on 12th December 2012 that he had difficulty bending.

Count 42: he said in his witness statement, verified by a statement of truth dated 27th June 2013, that he could not carry heavy things.

Count 51: he told Dr Leng on 9th May 2013 that he needed help with shopping.

Count 53: he said in his witness statement, verified by a statement of truth dated 27th June 2013, that he could not help with the children at all.

Count 66: he said in his witness statement, verified by a statement of truth dated 27th June 2013, that he had tried to drive but could not control the clutch, that he might be able to drive an automatic car, and that it was too early for him to think about driving.

Count 68: he told Ms Makda on 5th August 2013 that he had tried to drive 2 or 3 times but he could not control the clutch.

Count 69: he told Dr Master on 14th August 2013 that he had first started driving 6-8 weeks before he saw him.

104. Those are my findings. When the case is next listed for hearing I will hand down this judgment and consider what penalty should be imposed for the contempts I have found proved.

APPENDIX

SCHEDULE TO THE PARTICULARS OF CONTEMPT

ALLEGATIONS RELATING TO SPECIFIC STATEMENTS AND REPRESENTATIONS

Relating to variability of the Defendant's condition

(1) The Defendant said he could walk 50 metres with crutches on a good day; on a bad day he spends the time in bed. [Osborne I p.5]

(2) He said that on bad days he stayed in bed. [Read I §21]

(3) He said he still had to stay in bed for odd days if symptoms were severe. [Osborne II p. 4]

(4) He said that on bad days he stayed in bed and would not go out. [Gowings p.10, 11]

(5) He said that on a bad day he might remain bed-bound all day. [Particulars of Claim §7]

(6) He said his pain was occasionally so severe that he spent most of his time in bed. [Morley p.7]

(7) He said he had good days but maybe twice a week he had a bad day when he would be in bed all day. [Makda §7.11]

On the contrary, on good days the Defendant has been, at all material times, fully mobile and able-bodied save for a slight limp; on 'bad days' he did not stay in bed.

relating to the Defendant's ability to walk

(8) The Defendant said he could walk 50 metres with crutches on a good day" [Osborne I p.5]

(9) He presented himself as unable to bear his own weight. [Osborne I p.9]

(10) He presented himself walking slowly and with a stick. [Read I §44]

(11) He presented himself walking with a stick. [Osborne II p. 4]

(12) He said he walked with the aid of a stick; he said he could manage about 30 metres. [Jenkins p.9]

(13) He said that on a good day he could walk approximately 30 metres before needing to sit and rest. [Gowings p.11]

(14) He said that his mobility remained substantially restricted and that he was able to walk only approximately 30 yards and with the use of a stick. [Particulars of Claim §7]

(15) He said and/or demonstrated that his mobility was significantly decreased and that he walked with a stick. [Cockerell §3.1.3.2]

(16) He presented himself walking quite slowly with some awkwardness with a stick, and that in the morning he could not walk at all. [Leng §5.1]

(17) He said he could not walk very far and was wobbly on his feet; he said he could walk approximately 30 metres with a walking stick on a good day. [witness statement §40, 41]

(18) He said that, when he was out, he knew the position of every bench so he could sit down. [witness statement §48]

(19) He said he could walk 25 to 30 metres and then he had to sit and rest. [Makda §8.2]

(20) He said he could walk 25 to 30 metres then he needed to sit down. He said he carried a stick, that he never went out without it and that he never went out unless accompanied. [Master §3.2.12]

On the contrary, the distance the Defendant could walk was unlimited, alternatively very much farther than 50 metres

relating to the Defendant's use of walking aids

(21) The Defendant said he could walk 50 metres with crutches on a good day" [Osborne I p.5]

(22) He presented himself walking with a stick. [Read I §44]

(23) The Defendant presented himself walking with a stick, and needed to lean on it so he could be measured. [Osborne II p. 4, 8]

(24) He presented himself walking with the aid of a stick. [Jenkins p.9]

(25) He presented himself walking with the aid of a stick and said that otherwise he could support himself with walls or furniture. [Gowings p.11]

(26) He included a claim for a powered scooter. [Gowings p. 26]

(27) He said he was able to walk only with the use of a stick. [Particulars of Claim §7]

(28) He said and/or demonstrated that he walked with a stick. [Cockerell §3.1.3.2]

(29) He presented himself walking with a stick. [Morley p.7]

(30) He presented himself walking with a stick. [Leng §5.1]

(31) He said he used a walking stick to help him walk. [witness statement §41, 42]

(32) He presented himself as walking with a stick; he said he used a stick but also had a pair of crutches. [Makda §8.2, 16.2]

(33) He said he carried a stick, that he never went out without it. [Master §3.2.12]

(34) He said he still used a stick; he presented himself walking with a stick on which he leant heavily. [Osborne III p.6]

On the contrary, the Defendant did not need walking aids.

relating to the Defendant's ability to bend

(35) The Defendant demonstrated reduced movement in forward flexion. [Gowings p.9]

(36) He said he had difficulty bending [Miller §6.6]

(37) He demonstrated only partial movement of his trunk. [Makda §7.5]

(38) He demonstrated leaning on his stick for forward flexion. [Osborne III §9]

On the contrary, the Defendant had full movement from the waist and could bend without restriction.

relating to the Defendant's use of his arms

(39) The Defendant said he could not carry anything heavy in the right arm, and tended to drop anything he was holding. [Osborne II p.4]

(40) He said he could carry a small, light item such as a newspaper but nothing heavier. He said he could not carry heavy shopping bags. [Gowings p.12]

(41) He said that he was precluded from lifting any significant weight without aggravating pain. [Particulars of Claim §7]

(42) He said he could not carry heavy things. [witness statement §40]

On the contrary, the Defendant could use both arms to lift and carry significant weights such as a table top, a table frame and a six-pack of two-litres bottles of water.

relating to the Defendant's care for himself and others

(43) The Defendant said he could not take his daughters out alone and that his wife took them to school. [Read I §23, 25]

(44) He said he needed help dressing himself. [Read I §25]

(45) He said he needed regular help. [Osborne II p.5]

(46) He said he needed help with getting in and out of the bath, drying body, dressing lower body, putting on compression stocking. [Gowings p.16]

(47) With regard to childcare he said he was able to do some sedentary activities only with his children. [Gowings p. 16]

(48) He included a claim for assistance at petrol stations. [Gowings p.22]

(49) He claimed that he needed a case manager [Schedule §37]

(50) He said he needed help with washing and bathing, and that he could not help with the housework, cleaning or cooking. [Cockerell §3.1.3.2]

(51) He said he needed help with shopping. [Leng §5.2]

(52) He said his wife did all household tasks and helped him with personal hygiene and mobility. [witness statement §46]

(53) He said he could not help with the children at all. [witness statement §49]

(54) He said that once the children were out of the house, his wife attends to him and his care needs slowly getting him up. [Read II §24]

(55) He said that his wife took his daughter to school and collected her afterwards. [Makda §4.5]

(56) He said his wife did the weekly shopping and that if he accompanied her, he would sit whilst she did the shopping. [Makda §9.2]

(57) He said his wife took the children to school. [Makda §10.1]

On the contrary, the Defendant did not need assistance, and regularly took his daughters out alone, including taking them to school and helping them.

relating to the Defendant's driving and cars

(58) The Defendant said he had not returned to driving. [Read I §31]

(59) He said he had not driven since the accident. [Jenkins p.9]

(60) He said he was anxious about the idea of driving again. [Gowings p.10]

(61) He said he needed help with outdoor transport; he said he had not returned to driving; he said it was difficult for him to get in and out of car; he included a claim for an automatic cars. [Gowings p. 16, 20, 21, 22]

(62) He said that he does not now drive. [Miller §6.10]

(63) He said that, taxis apart, he had otherwise been driven by his wife; he said he had not returned to driving; he made claims related to this alleged disability. [Schedule §54, 55]

(64) He said he would not drive. [Morley p.7]

(65) He said he needed help with driving. [Leng §5.2]

(66) He said he had tried to drive but could not control the clutch; he said he might be able to drive an automatic car; he said it was too early for him to think about driving. [witness statement §53]

(67) He said it required a lot of effort to get into a car. [Makda §8.7]

(68) He said he had tried to drive two to three times but he could not control the clutch. [Makda §13.2] .

(69) He said he had first started driving six to eight weeks before he saw Dr Master but did so only on one occasion and that he was unable to drive. [Master §3.2.13, 4.4]

On the contrary, the Defendant could and did drive a geared car regularly.

In relation to each and every statement or representation set out above (or any of them):-

(A) the statement or representation was false;

(B) the statement or representation, if persisted in, would have interfered with the administration of justice in that it would have caused the Defendant to be awarded more damages than he was entitled to;

(C) when he made the statement or representation, the Defendant had no honest belief in its truth;

(D) when he made the statement or representation, the Defendant knew that it would be likely to interfere with the administration of justice.