

**IN THE COUNTY COURT AT BURNLEY**

Hammerton Street  
Burnley

**Before HER HONOUR JUDGE O'BRIEN****IN THE MATTER OF****TRACY JANE GRIMAL (Claimant)****-v-****LANCASHIRE COUNTY COUNCIL (Defendant)****MR H VANDERPUMP, instructed by MICHAEL CORRIGAN, appeared on behalf of  
the Claimant****MISS E MURRAY, instructed by VIVIENNE WOODS, appeared on behalf of the  
Defendant****JUDGMENT  
7<sup>th</sup> MAY 2024  
(APPROVED)**

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JUDGE O'BRIEN:

Factual Background

1. The Claimant in this case was born on 22<sup>nd</sup> April 1964. She is now 60 years old. She was an employee of the Defendant, working at Rivington Foundation Primary School. By the time of the accident that gave rise to this claim, she had worked there for approximately 12 years as a teaching assistant, after school club supervisor and dinner lady. There is no dispute that she was a well-respected and trusted member of staff. Her appraisal in 2016 says that she is a valued member of staff and that her flexibility, willingness to support others and hard work are much appreciated. The Claimant can be noted to have carried out training and courses to allow her to progress to the roles that she held within the school by September 2017 and in fact she had started a new role on the day of this accident. It is clear from the HR documents disclosed by the Defendant that the Claimant enjoyed working at the school and she worked hard there.

2. On 4 September 2017 the Claimant slipped on moss when walking out of the dinner hall at the school. She fell and suffered injury. Her former employer, the Defendant, admitted breach of duty on 18<sup>th</sup> September 2018. In the Defence the Defendant put in issue causation, pleaded contributory negligence and asserted that the claim should be struck out as fundamentally dishonest as the Defendant said that the Claimant had exaggerated the effect of the injury upon her.

3. At trial the Defendant did not dispute that the breach of duty caused the Claimant to suffer some injury. In reality the Defendant did not really have much option in relation to that because the Defendant's own expert accepted that the Claimant did suffer some injury. The Defendant did not call any evidence at all about its assertion that the Claimant was contributorily negligent nor indeed was she asked a single question about the accident circumstances. So although that assertion was not formally abandoned, there is no basis at all upon which the court could find that the Claimant was contributorily negligent when she slipped and fell on the moss.

4. So what is in dispute? The extent of the Claimant's injury and the effect upon her is in dispute. The Defendant's position is that whilst the Claimant did suffer an initial injury, she has dishonestly exaggerated the extent of the injury and its impact upon her.

5. The issues that I have to decide are as follows.

1. Has the Claimant deliberately exaggerated the extent of her injuries or been fundamentally dishonest in respect of any aspect of her claim?
2. What injury did she suffer?
3. What has been the impact of that injury on the Claimant?
4. The quantum of general damages for pain, suffering and loss of amenity.
5. The quantum, if any, of each head of claimed special damages.
6. If I find that the Claimant has been fundamentally dishonest, whether the genuine part of the claim should be dismissed.

6. The burden of proof rests on the Claimant to establish each element of her claim on the balance of probabilities. The burden of proof rests on the Defendant to establish fundamental dishonesty on the balance of probabilities.

### The evidence

7. I heard oral evidence from the Claimant, her husband and the orthopaedic surgeons, Mr Cox and Mr Sylvester, and read the evidence of the Claimant's pain expert, Professor Ghaly. The Defendant did not instruct their own pain expert.

8. I read the documents in the trial bundle and the additional bundles that were provided on the first day of the trial. I watched the surveillance footage in full on at least two occasions and some of the more relevant parts of the footage I watched additional times.

9. In terms of my general impressions of the witnesses, I found the Claimant to be a very straightforward witness. She struck me, and the HR records demonstrate that this is a correct impression, as a hardworking individual who loved her job in the school. I do not doubt for one second that the distress and upset she felt at having to leave that job was genuine. In her unchallenged evidence - in response to the Defendant's allegations of fundamental dishonesty - she states that she has never been disciplined at work, she has never been in any sort of trouble and has never had so much as a speeding ticket. Of course, she does not have a perfect recollection of every aspect of the case. This accident is now almost seven years ago. I would find it more surprising and perhaps more concerning if she was able to recall exactly when, for example, she started driving again. When asked for that sort of detail, the Claimant tried to answer but then frankly said that at this stage she was just guessing because it was all so long ago. It is refreshing to hear from a Claimant who understands and accepts that her memory of matters is not in fact perfect.

10. The court has been given clear guidance about dealing with matters of some age in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm). What does that say? Human memory is fallible. We all believe our memories to be more faithful than they actually are. Memories are fluid; they are constantly rewritten whenever they are retrieved. Memories are generally revised to make them more consistent with our present beliefs and even the process of preparing for a trial has considerable interference with memory. The key point from *Gestmin* is that just because a witness is honest and has confidence in his or her recollection, that does not mean that their recollection is accurate. Of course the counter side of that is just because a witness cannot remember some historic details, that does not mean that they are dishonest.

11. I also heard from the Claimant's husband. He is not independent - he will naturally support his wife. My impression of him was also that he was a straightforward and hardworking individual. He did not appear to me to be a man who would have the cunning or guile to be involved in some sort of elaborate plan to assist his wife in obtaining money from the defendant by deception.

12. Mr Cox I found to be a very convincing expert witness. He was extremely measured in his opinions. They were logical and in accordance with the documentary evidence. He was also very careful to identify areas outside his expertise. He was certainly not partisan. His view of the surveillance evidence was actually slightly more critical than that of the Defendant's expert (and indeed was more critical than my own view of that evidence).

13. Mr Sylvester is clearly a very experienced clinician and medical legal expert. Again, there is no proper suggestion that he is a partisan expert. His view of the surveillance evidence was actually more positive towards the Claimant than that of the Claimant's expert. However I did find some of his evidence concerning. He seemed to me to be rather too prepared to give expert opinion on areas that are really outside of his area of expertise and he often seemed to be trying to move on to other documents and issues rather than actually just answering the question he was being asked to answer. He sometimes presented a conclusion that just did not follow logically from the other opinions he expressed.

14. I will come to the detail of what I found in respect of the evidence that I heard in the main body of the judgment but those are my general impressions.

15. So turning, then, to the issues I have to decide.

Has the Claimant deliberately exaggerated the extent of her injuries or been fundamentally dishonest in respect of any aspect of her claim?

16. In large part, the Defendant relies on the surveillance evidence as undermining the Claimant's reporting of the effect of her injury to the experts. The Defendant also points to what it deems to be a number of inconsistencies in the Claimant's reporting of her symptoms to experts, medical professionals and the DWP.

17. I start with the surveillance evidence. The Defendant instructed surveillance operatives to follow and film the Claimant over a period of four days in April and May 2023. I have looked at the witness statements and on each day the operatives waited outside the Claimant's house for between eight and eight and a half hours. The Claimant was being watched for around 32 hours. One of the dates selected was her birthday. I do not know if that was a coincidence or a deliberate choice because no one gave oral evidence about how the dates were selected. I have watched all of the footage that was obtained over those four days and 32 hours. It is relevant to consider not just what the footage shows but what it demonstrates by absence. When I consider the length of time that the Claimant was being watched, the footage obtained is very limited. Unsurprisingly a lot of the activity that was filmed occurred on the Claimant's birthday. What that means is that for the rest of the time that the operatives were sitting outside her house, the Claimant was in the house not going anywhere. Surveillance is quite a blunt instrument. All surveillance shows is what someone is functionally able to do on a particular day. It does not usually show if that is causing them pain and it certainly does not show if they have taken painkillers or if they pay a price for that activity later.

18<sup>th</sup> April 2023

18. The Claimant is seen opening and closing the boot of her car. She then takes her dog, a Jack Russell named Rocky on his lead down the road to a small grassy area at the end of the road. She is walking relatively slowly with her stick. This is a short walk and the Claimant returns to the house and is not seen to leave again.

19. It was suggested to her in cross-examination that she knew she was being watched, which she denied. That seemed to me to be a very strange line of questioning as the Defendant's starting point was that the footage they had obtained shows a greater level of function than that reported to Mr Sylvester.

20. This point was developed further in closing submissions when the Defendant suggested that the Claimant knew on the two occasions she walked her dog and perhaps on her visit to Sainsbury's (on 22<sup>nd</sup> April 2023) that she was being watched but she did not know on any other occasion that she was being watched.

21. There is absolutely no evidence to support that assertion and it seemed to me that the Defendant was clutching at straws when the realisation started to dawn that the fact that the Claimant was walking with a stick when walking her dog and was limping when walking out of Sainsbury's was contrary to the Defendant's case that in fact by the time of the surveillance, there was nothing at all wrong with the Claimant and she is a liar.

#### 22 April 2023

22. The Claimant is seen leaving her home to drive to the pub. This is her birthday. She parks outside the pub – right outside, the closest space – and walks a very short distance into the pub without a stick. She then sits at a table with her daughter, her mother and her sister and has a drink and a meal. She is there for about an hour and a half. The footage of that is not great quality but it is clear that the Claimant does manage to sit in her seat for an hour and a half on that occasion.

23. After the meal, the Claimant drives to two shops with her daughter. At both shops, she parks in a mother and child space close to the shop. In the first shop, they are looking at jewellery. The Claimant walks a bit with the trolley and a bit without. She bends from the waist to pick some jewellery off a slightly lower part of the shelving.

24. When they leave the second shop, the Claimant walks back to the car with her daughter pushing the trolley. I have watched that footage a number of times; I asked for it to be replayed in court. Mr Cox did not think any of the footage showed a limp. Mr Sylvester thought there was a slight limp on some of it. Of course, that is a question of fact, not expert opinion, and it is accordingly a matter for me and I am clear that the Claimant is walking with a limp on that particular footage.

25. She is also resting her hand on her back when she stands still. Her daughter puts all of the shopping in the car and the Claimant looks uncomfortable on the footage insofar as pain and discomfort can ever be gleaned from a video. Of course, it is probably no coincidence that this is the day that she has done the most.

#### 5 May 2023

26. Again the Claimant walks Rocky on the lead, again down to the grass area at the bottom of the street. Again, she has the stick with her. At one point, she bends down, most of the movement coming from her waist, to pick up poo. She then walks back to the house. Later, she is seen shopping and going to the hairdressers and the dentist. She walks short distances from the car without her stick. Where possible, she moves the car closer to the shop she is visiting and that happens in relation to the Post Office.

#### 11 May 2023

27. The Claimant drives to Asda, again parking in a mother and child space. She puts the lottery on and looks at clothes and some mugs. She is pushing a small trolley. She puts two bags and some toilet rolls on the backseat of the car and she has to lift one of the bags with both hands.

28. I have looked at all of that surveillance evidence and compared it to what the Claimant told the experts about the impact of her injuries upon her and also what she told the DWP. In my view, it is just not the damning evidence that the Defendant thinks it is. As I have said, the surveillance shows limited activity when one considers how much surveillance was undertaken.

29. The footage that was obtained shows the Claimant limping on occasion - it also shows clear discomfort on that occasion. It shows her taking Rocky on two short walks, on both occasions using her stick. It shows her walking short distances without a stick and doing light shopping, having her hair done and making a dentist appointment. It shows her on a few occasions bending down. It shows her sitting in a chair while she has a meal with her family on her birthday.

30. Which of those things had the Claimant suggested to the experts that she could not do? None of them. She expressed that she had difficulty with some of these things, bending and low-level work and sitting for long periods. She said to most of the experts that she could not take her dog on long walks anymore. The only exception to that was Mr Sylvester, who she apparently told that she could not walk her dogs. She only has one dog. She said she could only do light shopping and did a lot more shopping online. She said her social life had suffered.

31. None of that is undermined by the surveillance evidence. Far from being at odds with what she told the DWP (albeit the Defendant accepts that this is a collateral issue) in fact if one reads out what is said by the Claimant to the DWP on 4<sup>th</sup> January 2019, it pretty much recites what can be seen on the footage.

32. It was suggested to the Claimant that she had misled the DWP. I do not find that at all. The Defendant said that because the Claimant had told the physio that she no longer 'relied' on her stick, she should have told the DWP that she was no longer using it. However of course that was two years before the surveillance evidence - when the Claimant was still at times seen using the stick. It seems to me that the Claimant has been honest with the DWP throughout.

33. Of course, there will be some variation in symptoms even if this is not a classic 'good days and bad days' type of case. The Claimant will feel that some days are worse than others. Professor Ghaly was of the view that was to be expected. It is also to be expected that there will be some inconsistencies arising from the way questions are put or even how the Claimant might feel at the time the question is put but there is a broad level of consistency about sites of pain and effect on function throughout the documents that I have seen.

34. Notably, the Claimant signed a witness statement before the surveillance was disclosed. In that, she did not suggest that she was unable to do anything that the surveillance revealed her doing. There is also evidence in that statement that she had seen some improvement in that she had returned to dog walking, albeit not longer dog walks, and was able to walk without a stick for some distances.

35. Although the Defendant has sought to argue the opposite and really taken every possible point, including suggesting (and this was a point that was returned to on several occasions) that the fact that the Claimant had managed to go on holiday to Mexico was in some way indicative of the fact that she was a liar. People with very significant disabilities go on holiday abroad. When those questions were being asked, I was rather expecting to be

taken to some Facebook posts of the Claimant bungee-jumping or something of that nature but no - it was the simple fact that the Claimant had gone to Mexico that was said to be the issue.

36. There seems to me to be little to no consideration by the Defendant of all the things that the Claimant was doing that indicated that she had an ongoing problem. Returning to medical professionals – and I do not mean experts in this case, I mean treating clinicians – over a lengthy period for further investigations and treatment to try to resolve the pain, having steroid injections, engaging in countless courses of physiotherapy, taking strong painkillers with nasty side effects. Did the Defendant seriously think she was doing all that to try and bolster a fake claim? Well, I do not take that view.

37. Clinically she was observed to have muscle wasting to the left thigh and swelling to the knee years after the accident. Mr Cox was clear that cannot be faked and also that if the Claimant had improved, there would be improvement in the muscle wasting. Although Mr Sylvester disagreed with that for older patients, Mr Cox's opinion makes much more sense when the facts of this case are considered. The Claimant was a fit woman of 53 who was going to the gym and walking up Rivington Pike and had a very active job prior to the accident. I agree with Mr Cox's view that she would improve her muscle tone once the pain that was preventing the use of the quadriceps had subsided. All of that indicates that this was a Claimant with an ongoing problem.

38. She had some improvement after she saw the Defendant's expert Mr Sylvester. The Claimant puts that down to two things - using the TENS machine recommended by Professor Ghaly and the positive mindset that came from being told by Professor Ghaly that there was some hope for the future. I entirely accept her explanation for that improvement which is supported by her husband. Mr Sylvester's view that an orthopaedic problem would not improve in this way entirely misses the point that both himself and Mr Cox accept that by this point this is not an orthopaedic problem.

39. I am not satisfied on the balance of probabilities that there has been any element of fundamental dishonesty on the part of the Claimant. On the contrary, I am of the view that she is an entirely genuine Claimant who has presented a broadly consistent picture throughout.

#### What injury did the Claimant suffer?

40. Well, in orthopaedic terms it is agreed between Mr Cox and Mr Sylvester that the Claimant suffered a Grade 2 injury to the soft tissues of the medial collateral ligament of the knee. There is a dispute about whether she suffered a fracture. I have no hesitation in accepting Mr Cox's evidence that she did indeed suffer a fracture. A fracture was identified on the first MRI scan by a consultant radiologist. Mr Sylvester says that may have been an error and also said in evidence that the treating orthopaedic surgeon, Mr Boden, did not quite agree with that because that is why he organised a CT scan.

41. Of course, when Mr Boden's letter is considered, that is not what Mr Boden says at all. He diagnosed (with the benefit of the MRI scan and the consultant radiologist's report of that scan) that there was a fracture and ordered the CT scan specifically to look for fracture union. The CT scan did not show a fracture, which is why Mr Sylvester says that there is doubt, but a later MRI showed that the fracture was healing. Mr Cox said that an MRI is the most sensitive radiological test and I accept that evidence.

42. Mr Sylvester rather oddly went on to say that in effect it does not really matter whether there was a fracture or not because it was healing but of course he was the only person who put in issue that there was a fracture. Here there are two MRI scans by different consultant radiologists, who are the experts at reading these scans, that show the fracture and then the fracture healing - the treating consultant accepted those scans as accurate. On the balance of probabilities I am satisfied that the Claimant did suffer an undisplaced fracture of the intercondylar elements of the tibia in addition to the soft tissue injury.

43. Mr Cox's evidence was that that orthopaedic injury would be expected to recover 18 months to two years following the accident save for minor long term symptoms not causing significant functional restriction. Mr Sylvester contended for a shorter prognosis period but of course he was excluding the fracture from his consideration in relation to that.

44. In any event, by the end of the orthopaedic prognosis period, the Claimant said that she had not recovered and was still experiencing significant problems. Mr Cox, rightly in my view, recommended referral to a pain expert. Mr Sylvester thought that this was not necessary, stating that "we deal with pain all the time". Of course he is not a pain expert and the days are long gone where orthopaedic consultants would dream of giving expert evidence about matters involving potential pain conditions.

45. The Claimant was seen by Professor Ghaly, the pain consultant, in November 2022. His evidence was that her continuing reported symptoms were related to the accident. He provided an explanation for those symptoms which was that the limping gait from the knee injury was putting pressure on her right knee and hip and causing pain in both areas. He suggested a number of treatments that he felt would help. Indeed, of course his view about that sits neatly with that of Mr Aslam Mohammed (who Mr Sylvester described as very well-respected) the treating orthopaedic surgeon who saw the Claimant in 2021 and said that her right-sided hip pain was mostly likely related to overloading of the right hip as she was putting less weight on her left leg due to her injury. It is notable and of course I have already referred to the fact that the Claimant had further treatment suggested by Mr Mohammed. The prognosis period for the ongoing symptoms identified by Professor Ghaly is five and a half years post-accident.

46. I reject the suggestion which was made by Mr Sylvester this is somehow constitutional. All of the clinical investigations have shown no constitutional issues of significance. The Claimant did not suffer constitutional problems before the accident, and moreover, all the experts accept that the orthopaedic cause ended at the latest two years after the accident and since then the issues have been caused by a pain condition. That is not a constitutional issue.

#### What has been the impact of that injury on the Claimant?

47. As I have accepted the Claimant's evidence as to her symptoms and function post-accident, that gives a prognosis period of five and a half years. The first 18 months to two years of that is an orthopaedic injury and the remainder the pain condition.

48. It has caused the loss of amenity that I have already in the main described, albeit that the first few months after the accident were significantly worse, the claimant being unable to walk properly for a period or get upstairs by herself and needing significant help with personal care. The problems that the Claimant had meant that her attempt to go back to work failed and she had to resign from the job that she loved.



### The quantum of general damages for pain, suffering and loss of amenity

49. The knee injury falls into 7(K)(b) which is £18,110 - £31,900. The pain condition falls into Bracket 9(B)(b) which is £25,710 - £346,970. There is a complete overlap between the pain condition and the orthopaedic injury in terms of impact and in my view it would not be appropriate to value each separately and add them together. In my view, the most appropriate way to assess this injury is to assess it as though it were a pain condition throughout the prognosis period whilst having one eye on the lower knee injury bracket. In my view, it falls at the bottom end of the pain bracket when the guidance in the section is considered, the knee bracket is considered and the claimant's level of function at the start, throughout and at the end of the prognosis period is considered. An award for pain, suffering and loss of amenity of £25,000 is appropriate.

### The quantum (if any) of each head of claimed special damage?

#### Loss of earnings

50. There is no dispute in the counter-schedule over the figures. No alternative figure is advanced if fundamental dishonesty is rejected. Occupational Health deemed that the Claimant was unable to undertake her previous role based on symptoms in 2019. It was suggested in cross-examination that the Claimant was fit for work when the original schedule was prepared because she said that she was hoping to become a self-employed beauty therapist. The reality is that the claimant was not able to do that role because of her ongoing symptoms.

51. No expert supports any ongoing (other than minor) symptomology after five and a half years post-accident. The Claimant may well be unable to return to work because of the other issues involving her hand and COPD but the causation in respect of this injury ends at five and a half years post-accident. That by my calculations is £78,683.22. The Claimant has to give credit for earnings she received in that period from her old job. The Claimant's schedule calculates those as £9,506.59 - there is no alternative calculation offered by the Defendant. That gives a sum of £69,176.63 covering the period from 4 September 2017 to 3 March 2023. That is the gross figure excluding interest - the parties will need to deal with interest and they will also need to deal with CRU.

#### Care and assistance

52. The figures are not disputed in the counter-schedule, no alternative figure is advanced in the event fundamental dishonesty is rejected. I do however take the view that some of the care and assistance described and claimed is on the high side - of course it is an estimate as the Claimant did not keep records of the same.

53. Taking into account the fact that the principal care was immediately after the accident, I take the view the Claimant has proved on the balance of probabilities the following: three hours a day for four weeks (£653.52); one and a half hours a day for eight weeks thereafter (£653.52); three hours a week from 27 November 2017 to 31 March 2018 - which is 17.86 weeks (£416.85) - the reason there has to be a split there is because there is an alteration to the rate; three hours a week from 1 April 2018 to the end of March 2019 (£1328.00); and then from 1 April 2019 to 12.12.2023, two hours a week (£3807.43). So that is a total sum on my calculations of £6,859.32 excluding interest.

#### Aids and adaptations

54. The Claimant gave evidence that she had a new oven installed at a different height to allow her to use it. She was not challenged on that in cross-examination and I am of the view that it is reasonable. That is £1,285 excluding interest.

Travel to and from appointments

55. Again this was not challenged in cross-examination. Given the number of clinical medical appointments that seems to be to be a cautious estimate and the £100 that is claimed will be allowed. That excludes interest.

Automatic vehicle

56. Mr Cox supported an automatic vehicle if the left knee was problematic. I find it was. No alternative figures are put forward by the Defendant. That is £1,493.61 excluding interest.

57. The parties will need to deal with interest and deal with CRU and produce an order.

58. The last question, obviously, was that if I had found the Claimant had been fundamentally dishonest, should the genuine part of the claim be dismissed? Well, it follows from my earlier comments that we do not get to that point.

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This transcript has been approved by the Judge